

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE JEROME GILLIAM,

Defendant-Appellant.

UNPUBLISHED

August 19, 2004

No. 247614

Muskegon Circuit Court

LC No. 02-047434-FH

Before: Fort Hood, P.J., and Donofrio and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree home invasion, MCL 750.110a(2), possession of a short barrel shotgun, MCL 750.224b, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to ten to twenty years' imprisonment for the home invasion conviction, two to five years' imprisonment for the possession of a shotgun conviction, two to four years' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first alleges that he was denied his constitutional right to effective assistance of counsel when his trial counsel waived opening statement, conceded guilt to charges during closing argument, and failed to request a lesser included jury instruction for the offense of entering without breaking. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Defendant failed to establish that he was denied effective assistance of counsel on the basis of trial counsel's waiver of opening statement. The decision to waive an opening statement is a matter of trial strategy that can rarely, if ever, be the basis for a successful claim of ineffective assistance of counsel. *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). Defendant failed to overcome the presumption that the waiver was sound trial strategy

or identify that the outcome of the proceedings would have been different, particularly in light of the overwhelming evidence against defendant.

Defendant next contends that trial counsel was ineffective when he conceded defendant's guilt of the offense of first-degree home invasion charge during closing argument. We disagree. Only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Kryzstopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). It is acceptable trial strategy to employ the tactic of admitting to offenses where the evidence strongly establishes guilt and at the same time denying other elements or other crimes. See *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

In the present case, trial counsel's tactics were permissible. Trial counsel disputed the charges for which the evidence was in dispute seemingly to retain credibility with the jury. Because trial counsel conceded guilt where the evidence was overwhelming, but contested guilt on charges where the evidence was less strong, his concession of guilt regarding the home invasion did not amount to objectively unreasonable assistance, let alone unreasonable assistance that likely affected the outcome of the trial.¹

Defendant next alleges that trial counsel was ineffective for failing to request an instruction of the lesser-included offense of entering without breaking, MCL 750.111. We disagree. Because the offense of entering without breaking contains elements not found in the greater offense of first-degree home invasion, see *People v Jackson*, 71 Mich App 487, 490; 247 NW2d 382 (1976), it is a cognate lesser offense, and instructions are permissible only for necessarily included lesser offenses. *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002). Defendant's claim of ineffective assistance of counsel fails because trial counsel was not required to raise a meritless objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next alleges that the trial court abused its discretion by denying his request to appoint substitute counsel. Reviewing this issue for an abuse of discretion, *People v Mack*, 190 Mich App 7, 13-14; 475 NW2d 830 (1991), we disagree.

Although an indigent defendant has a constituted guaranteed right to appointed counsel, *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973), "he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced." *Mack, supra*. Rather, appointment of substitute counsel is appropriate only when a showing of good cause is presented and when substitution will not unreasonably disrupt the judicial process. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

¹ Moreover, we note that the contention that trial counsel was ineffective is premised on isolated portions of the closing argument. Review of the closing argument in full reveals that defense counsel noted on numerous occasions that defendant was responding to a threat and a challenge by residents of the home in question. After finding that the threatening individuals who initiated the challenge were not present, defendant left the premises. Thus, despite any concession, defense counsel seemingly invited the jury to nullify any impropriety in light of the underlying facts and circumstances.

In the present case, the trial court did not abuse its discretion in denying defendant's request to substitute counsel because defendant failed to establish good cause. *Mack, supra*. As the trial court thoroughly explained on the record the motion that defendant requested his trial counsel file would have been futile. A bond reduction was inappropriate in light of the offenses and the circumstances. Moreover, there is no authority for suppression of evidence based on inconsistent witness statements. In addition, as the lower court explained, trial counsel had an obligation to advise defendant of any plea negotiations and attending sentencing considerations offered for a plea of guilty, particularly in light of the strong evidence against him. The trial court's denial of the request for substitute counsel was proper where defendant failed to present good cause. *Traylor, supra*. Furthermore, as the trial court recognized, substitution of counsel the day before trial was set to begin would have unreasonably disrupted the judicial process because it would have required adjournment of trial (like the earlier adjournment granted) to enable substitute trial counsel to familiarize himself with the case. *People v Johnson*, 144 Mich App 125, 135; 373 NW2d 263 (1985). We therefore conclude that the trial court did not abuse its discretion when it denied defendant's request for new counsel.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello