STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2012
v	No. 301200 Berrien Circuit Court
WILLIAM KELLEY WATSON, Defendant-Appellant.	LC No. 2010-002063-FH

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for first-degree home invasion, MCL 750.110a(2), and domestic assault, MCL 750.81(2). Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to 6 to 40 years' imprisonment for his home invasion conviction and to 169 days in jail for his domestic assault conviction. He was given 169 days of jail credit. Because we conclude that there was sufficient evidence to support defendant's conviction and that defendant was provided effective assistance of counsel, we affirm.

Defendant and Erica Campbell, the victim, were in a dating relationship for about five years. They signed a one-year lease for an apartment in February 2009 and lived there together. Campbell paid the security deposit, the water bills, and the rent. Defendant paid the electric bill and contributed to food costs. The household goods belonged to Campbell and defendant had only his clothing and personal items at the apartment. When the lease ended in February 2010, a new lease was not executed. Campbell continued to pay rent, and Campbell and defendant did not move out.

Campbell ended her relationship with defendant in late April 2010. Defendant took all his clothing, except a bag of dirty laundry, and all his personal belongings, and willingly moved out of the apartment. He left his keys to the apartment with Campbell. Defendant checked into a motel on April 29, 2010, and paid for a week.

On May 5, 2010, Campbell was in bed at about 9:30 p.m. when defendant came to her apartment. He knocked five or six times and when Campbell did not answer, defendant kicked in the door. Defendant went to Campbell's bedroom and hit, punched, and kicked her. Campbell suffered a cut lip, a blood clot in her eye, and a fractured rib. Officers located defendant later that night at 1091 Pavone Street, his sister's house, and he was arrested. He told a detective that he was at Campbell's apartment to pick up his dirty laundry and was mad when

he could not get in. Defendant admitted he had willingly returned his keys and moved out of the apartment. When he was booked at the jail, defendant gave his address as 1091 Pavone Street.

During the trial, outside the presence of the jury, a detective gave testimony regarding efforts by the prosecution to find two witnesses, Larry Featherstone, the landlord of the apartment, and Linda Rowe, the landlord's agent, as requested by defendant. Featherstone moved to Austin, Texas before the subpoenas were issued. The detective could not locate Rowe, but received a telephone call from her indicating that she did not have a copy of the lease and that a new lease was being written but would not have defendant's name on it. The detective asked the captain of the Benton Harbor Police Department to contact Rowe's boyfriend because the captain knew the boyfriend personally. The captain's messages went unanswered. The trial court found there was adequate due diligence to find the witnesses and stated that a missing witness instruction would not be appropriate. Defense counsel did not argue for an instruction allowing the jury to infer the missing witnesses would have been unfavorable to the prosecution.

Before the jury began deliberating, the trial court instructed the jury on the law. The trial court gave the standard instruction regarding the breaking and entering element of first-degree home invasion, and it also read a special instruction regarding tenancy. Defense counsel objected to this special instruction, arguing that it gave too much information to the jury. The trial court overruled defense counsel's objection.

On appeal, defendant first argues there was insufficient evidence to convict him of first-degree home invasion. Specifically, defendant argues that the requirement that he break and enter the apartment or enter without permission could not be proved because he was a co-lessee of the apartment.

We review a challenge to the sufficiency of the evidence de novo. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009). The evidence is viewed in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* at 377-378. It is the role of the finder of fact to make decisions about the credibility of witnesses and the probative value of evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "An actor's intent may be inferred from all of the facts and circumstances, . . . and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted).

To establish first-degree home invasion, the prosecution must prove beyond a reasonable doubt: (1) that the defendant either broke and entered a dwelling or entered a dwelling without permission, (2) that defendant either intended when entering to commit a felony, larceny, or assault in the dwelling or at any time while entering, present in, or exiting the dwelling committed a felony, larceny, or assault; and (3) while the defendant was entering, present in, or exiting the dwelling either the defendant was armed with a dangerous weapon or another person was lawfully present in the dwelling. MCL 750.110a(2); *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010).

On appeal, defendant challenges only the evidence regarding the first element. "Without permission" is defined as "without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling." MCL 750.110a(1)(c). Generally, when a defendant has a legal right to enter a building, the element of breaking and entering or entering without permission is not met. *People v Brownfield (After Remand)*, 216 Mich App 429, 432; 548 NW2d 248 (1996). When a lease expires but the tenant remains in possession and the landlord continues to accept rent payments, the law considers the lease renewed for the same term. *Kokalis v Whitehurst*, 334 Mich 477, 480-481; 54 NW2d 628 (1952). "Abandonment requires proof of an intent to abandon and acts of abandonment." *Fera v Village Plaza, Inc*, 52 Mich App 532, 538; 218 NW2d 155 (1974), rev'd on other grounds 396 Mich 639 (1976).

In this case, there was sufficient evidence that defendant had abandoned the apartment. Defendant did not pay rent, removed all his belongings except a bag of dirty laundry, returned his keys, found a different place to stay, and gave a different address when he was booked at the jail. Viewing the evidence in a light most favorable to the prosecution, a rational jury could reasonably infer defendant abandoned the apartment and no longer had a legal right to enter the premises. *Wolfe*, 440 Mich at 516; *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Accordingly, we conclude there was sufficient evidence to support defendant's conviction beyond a reasonable doubt.

Defendant next argues he was denied effective assistance of counsel. Because no evidentiary hearing was held regarding defendant's ineffective assistance of counsel claims, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish a claim of ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that trial counsel's action was sound trial strategy. *Id.* To show prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 302-303 (quotation and citation omitted). Trial counsel's decision regarding which jury instructions to request is generally considered part of trial strategy, which this Court does not second-guess. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003).

Defendant first argues that defense counsel's objection to the special jury instruction on tenancy constituted ineffective assistance of counsel. Specifically, defendant argues that defense counsel should have objected to the special jury instruction on tenancy on the basis of incompleteness. Defendant argues that defense counsel should have requested that the instruction be expanded to convey to the jury that if defendant was a tenant of the apartment he could not be guilty of first-degree home invasion.

For the breaking and entering element of first-degree home invasion, the trial court instructed:

> that the defendant broke into a dwelling. It does not matter whether anything was actually broken, however, some force must have used [sic], opening a door, raising a window and taking off a screen all examples [sic] of enough force to count as a breaking. Entering a dwelling through any already open door or window without using any force does not count as a breaking.

The special instruction that the trial court gave the jury provided:

> A tenant is a person who is lawfully in possession or control of a dwelling. You have also heard testimony the defendant had abandoned that tenancy and therefore at the time of these events, could no longer be lawfully in possession or control of the dwelling. It is for you to decide what the facts of this case are, that includes, whether the defendant was lawfully in possession or control of the dwelling at the time these events occurred.

Jury instructions are reviewed de novo as a whole to establish error. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003); *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). "[T]he trial court is required to instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner." *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995) (citations omitted); MCL 768.29. "Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Bell*, 209 Mich App at 276.

We conclude that defense counsel's failure to object to the special instruction on the basis of incompleteness did not fall below an objective standard of reasonableness because the instructions as given fully and fairly presented the case to the jury in an understandable manner. *Toma*, 462 Mich at 302; *Mills*, 450 Mich at 80. Viewing the instructions as a whole and in context, there can be no mistake that the jury was aware that there could not be a breaking and entering if defendant was entitled to control of the apartment. Specifically, the reading of the instruction on first-degree home invasion, along with the special instruction, implied that if defendant abandoned the tenancy, he was not in control. The instructions, when considered with the parties' arguments and theories, clearly informed the jury that if defendant had a right to enter the apartment, he could not break and enter the apartment. *Bell*, 209 Mich App at 276. Accordingly, defense counsel's failure to object to the instructions on the basis that they were incomplete because they failed to adequately inform the jury regarding the breaking and entering element of first-degree home invasion was reasonable because the instructions in fact did so inform the jury. Defense counsel cannot be ineffective for failing to raise a meritless objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Accordingly, we reject defendant's claim that he was provided with constitutionally ineffective assistance of counsel.

Defendant next argues that defense counsel was ineffective for failing to request the standard jury instruction concerning missing witnesses when the prosecution did not procure Featherstone and Rowe. MCL 767.10a(5) provides that prosecution or law enforcement will provide reasonable assistance in locating and serving witnesses if requested. When there is not reasonable assistance, the defendant may be entitled to a jury instruction permitting the jury to infer the missing witness's testimony would have been unfavorable to the prosecution. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004).

In this case, a hearing was held outside the presence of the jury regarding the prosecution's failure to present the witnesses. After hearing testimony and argument, the trial court found that the prosecution exercised due diligence in attempting to locate the witnesses. Accordingly, the trial court concluded that a missing witness instruction would not be appropriate. Consequently, not requesting a missing witness instruction later during trial can not constitute ineffective assistance because trial counsel cannot be faulted for failing to make a meritless objection. *Goodin*, 257 Mich App at 433. Therefore, defense counsel's representation of defendant did not fall below an objective standard of reasonableness on this record. *Toma*, 462 Mich at 302.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Stephen L. Borrello