

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARVEY BROWN, JR.,

Defendant-Appellant.

UNPUBLISHED

February 1, 2002

No. 225785

Saginaw Circuit Court

LC No. 99-017476-FH

Before: Sawyer, P.J., and O'Connell and Zahra, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3), first-degree home invasion, MCL 750.110a(2), and possession of burglar's tools, MCL 750.116. The trial court sentenced him as a fourth felony offender, MCL 769.12, to concurrent terms of eleven to twenty-five years for the second-degree home invasion conviction, twenty to forty years for the first-degree home invasion conviction, and four to eight years for the burglar's tools conviction. Defendant appeals as of right. We affirm.

On appeal, defendant contends that he was denied the effective assistance of counsel because his attorney failed to present expert testimony in support of his diminished capacity defense. 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). A defendant who claims that he has been denied the effective assistance of counsel must establish that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Because the defendant bears the burden of demonstrating both deficient performance and prejudice, he necessarily bears the burden of establishing the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant did not move for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), and therefore this Court's review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Trial counsel's failure to present expert testimony is presumed to be a permissible exercise of trial strategy. *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). There is insufficient evidence on this record to overcome this presumption. Defendant has presented nothing to indicate that an expert would have testified that his consumption of cocaine and beer, the majority of which took place

several hours before the offenses, may have left him incapable of forming the intent to commit a larceny in the houses he entered. Because he has not established the factual predicate for his claim, *Carbin, supra*, we decline to reverse on this basis.

Defendant's remaining claim is that his sentence was disproportionate and thus an abuse of discretion under *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). This claim is also without merit. The statutory sentencing guidelines apply to this case because the crimes were committed after January 1, 1999. MCL 769.34(1). This Court must affirm sentences within the statutory guidelines range absent an error in scoring or inaccurate information relied on in determining the defendant's sentence. MCL 769.34(10). Each of defendant's sentences was within the guidelines range and defendant did not question the underlying information or scoring. Consequently, they must be upheld.

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Brian K. Zahra