

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSHUA LEIGH TUSING,

Defendant-Appellant.

UNPUBLISHED
December 6, 2005

No. 253863
Kent Circuit Court
LC No. 03-004294-FH

Before: Murphy, P.J., and Sawyer and Meter, JJ.

MEMORANDUM.

Defendant appeals as of right from his conviction following a jury trial of second-degree home invasion, MCL 750.110. This case stems from the burglary of an apartment building. We affirm.

Defendant's sole argument on appeal is that his trial counsel was ineffective for failing to call witnesses who would allegedly have testified that another individual approached them offering to sell items stolen from the burgled apartment. We see no merit to defendant's argument.

To establish ineffective assistance of counsel, defendant must show that the attorney's performance was objectively unreasonable in light of prevailing professional norms and that, but for the attorney's deficient performance, a different outcome likely would have resulted. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must rebut the strong presumption of effective assistance of counsel by showing that the challenged actions did not constitute a sound trial strategy. *Strickland*, *supra* at 689; *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant has not shown that his trial attorney's performance was objectively unreasonable. Defendant does not identify who these potential witnesses are, no affidavits from these witnesses outlining what their testimony would have been provided, and there is no indication that they are willing to testify. Accordingly, defendant fails to show that their testimony would have aided his defense. Further, counsel's decision not to call these other witnesses did not deprive defendant of a substantial defense. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defense counsel developed the theory that someone else had committed the crime, and he argued it to the jury during his closing statement.

Additionally, defendant has not shown that but for his trial attorney's alleged error or errors, a different outcome would have likely resulted. Assuming that the alleged witnesses would have testified that the other man did try to sell them items taken from the apartment, it does not necessarily follow that defendant did not enter the apartment with the requisite intent. Given the testimony of the witness who did testify at trial inculcating defendant, it is not reasonably likely that additional witnesses would have changed the outcome of the trial.

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Patrick M. Meter