STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2009
v	No. 282437 Eaton Circuit Court
LARRY O'NEAL MCCLAIN, Defendant-Appellant.	LC No. 07-020226-FC

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Defendant Larry McClain appeals as of right his jury trial conviction for first-degree home invasion.[1] The trial court sentenced McClain, as a fourth habitual offender,[2] to 6 to 20 years in prison. We affirm.

I. Basic Facts And Procedural History

A. Lawrence Dunn's Testimony

Lawrence Dunn testified that he has been a friend of James Snell for over 25 years and that at about 10:45 p.m. on October 23, 2006, he went to James Snell's house in Lansing, Michigan to watch Monday Night Football. Dunn stated that when he arrived, James Snell's nephew, Marcus Boles, was there, but he left at approximately 11:15 p.m., with James Snell's son, Ryan Maurice Bentley. About five minutes later, according to Dunn:

> I'm teasing Snell about how the Cowboys are getting blowed out. And, I don't even think he could get the word out and we heard a big boom, you know, the door hit . . . . [Snell] was over to my left. So I looked at him and his eyes was real big. And, so then I reacted. I just jumped up off the couch and ran and dove behind the bar . . . . I heard a guy coming down the steps, 'cause that was right there to my left. And, I heard footsteps, you know, stomping upstairs, like a guy

[1] MCL 750.110a(2).

[2] MCL 769.12.

> running through upstairs with a bunch of people . . . . I heard the guy say "Metro," or "police," and then he took another step or so down the steps. And one of the guys hollered, I told ya I'd be back, or some of them words . . . . And, I dove and closed my eyes. And, I just laid there, you know, 'cause I didn't know whether the police or whoever it might have been. Then I heard shots. I heard several shots.

Dunn did not see who did the shooting because he had his eyes closed and was praying. About five minutes after the shooting stopped, Dunn noticed shell casings all over the floor and then saw James Snell, down on his knees, at the top of the stairs. Dunn lifted James Snell up and took him to the hospital. Dunn testified at trial that he was not aware that James Snell was involved with drugs, and he did not notice the security cameras stationed around James Snell's house. Dunn also said that he did not see James Snell with a gun on the evening of the shooting.

B. James Snell's Testimony

James Snell testified that he invited Dunn over on the evening of October 23, 2006. According to James Snell, Dunn got to the house between 10:00 and 10:30 p.m. About 20 minutes later, Bentley came home from work. Bentley and Boles then left the house together, and James Snell believed they were headed to the store.

James Snell, a diabetic, testified that, at the time of the shooting, he was temporarily blind, and although he could see shadows, he could see very little movement. He said that shortly after Bentley and Boles left, someone kicked in the back door and yelled out "five-O," which James Snell understood to mean "police." James Snell wanted to jump behind the bar, but Dunn was already there, and the intruders had started firing. So, he grabbed a 45-caliber semiautomatic weapon that he kept behind the bar and returned fire. James Snell believed that two people had come into the house because, while he was exchanging fire in the basement, he heard someone else running upstairs. James Snell emptied his gun and heard someone say, "I'm hit." But the intruder continued to fire his weapon, and James Snell was struck.

James Snell stated that he managed to go up to the kitchen and then his bedroom in an attempt to find a phone. He also went outside on the back deck and yelled for help. According to James Snell, when he went back inside the house, Dunn found him, and took him to the hospital. James Snell testified that he had been shot seven times and spent three months in the hospital. He also reported that a herringbone necklace and a ring were taken during the incident.

James Snell stated that he did not know McClain or anyone named Israel Goodin. He said that he had $2,000 in cash on his person that evening because he had planned to give it to his fiancée so that she could buy some furniture. He did not think that he had as much as $4,000 and was not aware that officers found cocaine in his bedroom drawer, which was locked. He was further unaware that there was a digital scale and a razor blade on top of his refrigerator. James Snell explained the presence of multiple boxes of baking soda by saying that he used baking soda to brush his teeth, clean out the garbage disposal, and deodorize the refrigerator. He denied that his home was equipped with a security system, yet explained that cameras wired to a monitor in his bedroom were installed as a result of an incident when two men entered the house. James Snell said that he had a flak jacket and bulletproof vest for protection when he worked at his music promotion business; he would wear them when he set up parties for shows because

often the shows were in "rough" areas. He said that he kept a 45-caliber gun, a nine-millimeter gun, and a shotgun in his house for protection, but he did not know why anyone would break into his house and try to kill him.

C. Marcus Boles' Testimony

On October 23, 2006, Marcus Boles arrived at James Snell's residence at approximately 7:30 p.m. After Dunn arrived to watch the Monday Night Football game, Boles and Bentley left to go to the store. Boles said that they were gone for several hours and, when they returned to the house, he noticed that the backdoor looked as though it had been kicked in and the doorknob was twisted. In the basement, Boles observed "blood everywhere," clothes scattered about, furniture flipped over, and shell casings on the floor. James Snell's bedroom door had also been kicked in. Boles picked up an unfamiliar cell phone lying on the floor by the bathroom upstairs.

Boles' mother then called to tell him that James Snell had been taken to the hospital. At the hospital, Boles gave the cell phone that he had discovered to his cousin, Roquelle Snell, who said she would give it to the police. On cross-examination, Boles stated that he did not know McClain, Goodin, or anyone named Ignacio Bermudez. He denied having anything to do with the robbery of James Snell's house.

D. Roquelle Snell's Testimony

James Snell's niece, Roquelle Snell, testified that her mother called her around midnight on October 23, 2006, and told her that her uncle had been shot. While at the hospital, Roquelle Snell saw her cousins, Boles and Bentley. She stated that they gave her a cell phone, which she attempted to turn on, but it was dead, so she put it in her pocket. Roquelle Snell explained that she wanted to try to charge the phone to see if she recognized any of the numbers on it. Later that evening, Roquelle Snell, her mother, and Bentley went back to James Snell's house to make sure that it was secure. Police officers on the scene, however, handcuffed the trio and searched their car. Several days later, Detective Christopher Burton retrieved the cell phone from Roquelle Snell.

E. Israel Goodin's Testimony

At trial, Israel Goodin explained that he was testifying pursuant to an agreement with the prosecutor's office in which he pleaded guilty to first-degree home invasion, assault with intent to murder, and felony-firearm, and agreed to help with other cases in addition to McClain's case. In turn, the prosecutor was to recommend that the judge sentence him toward the lower end of the sentencing guidelines and the judge would consider departing from those guidelines

Goodin testified that he had been McClain's friend for approximately 20 years. And several weeks before the October 23, 2006, he, McClain, and McClain's girlfriend had discussed the larceny of James Snell's house, which they believed to be a drug house. According to Goodin, McClain told him that there was a "large amount" of money and drugs in James Snell's house, and that "so much of the money was supposed to be given to the person who informed us of the heist, and that him and I and another individual was going to split the drugs and split the remaining of the money after we gave so much to one person." The third person to which

Goodin referred was Ignacio Bermudez, whom Goodin knew prior to October 23, 2006, because he and McClain used to sell drugs for him.

According to Goodin, in preparation for the robbery, McClain used a stencil to paint "LPD" on the back of a "black correction officer jacket." Goodin explained that "LPD" was intended mean "Lansing Police Department." McClain used a ripped up shirt for a mask. And both men put on multiple pairs of latex gloves. McClain wore dark-colored jeans, white basketball shoes, and a shirt with the letters FBI on it. Goodin put on several layers of dark-colored clothes and had a Velcro ski mask.

According to Goodin, at about 10:00 p.m., he and McClain left in Goodin's car to "commit a larceny." Goodin and McClain first went to Bermudez's house "to obtain weapons for the robbery and to format [their] plan." McClain used his cell phone to call Bermudez and let him know they had arrived. McClain then went into the house and came out with two guns wrapped in pantyhose. Bermudez and another man came outside as well. Goodin did not know the other man, but McClain identified him as Boles. Boles' role was to go into James Snell's house and clear it out so that Goodin and McClain could run in. Bermudez told Goodin that the only thing he wanted was $10,000 and some jewelry; the rest could be divided between Boles, McClain, and Goodin.

Goodin testified that he and McClain then drove to James Snell's house and parked around the corner. They then traveled on foot, through some backyards, jumped a fence, and waited behind James Snell's garage until they saw Boles pull in. Goodin was familiar with James Snell's house because he and McClain had "cased" it on a prior occasion. After Boles left with two individuals, McClain and Goodin entered the house by kicking in the backdoor. When they entered, McClain yelled out "Lansing Police Department," and Goodin shouted, "Eaton County Sheriff's Department." The men then went into the living room and down a hallway, kicking in doors on each side to see if anyone was there.

According to Goodin, he and McClain proceeded to the basement. Goodin stated that he was carrying a smaller gun (he was unsure of the caliber), and McClain was using a nine-millimeter. When they got to the bottom of the steps, they saw James Snell, who started shooting at them. Goodin was hit once in the arm and once in the abdomen. Goodin stated that he then ran towards James Snell and grabbed his hand to keep him from shooting again. The two men struggled as Goodin attempted to disarm James Snell, and James Snell emptied his magazine. McClain ran back upstairs but returned when the shooting stopped. Goodin asked for help, and McClain shot James Snell twice in the back.

Goodin said that he then took James Snell's gun and gave it to McClain, as well as the gun Goodin was carrying. He and McClain then ran out of the house, without looking for drugs or money, believing that the neighbors had to have heard the shooting. The men ran back to the car, and McClain drove Goodin to St. Lawrence Hospital.

Goodin explained that, while he was in the hospital, he was interviewed by the Lansing Police Department and he told the officer that he had been shot by a Hispanic man while walking on Martin Luther King Boulevard. Goodin also spoke to McClain, but they believed the phone to be tapped, so they did not discuss guns or clothing.

Goodin testified that about two weeks after he got out of the hospital, he went to McClain's mother's house, and McClain told him that if the police asked what happened, he should say that he was shot by the same person that shot James Snell. Goodin stuck by his original story of having been shot by a Hispanic man, but later changed his story when he was represented by counsel. On cross-examination, he stated that he told "two or three" different stories and explained that he initially denied having met Bermudez because "Bermudez is a very powerful man on the street. Things happen to people that testify against him."

Goodin identified McClain's cell phone at trial and stated that McClain had the phone with him on the night of October 23, 2006. Goodin was not aware that the phone had been lost. He was also not aware that the phone was broken and maintained that McClain made several calls on it that evening.

F. Detective Kevin Herald's Testimony

On the evening of October 24, 2006, Detective Kevin Herald, of the Eaton County Sheriff's Department, interviewed McClain at the Delta County substation. During the interview, McClain stated that he went to Israel Goodin's residence on the evening of October 23, 2006. According to McClain, after hanging out for a while, he and Goodin went to the north end of Lansing. McClain told Detective Herald that he dropped Goodin off and then went to the Meijer store on South Pennsylvania (though he then changed his story and said it was the one on West Saginaw) where he stayed for 15 to 30 minutes. When McClain went back to the north end of Lansing, he noticed Goodin staggering down the street, and Goodin said that he had been stabbed. McClain said that he dropped Goodin off at the hospital but did not go inside and did not stay.

Detective Herald did not believe McClain's story and asked him about his cell phone. McClain indicated that he had lost the phone about two weeks earlier and that is how it must have ended up in James Snell's house. McClain then changed his story and told Detective Herald that Goodin must have taken the phone and that is how it ended up in James Snell's house. According to Detective Herald, McClain eventually reverted back to his first story, that he had lost the phone two weeks earlier.

G. Larry McClain's Testimony

Larry McClain took the stand in his defense and denied suggesting to Goodin that they rob James Snell's house. McClain knew Bermudez because he was a distant cousin, but McClain never sold drugs for him. McClain stated that he spent most of the day on October 23, 2006, at Goodin's house, "putting some beats together" on the computer. The men were smoking marijuana, using cocaine, and drinking. McClain said that he left the house around 9:00 p.m., with Goodin, to get some more cocaine.

According to McClain, the men drove down Waverly and parked the car on a side street. They then discussed whether McClain should go in the house with Goodin, and they decided that McClain would drive around for a while and then come back and pick up Goodin after about a half hour. McClain stated that he gave Goodin his cell phone and $20 for his share of the cocaine. He then drove around for only 20 minutes, because he did not have a license and was afraid of getting pulled over. McClain maintained that he gave the cell phone to Goodin so that

Goodin could use it to keep track of time. McClain further stated that the phone was not working, and he did not make any calls from it that evening.

McClain admitted that he lied when he was questioned by police because he "didn't want to be implicated in anything that had happened." When asked if he knew what had happened, he answered, "No, I don't. All I know is that he went to go get some dope, and when he came back out to the car, when I was riding down the street, and I picked him up, he was injured, and that's all I knew. I just knew something had happened to him." McClain denied that he went to Bermudez's house that evening and denied that he received guns from either Bermudez or Boles. McClain testified that when he encountered Goodin on the street, Goodin jumped in the car, grabbed McClain's coat, and held it to his stomach. According to McClain, he then took Goodin to the hospital, dropped him off, and then went back to Goodin's house.

McClain also stated that he did not fire a gun on the night of October 23, 2006. He denied knowing either Boles or Bentley. He stated that he did not kick in James Snell's door, rifle through his belongings, or rob his house. He admitted that he gave the police different stories about what happened and that he went to Columbia, Missouri, about four to five days after police searched his house. He said that the reason he left the state was because he was scared for the safety of himself and his family. He said that he was in Missouri for about four to five months before he was arrested.

II. Sufficiency Of The Evidence

A. Standard Of Review

McClain argues that there was insufficient evidence to prove beyond a reasonable doubt that he was guilty of first-degree home invasion as an aider and abettor. We review a challenge to the sufficiency of the evidence de novo.[3] "[A] court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt."[4] Nevertheless, "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime."[5]

B. Elements Of The Crimes

(1) First Degree Home Invasion

First-degree home invasion occurs when a person

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[3] *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

[4] *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

[5] *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007) (internal citation omitted).

> breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, . . . enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or . . . breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault, . . . if at any time . . . either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon;
>
> (b) Another person is lawfully present in the dwelling.[6]

(2) Aiding And Abetting

Here, after the trial court instructed the jury on the elements of first-degree home invasion, it also gave the jury an instruction on aiding and abetting. MCL 767.39 provides: "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."[7] The three elements necessary for a conviction under an aiding and abetting theory are

> "'(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.'"[8]

C. Evaluating The Evidence

Although the trial court instructed the jury on an aiding an abetting theory, it is not clear from the verdict whether the jury found McClain guilty as a principal, or as an aider and abettor. The jury acquitted McClain of both assault with intent to murder and felony-firearm, indicating that the jurors did not believe that he used a gun during the home invasion. However, there was still sufficient evidence from which a rational trier of fact could find that McClain was present in the James Snell house during the home invasion and thus was guilty as a principal of first-degree home invasion under MCL 750.110a(2)(b).

First, Goodin testified that McClain was with him inside the house and took part in kicking in doors as well as the actual shooting. Although McClain argues that Goodin's testimony is suspect because he gave it in exchange for leniency in his own sentencing and, in

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[6] MCL 750.110a(2); see *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004).

[7] See *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006).

[8] *Id*. at 6, quoting *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999) (alteration in *Moore*).

specific instances, his assertions were shown to be factually incorrect, it is up to the trier of fact to assess the credibility of witnesses.[9]

Second, other testimony corroborated many of Goodin's claims. For example, Goodin, his wife, McClain's girlfriend, and even McClain himself, testified that Goodin and McClain were together on the evening of October 23, 2006, at the time of the shooting. Both James Snell and Dunn testified that they heard more than one person inside James Snell's house during the home invasion and shooting. The next-door neighbor stated that he saw "two shadows" running through the back yard, which corroborates Goodin's account of the route that he and McClain took into and out of James Snell's house. Further, while McClain claims that no physical evidence linked him to the scene, Boles found McClain's cell phone in James Snell's house.

But even if the jury did not believe that McClain was present in the house, there was sufficient evidence to conclude that he was guilty beyond a reasonable doubt of aiding and abetting. Regarding the first element, as conceded by McClain, a home invasion and assault occurred, to which Goodin pleaded guilty. The second element, that the "defendant performed acts or gave encouragement that assisted the commission of the crime," was also satisfied. Goodin testified that McClain stenciled the letters "LPD" on his black corrections officer jacket, which he wore over a shirt that said "FBI." McClain's own testimony indicated that he rode in the car with Goodin to James Snell's neighborhood, allegedly gave Goodin his cell phone so that Goodin could keep track of time, and agreed to drive around for 30 minutes while Goodin went to James Snell's house. McClain also admitted that he drove back to retrieve Goodin. Goodin testified that McClain aided in covering up the crime by agreeing on a story to tell police and attempting to get rid of the clothing and weapons used.

McClain argues that because he thought Goodin was merely buying drugs, he did not have the requisite intent for aiding and abetting, which requires that he either "intended the commission of the crime or had knowledge that the principal intended its commission." Regarding intent, "'[a]n aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in planning or executing the crime, and evidence of flight after the crime.'"[10]

Here, there was sufficient evidence to find the requisite intent. McClain himself admitted that he fled the state for several months. Goodin's testimony portrayed McClain as the principal architect of the plan to rob James Snell's house by coming up with the idea a few weeks earlier, coordinating with Boles, procuring weapons from Bermudez, and agreeing to split the proceeds.

While it is true that Goodin had his own self-interest in mind when he testified, it is, as we note above, the jury's province to assess credibility.[11] Many of the witnesses told stories that

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[9] *Passage*, *supra* at 177.

[10] *Carines*, *supra* at 757-758, quoting *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615 (2001).

[11] *Passage*, *supra* at 177.

were not entirely believable, including James Snell, who professed to not know how cocaine got into a drawer in his locked bedroom or how a scale and razor blade appeared on top of his refrigerator. McClain, however, had his own problems with credibility. He admitted lying to police about a number of things, including how it was that his cell phone ended up in James Snell's house. He further admitted that he changed his story. Therefore, there was sufficient evidence from which a rational jury could find McClain guilty beyond a reasonable doubt of first-degree home invasion, as either a principal or as an aider and abettor.

III. Ineffective Assistance Of Counsel

A. Standard Of Review

McClain asserts several reasons in support of his claim that he received ineffective assistance of counsel at trial. "'Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.'"[12] "This Court reviews a trial court's factual findings for clear error and reviews de novo questions of constitutional law."[13] "[B]ecause the trial court did not hold an evidentiary hearing, our review is limited to the facts on the record."[14]

B. Legal Standards

"An accused's right to counsel encompasses the right to the 'effective' assistance of counsel."[15] 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."[16] "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise."[17] "[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."[18]

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[12] *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008), quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[13] *Id*.

[14] *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

[15] *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007), citing US Const Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[16] *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland*, *supra* at 694.

[17] *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

[18] *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

C. Applying The Standards

(1) The Instructions

McClain first argues that trial counsel erred in failing to object to two instructions given by the trial court. To begin, McClain points to the phrase "[t]he defendant says," in the following instruction:

> The defendant says that he is not guilty of home invasion, [and] assault with intent to commit murder, because he did not intend to help anyone commit that offense. It is not sufficient for the prosecutor just to prove that the defendant intended to help another in the common unlawful activity of home invasion and assault with intent to murder . . . .

McClain contends that the phrase "[t]he defendant says," implied that the trial court deemed the prosecution's evidence more worthy of belief and unduly influenced the jury. McClain cites no Michigan case law that is on point to support his position; he merely cites commentary from the Criminal Jury Instruction Committee pertaining to alibi defenses. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position."[19]

The trial court gave the jury the following instructions: "[m]y comments, rulings, questions, and instructions are . . . not evidence" and "when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion." Because "[j]urors are presumed to follow instructions," even if it were error not to object, McClain has not shown prejudice.[20]

McClain also argues that trial counsel should have objected to the aiding and abetting instruction because it was ambiguous and confusing. In the instruction, the trial court explained that the first element the prosecution had to prove was that "the alleged crime was actually committed either by defendant or someone else. It does not matter whether anyone else . . . has been convicted of the crime." McClain asserts that this language is confusing because (1) throughout the instruction, neither Goodin nor McClain was named; and (2) Goodin *had* pleaded guilty to all three offenses, and therefore, he was the "someone else." But McClain contends that a reasonable juror would mistakenly conclude that he was the "someone else." But McClain's reasoning is strained, at best.

On review, "'this Court examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the

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[19] *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

[20] *People v Petri*, 279 Mich App 407, 414; __ NW2d __ (2008).

defendant's rights by fairly presenting to the jury the issues to be tried.'"[21] It is true, as McClain hints in his brief, that "[t]he Criminal Jury Instructions are not officially sanctioned by the Supreme Court" and "[w]here a Criminal Jury Instruction does not accurately state the law, it will be disavowed by the courts."[22] Moreover, "[i]t is an error of constitutional magnitude to omit an instruction on an element of a crime."[23] However, the plain language of the instruction the trial court gave here mirrors the language of the law of aiding and abetting as stated in *Robinson*,[24] as well as in *People v Turner*,[25] which states that "[t]he principal need not be convicted. Rather, the prosecutor need only introduce sufficient evidence that the crime was committed and that the defendant committed it or aided and abetted it." Thus, because the instruction was an accurate reflection of the law of aiding and abetting, there was no error.

McClain also appears to argue that the trial court should not have given the instruction at all because the evidence did not support it. However, "[a]n aiding and abetting instruction is proper where there is evidence that (1) more than one person was involved in the commission of a crime, and (2) the defendant's role in the crime may have been less than direct participation in the wrongdoing."[26] Here, McClain testified that he was with Goodin on the evening the home invasion was committed. And Goodin's testimony indicated that McClain was, at the very least, involved in the planning of the crime. Because there was sufficient evidence to give the instruction, there was no error. And "[c]ounsel is not ineffective for failing 'to advocate a meritless position.'"[27]

McClain also argues that trial counsel was ineffective for failing to request two instructions. McClain first asserts that trial counsel should have requested an accomplice cautionary instruction, admonishing the jury to consider Goodin's testimony more cautiously than that of an ordinary witness. In *People v Young*,[28] the Court found that the accomplice instruction was not obviously required, and therefore there was no plain error, because other testimony and physical evidence implicated the defendant. Further, "counsel thoroughly cross-examined [the alleged accomplices] and challenged their testimony during closing argument, thereby exposing their potential credibility problems to the jury. The court also instructed the jury to consider any bias, prejudice, or personal interest that a witness might have."[29]

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[21] *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006), quoting *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997) (opinion by Riley, J.).

[22] *People v Stephan*, 241 Mich App 482, 495; 616 NW2d 188 (2000).

[23] *Martin*, *supra* at 338.

[24] *Robinson*, *supra* at 6.

[25] *Turner*, *supra* at 569.

[26] *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995).

[27] *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), quoting *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

[28] *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005).

[29] *Id*. at 144.

Here, Goodin's testimony, that McClain was present inside James Snell's house during the home invasion and participated in planning the crime, was the most damning. However, even if counsel's failure to request an accomplice cautionary instruction fell below an objective standard of reasonableness, the lack of instruction was not outcome-determinative. First, as in *Young*, there was corroborating evidence placing McClain at the scene; that is, McClain's cell phone and testimony from James Snell, Dunn, and the neighbor, who heard or saw more than one person at the house. And McClain himself admits to being with Goodin on the evening of October 23, 2006. Second, potential problems with Goodin's credibility were brought to the jury's attention. During the prosecution's case in chief, Goodin clearly explained his plea agreement to the jury. Defense counsel then subjected Goodin to thorough cross-examination, in which Goodin admitted that he had given the police "two or three" different stories and further commented on the plea agreement. Finally, the trial court instructed the jury to consider witness bias, asking "[d]oes the witness have any bias, prejudice, or personal interest in how this case is decided" and "[h]ave there been any promises, threats, suggestions, or other influences that affected how the witness testified?" Thus, as in *Young*, failure to give the accomplice instruction was not outcome-determinative error, and therefore, McClain cannot show ineffective assistance of counsel for this reason.

McClain also claims that the jury should have been instructed to consider whether someone else may have committed the crime and not to convict him unless it found him guilty beyond a reasonable doubt. "[W]hen a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge."[30] Suffice it to say that McClain offered no evidence at trial showing that "someone else" was the alleged second intruder. Further, when instructing the jury, the trial court *did* plainly state that McClain was presumed to be innocent and that the prosecution was required to prove each element of each crime beyond a reasonable doubt. Once again, because "[c]ounsel is not ineffective for failing 'to advocate a meritless position,'"[31] McClain has not met the burden of showing that counsel's failure to request this instruction fell below an objective standard of reasonableness or resulted in prejudice.

(2) The Prosecutor's Statements

McClain argues that trial counsel was ineffective for failing to object to statements made by the prosecutor in closing arguments regarding the plea agreement reached with Goodin. During the prosecution's case in chief, the prosecutor asked Goodin, "is it your understanding that if you cooperate in other prosecutions other than this case that the judge, pursuant to the *Cobbs*[32] agreement, would *consider* departing from the guidelines?" to which Goodin answered

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[30] *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995).

[31] *Mack*, *supra* at 130, quoting *Snider*, *supra* at 425.

[32] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). See *People v Williams*, 464 Mich 174, 183 n 5; 626 NW2d 899 (2001) (Kelly, J. dissenting) ("A *Cobbs* plea agreement is made between the prosecutor and the defendant, but it is based, in part, on the judge's pronouncement of a preliminary sentence estimate.").

in the affirmative. (Emphasis added). During closing arguments, the prosecutor referred to the *Cobbs* agreement and stated, "[s]o, ultimately in this case, Israel Goodin doesn't know what his sentence is going to be. It's gonna be Judge Eveland that decides that."

McClain argues that this statement is untrue because the trial court must adhere to the guidelines and cannot give whatever sentence he chooses, and unless Goodin's counsel was ineffective as well, he would have informed Goodin of the minimum sentence. Be that as it may, the prosecutor plainly stated that the *Cobbs* agreement indicated that the trial court would *consider* departing from the guidelines. Generally, a defendant must be sentenced to a minimum sentence within the sentencing guidelines range unless there are substantial and compelling reasons to do otherwise.[33] Thus, it was possible for the trial court to depart from the guidelines and since Goodin had not been sentenced at the time of trial, it was true that, ultimately, Goodin did not know what his sentence would be.

McClain further contends that the prosecutor's remarks implied that the prosecutor had special knowledge regarding the sentencing process and, as such, was prohibited. "Although a plea agreement should be admitted only with great caution, no error occurs unless the prosecutor uses the agreement to suggest that the government has special knowledge unknown to the jury that the witness testified truthfully."[34] As stated above, the prosecutor made a true statement regarding the nature of the *Cobbs* agreement and its effect and, therefore, he was not professing to have any secret knowledge.

McClain also argues that when the prosecutor said that Goodin had no reason to lie because he could have blamed someone else for the crime, like Bermudez, the prosecutor was once again improperly vouching for Goodin's truthfulness. It is true that, "[a] prosecutor may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness; however, the prosecutor may argue from the facts that a witness should be believed."[35] Here, the prosecutor was simply making a logical argument regarding Goodin's motivations, based on the fact that Goodin and McClain were longtime friends and that Bermudez was allegedly in on the plan to rob James Snell's house.

Although "declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy," even if it were error to fail to object to these comments, "[c]urative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements."[36] Here, the trial court instructed the jury: "The lawyers' statements are not evidence. They are only meant to help you understand the evidence and each side's legal theories. The lawyer's questions to witnesses are also not evidence." Thus, trial "counsel may have considered an objection to be superfluous to the trial court's instructions . . . . It is presumed that the jury followed these instructions of the trial court when it deliberated [the] defendant's

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[33] MCL 769.34(2) and (3).

[34] *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005).

[35] *Id*. (internal citations omitted).

[36] *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

guilt."[37] We conclude that McClain has not met his burden of proving prejudice and, thereby, failed to prove his claim of ineffective assistance of counsel.

(3) Alibi

McClain argues that trial counsel rendered ineffective assistance by failing to investigate, give notice of, and present an alibi defense, as well as failing to request an alibi instruction. McClain contends that such a defense was supported by his testimony that he gave Goodin $20 for his share of the cocaine, agreed to drive Goodin's car around for a half an hour, and then returned to retrieve Goodin. Alibi testimony is that "offered for the sole purpose of placing the defendant elsewhere than at the scene of the crime[.]"[38] "While a defendant's general denial of the charges against him does not constitute an alibi defense, if a defendant gives specific testimony regarding his whereabouts at the time in question, it is alibi testimony the same as if another witness had given the testimony."[39]

Clearly, McClain *did* testify at trial, stating that he was somewhere else when the home invasion occurred, but even if it were error for trial counsel to fail to specifically request an alibi instruction, the error would not be outcome determinative. In *People v Sabin* (*On Second Remand*),[40] this Court held that failure to give an alibi instruction "is not error requiring reversal where proper instruction is given on the elements of the offense and on the requirement that the prosecution must prove each element beyond a reasonable doubt." Here, as we noted above, the trial court instructed the jury on home invasion, aiding and abetting, and reasonable doubt. McClain cannot prove prejudice, and thereby, has failed to prove his claim of ineffective assistance of counsel.

(4) Proper Investigation

McClain argues that trial counsel provided ineffective assistance by failing to investigate the claims of three prisoners who stated that they would testify on McClain's behalf regarding statements made by Goodin to the effect that he planned to testify falsely, blame someone else for his crimes, and, more importantly, that he was the one who dropped McClain's cell phone in James Snell's house. According to McClain, the cell phone was the most damning piece of evidence introduced at trial because it placed him at the scene of the crime. Yet, he argues, although two of the witnesses were on the original witness list, they were not called. A third was left off the list entirely. McClain's affidavit asserts that trial counsel told McClain that McClain did not have the money to call these witnesses to trial. However, since review is limited to facts on the record,[41] this affidavit is not properly before this Court.

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[37] *Matuszak, supra* at 58.

[38] *People v Watkins*, 54 Mich App 576, 580; 221 NW2d 437 (1974).

[39] *People v McGinnis*, 402 Mich 343, 346; 262 NW2d 669 (1978) (internal citations omitted).

[40] *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658; 620 NW2d 19 (2000).

[41] *Wilson, supra* at 352.

Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy, which, as noted above, this Court "will not second-guess with the benefit of hindsight."[42] Even if failure to call these witnesses was error, "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense."[43] "A defense is substantial if it might have made a difference in the outcome of the trial."[44] Goodin's testimony as a whole, including that regarding McClain's cell phone, was subjected to cross-examination, and Goodin's motivation to lie was fully presented to the jury. Therefore, even though these witnesses were not called to impeach Goodin's credibility, McClain was not deprived of a substantial defense and counsel's performance was not shown to be ineffective.

(5) Cumulative Effect

McClain argues that the cumulative effect of all of the errors alleged above was prejudicial to his case. "This Court reviews this issue to determine if the combination of alleged errors denied [the] defendant a fair trial."[45] "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal. In order to reverse on the grounds of cumulative error, the errors at issue must be of consequence."[46] Of the seven alleged errors made by trial counsel, however, only the failure to ask for an accomplice instruction could conceivably be construed as an actual error. As discussed above, even this error did not result in prejudice because other testimony and physical evidence corroborated that of Goodin's. Moreover, Goodin's plea agreement was disclosed to the jury, and he was thoroughly cross-examined. Finally, the trial court instructed the jury to consider witness bias. Therefore, McClain was not denied a fair trial.

(6) Other Arguments

McClain also argues that he received ineffective assistance of appellate counsel because appellate counsel failed to raise the issue of ineffective assistance of trial counsel. McClain further asserts that Michigan's system for funding public defenders is inadequate and violates the Sixth Amendment.

"[B]ecause the trial court did not hold an evidentiary hearing, our review is limited to the facts on the record."[47] "[T]he test for ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel. Hence, a defendant must

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[42] *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

[43] *Id*.

[44] *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

[45] *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001).

[46] *Id*. at 388 (internal citation omitted).

[47] *Wilson*, *supra* at 352.

show that his appellate counsel's decision not to raise a claim of ineffective assistance of trial counsel fell below an objective standard of reasonableness and prejudiced his appeal."[48] As outlined above, all of McClain's claims of ineffective assistance of trial counsel were without merit. Moreover, "under the deferential standard of review, appellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance."[49] "[D]efendant's argument fails because he is unable to show any possible prejudice. McClain himself argues that his trial counsel was ineffective; therefore, the issue was presented to this Court, and appellate counsel's failure to do so was insignificant."[50]

McClain's also argues that lack of funding makes effective appellate representation impossible and therefore violates the Sixth Amendment. "In Michigan, assigned counsel have a statutory right to ['reasonable'] compensation for providing criminal defense services to the indigent."[51] The Court has refused "to establish any specific definition or formula for determining or calculating 'reasonable compensation'"; however, the Legislature, through MCL 775.16, left the decision to the chief judges of the circuit courts, and, "what constitutes reasonable compensation may necessarily vary among circuits."[52] For his part, McClain offers no specific reasons why Eaton County's system, in particular, is "unreasonable." Moreover, as has been discussed, McClain has failed to show that appellate counsel was ineffective, and therefore, the issue of compensation for public defenders is not before us.

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro

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[48] *People v Uphaus*, 278 Mich App 174, 186; 748 NW2d 899 (2008) (internal citation omitted).

[49] *People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995).

[50] *People v Pratt*, 254 Mich App 425, 430-431; 656 NW2d 866 (2002).

[51] *Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 122; 503 NW2d 885 (1993).

[52] *Id*. at 128-129.