

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW JAMES KERLIKOWSKE,

Defendant-Appellant.

UNPUBLISHED
November 1, 2007

No. 270442
Cass Circuit Court
LC No. 06-010027-FH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree home invasion, MCL 750.110a(3), and unlawfully driving away a motor vehicle, MCL 750.413. The trial court sentenced defendant to serve concurrent terms of imprisonment of 30 months to 15 years for home invasion, and 23 months to five years for driving away a motor vehicle. Defendant appeals as of right. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

Complainant testified that, on August 30, 2005, upon returning to his home, he discovered that a window was broken, that several items were taken, and that his Ford Explorer was missing. An acquaintance of defendant testified that, on the date in question, defendant picked him up in a Ford Explorer the acquaintance recognized as from the area in question, but which was not defendant's own.

The police obtained a detailed confession from defendant, in which, after signing a *Miranda*¹-waiver form, he implicated himself in connection with both the home invasion and the driving away of complainant's vehicle. However, at trial, defendant denied responsibility for the crimes, and testified that the statement was the product of coercion or duress.

Defendant's sole claim on appeal is that he suffered constitutionally ineffective assistance of counsel because his attorney elected not to seek suppression of his confession. "In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Coerced confessions are not admissible at trial. See *Michigan v Tucker*, 417 US 433, 439-441; 94 S Ct 2357; 41 L Ed 2d 182 (1974). In this case we are called upon to examine, therefore, whether defense counsel could have succeeded in having the confession in question suppressed, and, if so, whether the absence of that confession would have changed the outcome of the trial. Because defendant did not move for a new trial or a *Ginther*² hearing below, our review of defendant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Defense counsel did not move the trial court to suppress defendant's confession, but instead explicitly urged the jury to reject it as "not voluntary . . . and accurate and knowing." On appeal, defendant articulates no evidence in the record that would support his contention that his confession was coerced or given under duress. It is well established that defense counsel is not ineffective for failing to pursue a futile motion. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Further, had counsel obtained an unfavorable ruling by the trial court that defendant's confession was voluntary, counsel would not have been able to argue to the jury that the confession was not voluntary. *People v Walker (On Rehearing)*, 374 Mich 331, 337-338; 132 NW2d 87 (1965). Defendant has failed to overcome the strong presumption, that defense counsel's decision to forgo a likely futile motion and to instead endeavor to instill doubts in the minds of the jurors as to the voluntariness of the confession, was a matter of sound trial strategy. See *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

Moreover, the testimony of defendant's acquaintance which placed defendant in the stolen vehicle on the date in question was solid circumstantial evidence linking defendant to that vehicle, and thus to the residence from which it was taken. In light of this evidence, defendant has failed to show that suppression of his confession would have led to a different result. *Messenger, supra*.

Because defendant fails to show that defense counsel would likely have succeeded had counsel moved the trial court to suppress the confession, and because defendant also fails to show that a different result would have been likely in any event, defendant's ineffective assistance argument must fail.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).