STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 28, 2002
v	No. 230898 Wayne Circuit Court
ANTOINE SMITH, Defendant-Appellant.	LC No. 99-012574

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial,[1] of first-degree home invasion, MCL 750.110a(2), and unarmed robbery, MCL 750.530. Defendant was sentenced to a term of 6 years, 3 months to 20 years' imprisonment for the first-degree home invasion conviction, to be served consecutively to a term of 4 to 15 years' imprisonment for the unarmed robbery conviction. We affirm.

On appeal, defendant first argues that he received ineffective assistance of counsel at trial because his attorney conceded that defendant was an accomplice to first-degree home invasion and robbery, did not request an instruction on second-degree home invasion,[2] and argued that defendant was scary, dangerous and that his testimony was incredible. Defendant did not preserve his claim of ineffective assistance of counsel by filing a motion for new trial or moving for an evidentiary hearing in the lower court. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Therefore, our review is limited to errors apparent from the existing record. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

When alleging ineffective assistance of counsel, the defendant bears the burden of overcoming the presumption that counsel's assistance was effective. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against an objective standard of reasonableness

[1] Defendant was convicted following a joint jury trial with codefendant William Stewart. Stewart's appeal is also before this panel in Docket No. 230899.

[2] MCL 750.110a(3).

under the circumstances according to prevailing professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Second, the deficiency must have been prejudicial to the extent that the defendant was deprived of a fair trial. *Strickland, supra* at 687-688; *Pickens, supra* at 309. To establish the requisite showing of prejudice, the defendant must demonstrate a reasonable probability, that but for counsel's unprofessional errors, the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

As part of his claim alleging ineffective assistance of counsel, defendant initially maintains that counsel erred in conceding defendant's involvement in the first-degree home invasion and robbery where defendant did not admit to the specific elements of these offenses. Specifically, defendant argues that his counsel's concessions were improper because he could not be convicted of these offenses under an aider and abettor theory since he was unaware that the home his accomplices invaded was occupied or that his accomplices intended to rob the occupants. In this regard, defendant asserts that accomplice culpability requires that one who aids and abets in the commission of a crime must possess the identical mental state as that of the principal.

In support of his argument, defendant cites the following language from our Supreme Court's decision in *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985), where the Court held that to be convicted as an aider and abettor: "[t]he requisite intent is that necessary to be convicted of the crime as a principal." However, the Court in *Kelly, supra* at 279, also cited with approval earlier decisions of this Court, holding that aiding and abetting an offense with knowledge of the principal's specific intent to commit it is sufficient for accomplice culpability. For example, in *People v Poplar*, 20 Mich App 132, 136; 173 NW2d 732 (1969), this Court held:

> Where a crime requires the existence of a specific intent, an alleged aider and abettor cannot be held as a principal unless he himself possessed the required intent or unless he aided and abetted in the perpetration of the crime knowing that the actual perpetrator had the required intent. 22 CJS, Criminal Law, § 87; 21 Am Jur 2d, Criminal Law, § 124.

Likewise, in *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995), this Court affirmed the longstanding principle of accomplice liability, holding that "[i]n the absence of a Supreme Court ruling clarifying the intent required of aiders and abettors, [this Court] reaffirm[s] [its] consistent holding that aiders and abettors can be liable for specific intent crimes if they possess the specific intent required of the principal or if they know that the principal has that intent." In *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999), our Supreme Court recently quoted with approval this Court's definition of aiding and abetting from *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995):

> "'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. . . . To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime,

> and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime." [Citations omitted.]

We find defendant's argument that counsel erred in conceding his involvement in first-degree home invasion and robbery to be without merit. In our view, counsel's decision did not amount to error because the record evidence demonstrated that defendant knew that his accomplices intended the commission of these offenses.[3] Indeed, defendant's admissions to the police and his trial testimony established that he was aware that his accomplices entered the dwelling with felonious intent because they intended to rob the occupants. Specifically, defendant admitted knowing that his friends planned on "hitting a lick" at a home and repeatedly acknowledged that this street-slang phrase implied a physical taking of property from a person or in their presence. Defendant also testified that he was aware of his accomplices' intentions to obtain "dope and money" from the home.

Further, defendant acknowledged that he was familiar with the area as a residential neighborhood. According to his trial testimony, defendant also sat in the vehicle and observed his accomplices bring property from the house and place it in the vehicle. Defendant also watched codefendant Stewart assault a resident of the house when she arrived during the home invasion. Defendant also admitted driving his accomplices away with the fruits of the home invasion. Therefore, it is reasonable to infer from the evidence that defendant knew his accomplices intended to invade the home and rob the occupants.

In a related argument, defendant asserts that trial counsel was deficient in conceding his involvement in first-degree home invasion where the record evidence demonstrates that defendant did not know that the home that was invaded was occupied at the time. As the prosecutor acknowledges in his brief on appeal, the distinction between first-degree home invasion and second-degree home invasion is that in the former one of two aggravating circumstance are present. Specifically, either (1) the perpetrator is armed with a dangerous weapon, or (2) another person is lawfully present in the dwelling. MCL 750.110a(2)(a),(b). While one of these aggravating circumstances must be established beyond a reasonable doubt to prove first-degree home invasion, see e.g., *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001), the plain language of the statute requires only that the perpetrator of first-degree home

[3] "The elements of armed robbery are (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute." *Carines*, *supra* at 757. Armed robbery is a specific intent crime that requires that the perpetrator intended to deprive the victim permanently of possession of the property stolen. *People v Parker*, 230 Mich App 337, 344; 584 NW2d 336 (1998). Unarmed robbery requires proof of the following elements: (1) a felonious taking of property from another, (2) by force, violence, assault, or putting in fear, and (3) being unarmed. *People v Randolph*, 242 Mich App 417, 419; 619 NW2d 168 (2000), lv gtd 465 Mich 885 (2001).

invasion possess the specific intent to "commit a felony, larceny, or assault in the dwelling." MCL 750 110a(2); see also *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000); *People v Warren*, 228 Mich App 336, 347-348; 578 NW2d 692 (1998), aff'd in part and rev'd in part on other grounds 462 Mich 415 (2000). The statute requires no further intent and none will be read into it by this Court. *People v Spann*, ___ Mich App ___; ___ NW2d ___ (Docket No. 234614, issued 3/29/02), slip op p 3.

Because one of the aggravating circumstances elevating the offense to first-degree home invasion was undisputed -- that the home invaded was occupied by an individual at the time of the offense – we are not persuaded that trial counsel erred in admitting defendant's involvement in the offense or failing to request an instruction on second-degree home invasion. A principal need not have prior knowledge or have intended that another person lawfully be in the home to be found guilty of committing the crime of first-degree home invasion. "Conviction of a crime as an aider and abettor does not require a higher level of intent with regard to the commission of the crime than that required for conviction as a principal," *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001), and therefore, the prosecutor was not required to prove defendant knew another person would be lawfully present to establish his guilt under an aider and abettor theory of first-degree home invasion.[4]

Moreover, we reject defendant's argument that trial counsel's decision to concede defendant's guilt with respect to the first-degree home invasion and robbery charges was not legitimate trial strategy under the circumstances of this case. "[A]rguing that the defendant is merely guilty of the lesser offense is not ineffective assistance of counsel." *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984). Further, this Court has recognized that only a complete concession of guilt will amount to ineffective assistance of counsel. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). In the instant case, that defendant impliedly consented to counsel's trial strategy was reflected by his decision to testify that he aided and abetted the home invasion and robbery although he denied any involvement in the sexual assaults. Thus, trial counsel's decision to concede the inevitable was clearly strategic in nature, given that the prosecutor admitted into evidence defendant's earlier statement to the police in which he admitted his involvement in the home invasion and robbery.[5] Consequently, we are not persuaded that trial counsel's conduct amounted to the "functional equivalent" of a plea of guilty to all charges. See *People v Fisher*, 119 Mich App 445, 446; 326 NW2d 537 (1982). Moreover, this Court will not second-guess trial counsel concerning trial strategy with the benefit of hindsight on appeal even where the strategy is unsuccessful. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

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[4] Similarly, we are satisfied that defense counsel's decision to not seek an instruction on the lesser offense of second-degree home invasion was the product of sound trial strategy, given the undisputed evidence at trial that the home was occupied at the time of the invasion.

[5] Further, we are of the view that counsel's comments portraying defendant as less than prudent by participating in these offenses was also strategic, given that one of counsel's aims was to attempt to minimize defendant's involvement in the brutal sexual assaults that occurred during the home invasion.

Next, defendant claims the trial court committed error warranting reversal by denying defendant's motion for substitute counsel. We will not disturb a trial court's decision on a motion seeking substitute counsel absent an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001); *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

On September 6, 2000, the first day of trial, before jury selection commenced defendant expressed general displeasure with appointed counsel, claiming counsel tried to get him to "take a cop to something I didn't even do," and expressing his feeling that counsel was not "benefiting [defendant]." Defendant also claimed counsel was not doing his job because he did not visit defendant the night before to review legal research that defendant had done. Defendant further complained that counsel did not see things his way and he sometimes lacked confidence in his counsel. Defendant also expressed his dissatisfaction with the way counsel talked to him behind closed doors. On the other hand, in response to the trial court's queries, defendant acknowledged that counsel was very experienced and had appeared on numerous motions on his behalf, advocating his case well.

In response to defendant's concerns, the trial court assured him that it was his choice whether to plead guilty or go to trial, and expressed its concern that defendant was attempting to delay the trial because defendant could have raised this issue on a number of earlier occasions. The trial court further noted that counsel's failure to review defendant's legal research did not affect counsel's ability to represent defendant. Finally, the trial court concluded that counsel was extremely competent, and indicated that it was not convinced that counsel could not or should not represent defendant.

In *Traylor, supra* at 462, this Court discussed an indigent defendant's right to counsel:

> "An indigent defendant is guaranteed the right to counsel; however he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only on a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion exists between a defendant and his appointed counsel with regard to a fundamental trial tactic." [Quoting *Mack, supra* at 14 (citations omitted).][6]

In the present case, we agree with the trial court that defendant's generalized expression of dissatisfaction and wavering confidence in his appointed attorney did not satisfy "good cause"

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[6] We find the primary case on which defendant relies in support of his argument, *People v Charles O Williams*, 386 Mich 565, 576; 194 NW2d 337 (1972), to be distinguishable, given that the present record does not yield an indication of an irreconcilable "*bona fide* dispute" between defendant and trial counsel. [Emphasis in original.]

to the extent that the trial court was required to appoint substitute counsel. *Traylor*, *supra* at 463. "Good cause" is not demonstrated by a defendant's allegations that he did not like the way counsel talked to him and that counsel did not see things the defendant's way. See, e.g., *People v Daniel Meyers (On Remand)*, 124 Mich App 148, 165-166; 335 NW2d 189 (1983). Further, counsel's alleged refusal to review defendant's legal research does not demonstrate good cause given that matters of legal research clearly fall "within the categories of professional judgment and trial strategy that are matters entrusted to the attorney" and do not justify substitution of counsel. *Traylor*, *supra* at 463; *People v O'Brien*, 89 Mich App 704, 708; 282 NW2d 190 (1979). Moreover, defendant acknowledged that his attorney was very experienced, had filed and argued numerous motions on his behalf, and had advocated his case well. The record simply does not indicate that defendant's rights to effective assistance of counsel or a fair trial were imperiled by counsel's representation of defendant.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Patrick M. Meter