STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 11, 1999
v	No. 206390 Kent Circuit Court
KABATA DAVID MCMILLAN, Defendant-Appellant.	LC No. 96012867 FH

Before: Holbrook, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3). The trial court sentenced defendant to a six-month term in the Kent County Jail and to twenty-four months of probation. Defendant appeals as of right and we affirm.

I.

Defendant first argues that the evidence was insufficient to support his conviction. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of an offense. *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991).

The Legislature defined second-degree home invasion as follows:

> A person who breaks and enters a dwelling with intent to commit a felony or a larceny in the dwelling or a person who enters a dwelling without permission with intent to commit a felony or a larceny in the dwelling is guilty of home invasion in the second degree. [MCL 750.110a(3); MSA 28.305(a)(3).]

Here, it cannot be seriously disputed that the evidence was sufficient for the jury to find the occurrence of a second-degree home invasion. The complainant testified that she left her house in order and returned three days later to find it ransacked; when she returned, some of her possessions were missing. Given this evidence, the jury was certainly entitled to infer that a person entered the house "without permission."[1] See MCL 750.110a(1)(c); MSA 28.305(a)(1)(c).

The more difficult question is whether the evidence was sufficient to establish that *defendant* was the perpetrator (or an aider and abettor) of the crime. To this end, the prosecution introduced evidence that defendant's fingerprints were lifted from the edge of a mirror found leaning against a wall in the bedroom. Before the complainant left her house, the mirror had been hanging on the back of the bedroom door. A police officer testified that defendant denied ever having been inside the complainant's house. The officer further testified that when defendant was confronted with the fingerprint evidence, he explained that he had gone to a party on the front porch of the house, that there was some furniture on the front porch, and that he may have touched a mirror at that time.

As a general rule, "fingerprint evidence alone is sufficient to establish identity if the prints are found at the scene of the crime under such circumstances that they could have only been made at the time of the commission of the crime." *People v Himmelein*, 177 Mich App 365, 375; 442 NW2d 667 (1989). Given the location of the mirror within the house (before and after the weekend in question), and the location of defendant's fingerprints on the edge of the mirror, the most logical inference is that defendant removed the mirror from the wall during the commission of the home invasion. When viewed in the light most favorable to the prosecution, defendant's story to the police appears to be nothing more than mere conjecture, as there was no evidence supporting defendant's theory regarding the fingerprint. Defendant himself was not sure if there was a mirror on the porch during the party. It is well-settled that the prosecution need not negate every theory consistent with the defendant's innocence. *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991). Instead, the prosecution is required only to prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide. *Id.* We conclude that the evidence was sufficient for the prosecution to have done so here. Cf. *Himmelein*, *supra* at 375; *People v Willis*, 60 Mich App 154, 159; 230 NW2d 353 (1975); *People v Jackson*, 42 Mich App 391, 394-395; 202 NW2d 459 (1972).

II.

Next, defendant suggests several reasons why his trial counsel was ineffective. A criminal defendant attempting to prove that trial counsel was ineffective bears a heavy burden. E.g. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). To justify reversal on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Strickland*, *supra* at 690-691; *People v Stanaway*, 446 Mich 643,

687; 521 NW2d 557 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, *supra* at 694; *Stanaway*, *supra* at 687-688. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, *supra* at 694. Finally, to properly advance a claim of ineffective assistance of counsel, a defendant must make a testimonial record at the trial court level in an evidentiary hearing or in connection with a motion for a new trial. *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973). Because defendant failed to do so here, our review is limited to mistakes apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

In this case, defendant first questions the soundness of defense counsel's strategic decision to make an issue of his "lack" of transportation and the "fact" that he lived in another county. Without a testimonial record or evidentiary hearing on the subject at the trial court level, we cannot know what facts available to defense counsel before trial may have led her to put forth this theory of defense. Lacking the proper factual context, we cannot evaluate (1) the soundness of defense counsel's strategic decision, or (2) defendant's claim that defense counsel failed to "investigate and prepare for trial."

Defendant also questions defense counsel's failure to object to certain bits of evidence admitted by the prosecution. However, in so doing he fails to explain why such evidentiary objections, if made by defense counsel, would have been successful. A defendant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990); *People v Heard*, 31 Mich App 439, 446-447; 188 NW2d 24 (1971), rev'd on other grounds 388 Mich 182 (1972). By doing so in this case, defendant has failed to show the prejudice necessary to prevail on this particular aspect of his ineffective assistance of counsel claim. *Strickland*, *supra* at 694.

Defendant further contends that defense counsel was ineffective for eliciting from a police witness testimony that defendant's fingerprint was matched using a database that included only persons who have been arrested for a felony offense. The trial court instructed the jury, sua sponte, that the mere fact that defendant's fingerprint was included in the database did not mean that defendant had been previously *convicted* of a felony. Given the trial court's cautionary instruction, we are not persuaded that a reasonable probability exists that the result of the proceeding would have been different but for the alleged "error." *Id.*

Defendant finally contends that defense counsel was ineffective for making a poor closing argument. Again we are not persuaded that the alleged "error" amounted to ineffective assistance of counsel under the *Strickland* standard.

III.

Defendant argues that he was denied a fair trial as a result of several instances of prosecutorial misconduct—none of which were met with objection at trial. Upon review of the record, we conclude that defendant's various allegations of prosecutorial misconduct are without merit.

IV.

Next, defendant argues that the trial court erred in failing to give three jury instructions that were not requested by defense counsel. Because defendant did not request any of these instructions, our review is limited to the issue whether relief is necessary to avoid manifest injustice. See, e.g., *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Upon review of the record, we conclude that the trial court's failure to sua sponte give CJI2d 4.11 (Evidence of Other Offenses), CJI2d 4.15 (Fingerprint Evidence), and CJI2d 3.9 (Specific Intent) did not amount to manifest injustice. Accordingly, defendant is not entitled to relief on this issue.

Defendant also argues that the trial court erred in instructing the jury on aiding and abetting. Defendant did not object to the aiding and abetting instruction at trial. Accordingly, our review is limited to the issue whether relief is necessary to avoid manifest injustice. See, e.g., *Haywood*, *supra* at 230. Given complainant's testimony suggesting that certain items removed from her house would have taken at least two persons to move, the aiding and abetting instruction was appropriate. See *People v Brown*, 120 Mich App 765, 770; 328 NW2d 380 (1982). Therefore, the trial court's decision to instruct the jury on aiding and abetting did not amount to manifest injustice.

Finally, defendant argues that he was denied the effective assistance of counsel when defense counsel failed to request or object to the instructions listed in the preceding two paragraphs. We disagree. Although defendant would have been entitled to an instruction on fingerprint evidence pursuant to CJI2d 4.15 if such instruction had been requested, we are not persuaded that defense counsel's failure to request CJI2d 4.15 amounted to ineffective assistance of counsel under the *Strickland* standard. Defendant was not entitled to the other instructions. Therefore, defense counsel's failure to request/object to them could not have amounted to ineffective assistance of counsel. See *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997) (explaining that failure to raise a meritless objection does not constitute ineffective assistance of counsel).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ Michael J. Talbot

[1] In fact, defendant admits in his brief on appeal that "the prosecution did show that someone committed a home invasion. . . ."