STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 10, 2012
v	No. 301618 Saginaw Circuit Court
WILLIAM CLYDE HENIX, II, Defendant-Appellant.	LC No. 10-034038-FH

Before: MURPHY, C.J., and FITZGERALD and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of first-degree home invasion, MCL 750.110a(2). The trial court sentenced him to a prison term of 125 months to 30 years. We affirm.

Defendant argues that much inculpatory evidence was obtained through an illegal search and, therefore, his trial counsel was ineffective for failing to move to suppress. Defendant further argues that counsel should have introduced evidence that defendant resided with his father, close to the site of the home invasion, which might have established a "non-inculpatory explanation for his presence in the area."

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996) (emphasis in original). 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). [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).]

That defense counsel did not move to suppress evidence obtained through the search of the residence where defendant was found immediately after the break-in was not objectively unreasonable. The exclusionary rule generally prohibits the admission of evidence obtained through an unconstitutional search or seizure. *People v Hawkins*, 468 Mich 488, 498-499; 668

NW2d 602 (2003). However, if there is probable cause to believe a dwelling contains the perpetrator of a crime, police may enter the dwelling without a warrant in order to prevent the imminent destruction of evidence, protect police officers or others, or prevent the escape of the suspect. *People v Raybon*, 125 Mich App 295, 301; 336 NW2d 782 (1983); *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997); *People v Davis*, 442 Mich 1, 24; 497 NW2d 910 (1993). The decision to enter the dwelling must be reasonable, which is judged from the perspective of the police officers at the scene. *People v Cartwright*, 454 Mich 550, 559; 563 NW2d 208 (1997).

Defendant was spotted by police leaving the site of the home invasion in a Chevrolet Impala. Police traced the car he was driving to the residence of a woman whom defendant had dated. Officers approached the home and spotted the car; one of the officers felt the vehicle's hood and determined that it had been recently driven because it was still quite warm. Cf. *Raybon*, 125 Mich App at 301. The officers repeatedly knocked on the front door of this residence and received no answer. However, an individual was seen peeking out a window. Receiving no response to their repeated requests to open the door, one officer kicked it open. Defendant was apprehended inside the residence.

Given the totality of the circumstances, it was reasonable for the officers to conclude that they were in hot pursuit of a felon and to enter the dwelling to prevent defendant's escape. Thus, it was not objectively unreasonable for trial counsel to decline to move to suppress the evidence seized within the residence, because the search fell within the exigent-circumstances exception to the warrant requirement. "[T]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Trial counsel's decision not to introduce evidence regarding the proximity of defendant's residence to the victims' residence was also not objectively unreasonable. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 248 Mich App 655, 666; 649 NW2d 94 (2002). The proximity of defendant's residence to the scene of the crime would have had little value, and certainly would not have represented a substantial defense to the charge, given the extensive evidence tending to establish defendant's guilt. Indeed, that defendant resided close to the scene of the crime could reasonably have been determined to be more prejudicial than helpful to his case. Trial counsel was within his discretion in declining to present this evidence.

Moreover, given the evidence presented at trial, defendant cannot show a reasonable probability that, but for counsel's inaction, the result of the proceedings would have been different. As someone attempted to kick in the door between her kitchen and garage, one of the occupants of the invaded home saw a medium-sized car that she believed was either white or silver parked in her driveway. When the intruder escaped to his car, she saw that he was a black male wearing a baseball cap and jacket. As he backed out of the driveway, the victim saw a police vehicle pass the intruder's vehicle. The officer driving the police vehicle, who was responding to a 911 call from the residence, saw a 2000 to 2004 Chevrolet Impala pull out of the driveway as he arrived. As the vehicle passed him, the officer observed the other driver for approximately five to ten seconds; he described the person as a black male, "20 to 30, maybe a

little older," with a mustache, flat-billed baseball hat, and coat with fold-down collar. At trial, the officer identified the driver as defendant. The officer traced the license number of the vehicle to the address where defendant was apprehended. In a recorded conversation during a jail visit with his parents, defendant told them, "I beat that home invasion, it was me, I beat that."

In light of the evidence adduced, defendant could not establish the requisite prejudice to sustain his claim of ineffective assistance even *if* counsel's actions had been objectively reasonable.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter