STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2002
v	No. 238115 Macomb Circuit Court
DENNIS FARMER, a/k/a DAVILLIAN BLACK, Defendant-Appellant.	LC No. 01-002008-FH

Before: Bandstra, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of first degree home invasion, MCL 750.110a(2). The trial court sentenced him to forty months to twenty years in prison. We affirm.

The trial occurred on September 20 and 21, 2001. Frank Pullizzi, eighty-six at the time of trial, testified as follows: On June 23, 2001, he was sleeping in his Warren home when he awoke from a noise in the early hours of the morning. He had locked his outside doors before initially going to bed. He got up to investigate the noise and found his basement light on and the basement door unlocked. He then returned to bed but subsequently heard someone trying to enter his locked bedroom door. He called 911, and when the police arrived, they found a person whom Pullizzi did not know in his basement. The house had been rummaged through and drawers had been upturned.

David Kriss, a Warren police officer, testified that (1) he responded to Pullizzi's 911 call on the morning in question, (2) there were pry marks on the rear door of Pullizzi's house and a window had been broken, (3) he captured defendant in the basement of the house and found two silver half-dollars in his pocket, and (4) there were coin cases at the base of the stairs to the basement and some coins were missing from the cases. Kriss admitted that he did not speak to Pullizzi to determine if the silver half-dollars in defendant's pocket belonged to Pullizzi.

Office Maye,[1] another Warren police officer, testified that he also responded to Pullizzi's 911 call on the morning in question. He testified that upon arriving at Pullizzi's house, he found it in disarray, with drawers ransacked.

Detective Galasso, another Warren police officer, testified that he interviewed defendant on June 24, 2001. Galasso testified that defendant admitted to breaking into the house but stated that he did so only to determine if his children were living there or to find papers, etc., relating to his children. According to Galasso, defendant stated that he had learned that his girlfriend, the twenty-four-year-old mother of his children, had been visiting Pullizzi's house, and he wanted to determine if she and the children were living with Pullizzi.

Officer Kroll, another Warren police officer, testified that he came to Pullizzi's house on the morning in question and took photographs of the disarray in the house. The photographs were admitted into evidence at trial.

Defendant testified as follows: He has two children with Clarissa Hudson. The night before the incident in question, he learned that Hudson had the children at Pullizzi's house. He entered Pullizzi's house because he wanted to find out if Hudson and the children had been staying with him. He looked through drawers because he "was looking for any type of mail or anything with her name on it that would show that she have [sic] been there, and with [the] kids." He had no intent to steal anything from Pullizzi, and the coins in his pocket were his bus fare to get home.

Pullizzi admitted that he knew Hudson because she used to care for his wife, who is now in a nursing home, although the prosecutor in cross-examining defendant implied that no one by the name of Clarissa Hudson exists.

Defendant admitted that he had used ten different aliases in the past. He also admitted that he had a prior conviction for larceny.

After trial, defendant moved for a new trial, arguing that the jury's verdict was against the great weight of the evidence. The trial court denied the motion. On appeal, defendant contends that the court erred in doing so because the evidence failed to demonstrate that he entered Pullizzi's house with the intent to steal. We disagree.

We review this issue for an abuse of discretion. *People v Harris*, 190 Mich App 652, 658-659; 476 NW2d 767 (1991). A new trial based on the weight of the evidence should be granted only if the evidence preponderates so heavily against the verdict that letting the verdict stand would result in a serious miscarriage of justice. *People v Lemmon*, 456 Mich 625, 642; NW2d (1998). Moreover, "[i]f the 'evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions,'" a court must not disturb a jury's findings. *Id.* at 644, quoting *State v Kringstad*, 353 NW2d 302, 307 (ND, 1984).

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[1] With the exception of David Kriss, the transcripts do not provide the first names of the police officers who testified at trial.

Here, the testimony about the time and manner of the break-in, the ransacked house, the coin boxes at the base of the stairs, and the coins in defendant's pocket supported the prosecutor's theory that defendant entered the house with the intent to steal. Because this testimony was not patently incredible and was not seriously impeached, and because the case was not marked by uncertainties and discrepancies, we cannot ignore this testimony on appeal. *Lemmon, supra* at 643-644. Moreover, the jurors, as the arbiters of witness credibility, were entitled to disbelieve defendant's alternate theory. Accordingly, because the evidence did not clearly preponderate in defendant's favor, the trial court did not abuse its discretion in denying the motion for a new trial. *Id.* at 642.

Defendant also moved for a new trial or, in the alternative, for an evidentiary hearing, on the basis of ineffective assistance of counsel. The trial court denied the motion, stating, "I felt the attorney did, indeed, an excellent job faced with what little he had to work with . . . ."

Defendant contends on appeal that his trial attorney did in fact render ineffective assistance and that a new trial is warranted. We disagree.

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger,* 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and that counsel's error or errors likely affected the outcome of the case. *Id.*; *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant contends that his trial attorney should have requested a jury instruction on the lesser misdemeanor of entering a dwelling house without permission, MCL 750.115. We reject defendant's suggestion that counsel's inaction constituted ineffective assistance of counsel because nothing in the existing record overcomes the presumption that counsel's failure to request the misdemeanor instruction was trial strategy. *Johnson, supra* at 124. Indeed, defendant admitted at trial that he entered Pullizzi's house without permission. Accordingly, an instruction on MCL 750.115 would have virtually guaranteed a conviction of that offense. By contrast, under the instructions as given, the jury would have acquitted defendant entirely if they believed his version of the incident in question. No error with respect to the jury instructions is apparent.

Defendant also contends that counsel unreasonably failed to call defendant's mother as a witness, even though she allegedly would have testified that she gave defendant the coins found in his pocket by the police. Once again, nothing in the existing record overcomes the presumption that counsel's failure to call this witness was trial strategy. See *People v Daniel,* 207 Mich App 47, 58; 523 NW2d 830 (1994) (whether to call witnesses is a matter of trial strategy). Indeed, nothing in the record details the proposed testimony of the witness. Accordingly, no error is apparent.

Defendant lastly contends that counsel ineffectively cross-examined the prosecution witnesses because he "fail[ed] to establish how long [defendant] was in the house, among other lost opportunities." Defendant has waived this issue for purposes of appeal, however, by failing

to develop an argument with respect to it. A party may not "'simply . . . announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). At any rate, we do not agree that counsel's cross-examination was deficient or that eliciting the amount of time defendant had been in the house would have affected the outcome of the case. Accordingly, no ineffective assistance of counsel occurred with respect to this claim. *Effinger, supra* at 69.

As part of his ineffective assistance of counsel argument, defendant alternatively contends that this Court should remand this case to the trial court and order the trial court to conduct an evidentiary hearing on the issue. We decline to do so, for two reasons. First, defendant's request is dilatory because he is making the argument not in a separate motion to remand but instead as part of his main brief on appeal. See *People v Bright*, 126 Mich App 606, 610; 337 NW2d 596 (1983). Second, defendant has proffered no affidavits supporting his assertions of inadequate counsel. Accordingly, we find that an evidentiary hearing is unwarranted. See, generally, *People v Ford*, 417 Mich 66, 113; 331 NW2d 878 (1982), and *People v Williams*, 391 Mich 832 (1974).

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Patrick M. Meter