STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2012
v	No. 304474 Wayne Circuit Court
DON DEMAZE JACKSON, Defendant-Appellant.	LC No. 10-006979-FH

Before: METER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and felonious assault, MCL 750.82. The trial court sentenced defendant as a fourth-offense offender, MCL 769.12, to concurrent prison terms of 8 years and 5 months to 20 years for the first-degree home invasion conviction and 8 years and 5 months to 15 years for the felonious assault conviction. Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence for a rational trier of fact to convict defendant of first-degree home invasion and felonious assault. When reviewing a claim of insufficient evidence, we review the record de novo. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). "When ascertaining whether sufficient evidence was presented in a bench trial to support a conviction, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008).

A person commits first-degree home invasion if: (1) he breaks and enters a dwelling or he enters a dwelling without permission; (2) he intends when entering to commit a felony, larceny, or assault in the dwelling or at any time while entering, present in, or exiting the dwelling he commits a felony, larceny, or assault; and (3) while he is entering, present in, or exiting the dwelling, he is armed with a dangerous weapon or another person is lawfully present in the dwelling. MCL 750.110a; *People v Baker*, 288 Mich App 378, 384; 792 NW2d 420 (2010). The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. MCL 750.82; *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007).

There was sufficient evidence for a rational trier of fact to find that the essential elements of first-degree home invasion were proven beyond a reasonable doubt. The victim testified that defendant did not have permission to enter the house and that he pushed his way into her house. After defendant entered the victim's house, he hit her in the face with a cordless phone. Given this evidence, a rational trier of fact could find that the elements of first-degree home invasion were proven beyond a reasonable doubt.

There was also sufficient evidence for a rational trier of fact to find that the essential elements of felonious assault were proven beyond a reasonable doubt. The victim testified that defendant forcibly pushed his way into her house. Defendant testified that he felt disrespected and jealous. Defendant twice hit the victim in the face with a cordless phone, resulting in a bruise beneath her eye. Given this evidence, a rational trier of fact could find that the elements of felonious assault were proven beyond a reasonable doubt.

Defendant claims that the above evidence was insufficient because the testimony was not credible. A witness's credibility is a question for the trier of fact, and any conflict in the evidence must be resolved in the prosecutor's favor. *Kanaan*, 278 Mich App at 619. This Court will not interfere with the trier of fact's role in determining the credibility of the witness. *Id*. In this case, the judge had the opportunity to hear the victim's testimony and observe the victim as she testified. While defendant's trial counsel utilized cross-examination to impeach the victim with inconsistencies between her preliminary examination testimony and her testimony at trial, the judge still found portions of the victim's account of the facts to be credible. This Court must not substitute its own judgment for that of the trier of fact.

Defendant also claims that there was insufficient evidence to convict him of first-degree home invasion and felonious assault because a cordless phone is not a dangerous weapon. The home invasion statute defines a dangerous weapon, in part, as

> (iii) An object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon. [MCL 750.110a(1)(b).]

The felonious assault statute does not define dangerous weapon, but case law suggests that the analysis is the same as under the home invasion statute. Our Supreme Court has noted that a telephone can be used as a dangerous weapon. *People v Heflin*, 434 Mich 482, 508 n 19; 456 NW2d 10 (1990); see also *People v Goolsby*, 284 Mich 375, 378; 279 NW 867 (1938) (An item can be a dangerous weapon . . . if it "was used as a weapon and, when so employed in an assault, dangerous"). Evidence was presented that defendant assaulted the victim by using a cordless telephone to strike her in the face causing bodily injury, thereby establishing that the telephone was used as a deadly weapon.

Defendant next argues that he was denied the effective assistance of counsel because his trial counsel failed to investigate and call several key witnesses. We review unpreserved claims of ineffective assistance of counsel for errors apparent on the record. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). The defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. *Id*. at 290.

Failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy. *People v Seals*, 285 Mich App 1, 20; 776 NW2d 314 (2009). The failure to call a witness will only constitute ineffective assistance of counsel when it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant asserts that defense counsel was ineffective because he failed to call Louis Whittaker III at trial. At trial, defendant testified that he had a woman named Jackie with him in his car when he went to the victim's house. On appeal, he argues that Whittaker was also in the car, and that his trial counsel should have called Whittaker as a witness. To support his argument, defendant has provided a non-notarized written statement from Whittaker. Review of a claim of ineffective assistance of counsel, however, is limited to the record. *People v Jackson*, 292 Mich App 583, 600; 808 NW2d 541 (2011). Whittaker's statement is not part of the lower court record and cannot be considered on appeal. Furthermore, defendant never mentioned Whittaker in his testimony at trial, and, therefore, there is nothing in the lower court record to show what Whitaker's testimony would have been, or that defendant's trial counsel knew, or should have known, to investigate or call Whittaker as a witness. Therefore, there is nothing in the record to suggest that the performance of defendant's trial counsel fell below an objective standard of reasonableness.

Defendant also asserts that defense counsel was ineffective because he failed to investigate or call two other eye witnesses and one impeachment witness. However, defendant offers no evidence to show what the proposed witnesses would have testified to or that the proposed witnesses would have testified on defendant's behalf. Therefore, there is no evidence to prove that his trial counsel performed below an objective standard of reasonableness, or that the outcome of trial would have been different had these witnesses testified.

Defendant next argues that the trial court departed from the guidelines range for the felonious assault conviction without providing substantial and compelling reasons to justify an upward departure from the guidelines range. We disagree, as the trial court did not depart from the sentencing guidelines. Where a defendant is sentenced on multiple, concurrent convictions, the court is only required to score the guidelines for the highest crime class felony conviction and not for each of defendant's multiple convictions. See MCL 771.14(2)(e); MCL 777.21(2); *People v Mack*, 265 Mich App 122; 695 NW2d 342 (2005). Home invasion is a class B felony, MCL 777.16f, and felonious assault is a class F felony, MCL 777.16d. Because home invasion is a higher crime class than felonious assault, and the court imposed concurrent sentences, the court did not need to separately score the felonious assault conviction. The guidelines range for

the home invasion conviction was 78 to 260 months. The sentence imposed for felonious assault is within this range.

Defendant argues in his standard 4 brief that the preliminary examination transcript he received was missing portions of the victim's testimony that were necessary to the cross-examination of the victim at trial, and his trial counsel was ineffective because he did not attempt to obtain a correct preliminary examination transcript. We disagree. We review this unpreserved claim for errors apparent on the record. *Johnson*, 293 Mich App at 90.

Certified records of trial proceedings are presumed to be correct, but that presumption can be rebutted. *People v Abdella*, 200 Mich App 473, 475; 505 NW2d 18 (1993). "[T]o overcome the presumption of accuracy and be entitled to relief, a party must satisfy the following requirements: (1) seasonably seek relief; (2) assert with specificity the alleged inaccuracy; (3) provide some independent corroboration of the asserted inaccuracy; and (4) describe how the claimed inaccuracy in transcription has adversely affected his ability to secure postconviction relief." *Id*. at 476.

Defendant cannot overcome the presumption that the record of the preliminary examination was accurate. Defendant does not argue the alleged inaccuracy with specificity. He asserts that portions of Tompkins's testimony are missing, but does not specifically refer to a portion of the transcript as being inaccurate. Defendant has also not provided any independent corroboration of his claim. Furthermore, a review of the preliminary examination record shows that the transcript is complete. There are page numbers on every page of the transcript, and no pages are missing. Additionally, there is a sworn statement by the court reporter that the transcript is a complete, true, and correct version of the proceedings.

Counsel is not ineffective for failing to advocate a futile or meritless position. *Mack*, 265 Mich App at 130. As discussed above, defendant's assertion that the preliminary examination transcript was incomplete is meritless. Therefore, defendant's trial counsel was not ineffective because he did not try to obtain an accurate preliminary examination transcript.

Even assuming there was an error in the preliminary examination transcript, there is no reasonable probability that the result of the proceedings would have been different if the missing testimony were available. Defendant argues that the missing testimony established a relationship between the victim and defendant that would show that defendant had permission to enter the victim's house. However, even if there was a relationship between defendant and the victim, it would not rebut the victim's testimony that at the time of the incident she specifically told defendant not to enter her house and asked him to leave. Therefore, defendant cannot prove that the outcome of the trial would have been different had the missing portions of the transcript been available.

Affirmed.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder