STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 24, 2009
v	No. 281964 Oakland Circuit Court
JESSE LEE BRYANT, JR., Defendant-Appellant.	LC No. 2005-205566-FH

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals his bench trial convictions for three counts of felonious assault, MCL 750.82, and one count of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant to two to four years in prison for each felonious assault conviction and 7 to 20 years in prison for the first-degree home invasion conviction. For the reasons stated below, we affirm.

Defendant claims he was denied the effective assistance of counsel because, despite signs of psychological problems, defense counsel did not request a forensic evaluation of his competency and criminal responsibility.

As our Supreme Court explained in *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008):

> "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's factual findings for clear error and reviews de novo questions of constitutional law. *Id.*

Generally, to establish ineffective assistance of counsel, a defendant must show that: "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is

presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004), citing *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569, 570 (1990). A substantial defense is one that might have made a difference in the outcome of the trial. *Id*. In *People v Bryant*, 77 Mich App 108, 110; 258 NW2d 162 (1977), "[the] defendant had attempted suicide on several different occasions, both prior to and after the commission of the offense for which he was convicted." Also, the "defendant initially was declared to be incompetent to stand trial." *Id.* Under the circumstances in *Bryant*, this Court held that "trial counsel's failure to arrange for a psychiatric evaluation of defendant regarding defendant's criminal responsibility was inexcusable" and deprived the defendant of effective assistance of counsel. *Id.* at 110-111.

Here, defendant asserts that there was also evidence of his psychological problems, including that he held a gun to his own head during the home invasion and because the family of victims said he acted out of character on the morning of the crime. While evidence indicated that defendant briefly pointed the gun at himself during the home invasion, evidence also showed that he pointed the gun at various other people in the room. Also, defendant took the position at trial that he did not have a gun when he entered the home. Further, ample evidence showed that the family of victims observed that defendant was often moody and that he must have been in one of his "moods" when he arrived at their home. Defendant has otherwise presented no evidence of any psychological problem he may have had at the time of the offense.

To the contrary, defendant testified at trial that he was not "losing his mind," and he gave logical explanations at trial for why he went to the home, why the family may have thought he had a gun, and why one of the witnesses may have had a reason to lie about the crime. During the presentence investigation, both defendant and his mother stated that defendant did not have any psychological problems, did not have an alcohol or drug problem, and had never sought professional treatment. Though the Center for Forensic Psychiatry's evaluation indicated that defendant has some psychological issues, it nonetheless found him competent to stand trial. If a defendant has no history of mental problems, this Court has found that failure by defense counsel to ask for a psychiatric evaluation is not a basis for granting a new trial. *People v Parker*, 133 Mich App 358, 363; 349 NW2d 514 (1984). Defendant has failed to show that his counsel was ineffective for failing to ask for a pretrial psychological evaluation and has failed to show that a remand for an evidentiary hearing is necessary.

Defendant next challenges his statements to Detective Robert S. Koteles because, although he described defendant's behavior as bizarre, Detective Koteles gave defendant *Miranda*[1] warnings and took his statement. Defendant also claims his counsel should have

[1] *Miranda v Arizona*, 396 US 868; 90 S Ct 140; 24 L Ed 2d 122 (1969).

requested a *Walker*[2] hearing to determine whether defendant was competent to make the statement and whether the statement was voluntary.

"Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law, which the court must determine under the totality of the circumstances." *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). In determining voluntariness, the Court considers a variety of factors, including:

> [1] the age of the accused; [2] his lack of education or his intelligence level; [3] the extent of his previous experience with the police; [4] the repeated and prolonged nature of the questioning; [5] the length of the detention of the accused before he gave the statement in question; [6] the lack of any advice to the accused of his constitutional rights; [7] whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; [8] whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; [9] whether the accused was deprived of food, sleep, or medical attention; [10] whether the accused was physically abused; and [11] whether the suspect was threatened with abuse. No single factor is determinative." [*Id.* at 708 (internal citations omitted).]

Regarding whether a waiver of Fifth Amendment rights was knowing and intelligent, "a defendant need not understand the ramifications and consequences of waiving his right . . . . Rather, a defendant need only know of his available options and make a rational decision, not necessarily the best decision." *Id.* at 709-710.

In *People v Harris*, 201 Mich App 147; 505 NW2d 889 (1993), the defendant claimed that he was denied the effective assistance of counsel when his attorney failed to ask for a *Walker* hearing. This Court disagreed, and opined:

> On this record, counsel was not ineffective. The detective who had taken [the] defendant's statement indicated that [the] defendant had read the typed statement and made two changes in it. [The] defendant also responded 'Yes' when the detective asked whether he understood his rights. The detective described [the] defendant as 'rational and coherent' at the time the statement was taken. We have no record evidence to support [the] defendant's claim . . . ." *Id.* at 154.

Here, defendant told Detective Koteles that he understood English and the Presentence Investigation Report indicates that defendant has a 12th grade education. In addition, when Detective Koteles read defendant his *Miranda* warnings, defendant answered yes (verbally and in writing) to the question "[d]id you understand each of these rights as I have explained them to you?" At trial, defendant also testified that he had understood his rights.

Regarding voluntariness, Detective Koteles did suspect that defendant was intoxicated because of defendant's unusual mannerisms but, during the interview and at trial, defendant

[2] *People v Walker*, 374 Mich 331, 338; 132 NW2d 87 (1965).

denied that he had been under the influence of drugs or alcohol. Moreover, at trial, defendant explained that he is "hyper" and tends to talk with his hands, so this explains his demeanor during the interrogation. Detective Koteles testified that he did not know how long defendant was in custody before he questioned defendant and did not ask him how long it had been since he had slept, rested, or had any food. However, Detective Koteles also testified that he interviewed defendant on the same afternoon he was arrested and he gave defendant water when defendant said he was thirsty. Defendant did not indicate that he was hungry or that he had not had any sleep or that he needed medication. Further, Detective Koteles denied using any coercion to persuade defendant to waive his rights. Based on the above evidence, if the trial court held a *Walker* hearing, it would have found that defendant's statements were voluntary, knowing and intelligent. Because defense counsel is not required to make a meritless motion, *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003), his failure to request a *Walker* hearing did not deny defendant the effective assistance of counsel.

We further observe that the testimony of various other witnesses constituted sufficient evidence to convict defendant of the home invasion and three counts of felonious assault and, therefore, defendant cannot show that suppression of his statements to Detective Koteles would have led to a different result.

Affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra