

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAM JUNIOR IVY,

Defendant-Appellant.

UNPUBLISHED

December 27, 2007

No. 271789

Genesee Circuit Court

LC No. 06-011762-FC

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and was sentenced to 95 months to 20 years in prison. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he was denied the effective assistance of counsel. He asserts that his attorney had no sound trial strategy in allowing the entire transcript of his interrogation to be presented to the jury. We disagree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Review of a claim of ineffective assistance involves a determination (1) whether counsel's performance was objectively unreasonable, and (2) whether the defendant was prejudiced by the defective performance. *Id.* To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Decisions on what evidence to present or witnesses to call are presumed to be matters of trial strategy. *Rockey, supra*. We will not substitute our judgment on matters of trial strategy, nor will we assess counsel's performance with the benefit of hindsight. *Id.*

Defendant maintains that the videotape buttressed the credibility of Sir Antonio Crockett, who testified that he, defendant, and two other men broke into George Thomas' home, that Thomas was assaulted, and that they stole Thomas' money. Thomas was able to identify only Crockett as being among the perpetrators. Crockett was permitted to plead to a charge of unarmed robbery in exchange for his testimony against defendant. During his interrogation, defendant admitted that he was present during the incident. However, he said that he believed

that he and the others were going to Thomas' house so that Crockett could borrow some money, and that he left when he saw Thomas being assaulted. At another point, defendant said that he "chickened out."

During defendant's interrogation, the officer indicated that a deal would be given to those persons who admitted involvement and expressed remorse. He subsequently said that everyone was getting a polygraph, and that he would know who was lying and who was not lying. In conjunction with this statement, the officer indicated that he had control of giving defendant a break until those administering the polygraph got involved, and that he would give a break to those who talked with him. Defendant argues that since the jury knew that Crockett ultimately got a deal and expressed remorse on the stand, the jury might have deduced that Crockett passed a polygraph, thereby bolstering his credibility. Defendant asserts that any strategy involved with showing the videotape was unreasonable and constituted ineffective assistance. Defense counsel explained that he wanted the jury to see the entire videotape because defendant ultimately acknowledged his presence, but otherwise consistently maintained his innocence. Counsel wanted to contrast Crockett as an opportunist who, unable to credibly maintain that he was not present at the scene, chose instead to blame others and repeatedly changed his story.

Defense counsel aptly impeached Crockett, bringing out that Crockett's testimony was in part inconsistent with his preliminary examination testimony, which was also inconsistent with his initial statement to the police. There was no testimony that Crockett passed a polygraph. It appears that the defense strategy of discrediting Crockett was successful, because the jury acquitted defendant of armed robbery and possession of a firearm during the commission of a felony, notwithstanding the fact that Crockett testified that defendant had a gun and was actively involved in the robbery itself. The jury apparently believed that defendant was telling the truth.

Defendant claims that regardless of the acquittals, the jury had to believe Crockett's claim that defendant knew of the plan to rob Thomas in order to convict him of first-degree home invasion. See MCL 750.110a(2). However, defendant admitted during the interrogation that he entered the home, but then said that he "chickened out." At another point, defendant said that he did not know that an armed robbery was planned, and that he left when he saw the victim being assaulted. Based on defendant's statement that he "chickened out," the jury could have inferred that defendant had unlawful intent upon entry. Even if the videotape had been redacted to omit references to polygraphs, there is no indication that counsel could have prevented the jury from learning of defendant's admission. The jury apparently rejected Crockett's version of events, but convicted defendant of first-degree home invasion based on defendant's own admission. Counsel's strategy of discrediting Crockett was successful. Defendant's claim of ineffective assistance, based on the manner in which counsel chose to prove Crockett's lack of credibility, must fail.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder