

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES F. WARREN,

Defendant-Appellant.

UNPUBLISHED

November 20, 2003

No. 241435

Wayne Circuit Court

LC No. 00-008036-01

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a(2), aggravated stalking, MCL 750.411i, and third-degree home invasion, MCL 750.110a(4). Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent sentences of 5 to 20 years' imprisonment for first-degree home invasion and 2 to 7 years' imprisonment each for aggravated stalking and third-degree home invasion. Defendant appeals as of right. We affirm in part, vacate in part, and remand.

Defendant's first issue on appeal is that he was denied the effective assistance of counsel. We disagree.

Because an evidentiary hearing or motion for new trial must precede a claim of ineffective assistance of counsel, defendant's claim is considered only to the extent that counsel's claimed mistakes are apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, MCR 2.613(C), while its constitutional determinations are reviewed de novo. *Id.*

In reviewing claims of ineffective assistance of counsel, we use the standard set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Under the two-prong *Strickland* test, a defendant must show: (1) that counsel's performance was deficient to the extent that it fell below an objective standard of reasonableness under prevailing professional norms; and (2) that counsel's deficient performance so prejudiced the defendant that it deprived him of a fair trial, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different. *Pickens, supra* at 303; see also *Strickland, supra* at 694. The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).

Where the evidence obviously points to defendant's guilt, it can be better tactically to admit to the guilt and assert a defense or to admit guilt on some charges but maintain innocence on others. *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8 (1988), overruled on other grounds *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998). Only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). In conceding that defendant was guilty of breaking and entering, counsel was employing the tactic of admitting what the evidence strongly demonstrated while at the same time denying other elements or other crimes, which is a tactic that this Court has found to be acceptable trial strategy. See *id.*; *People v Wise*, 134 Mich App 82, 98-99; 351 NW2d 255 (1984). That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Therefore, defendant has not overcome the presumption that he received effective assistance of counsel in this regard. *Riley, supra* at 140.

Although defendant alleges that defense counsel acted improperly in making denigrating comments about him, our review indicates that the comments were not denigrating to defendant personally, but only acknowledge the "admitted stupidity" of his actions. These comments appear to be part of defense counsel's overall strategy of seeking the jury's empathy. As noted, this Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *Rice, supra* at 445. That a strategy does not work does not render its use ineffective assistance of counsel. *Kevorkian, supra* at 414-415. Accordingly, defendant has not overcome the presumption that he received effective assistance of counsel in this regard. *Riley, supra* at 140.

Defendant also alleges that defense counsel's failure to request instruction on the lesser-included offense of third-degree home invasion with respect to Count I was improper. This argument is without merit because, as an alternative to Count I, the jury did in fact receive instruction on the charge of third-degree home invasion as Count III of the crimes charged. Defendant has failed to overcome the strong presumption that counsel's actions constituted sound trial strategy and that defense counsel's performance was not deficient and, therefore, defendant was not deprived of the effective assistance of counsel. See *Riley, supra* at 140.

Defendant's next issue on appeal is that the trial court erred in denying his request for new counsel. We disagree. A trial court's decision regarding substitution of counsel is reviewed for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462-463; 628 NW2d 120 (2001). Although an indigent person is entitled to appointed counsel, he is not entitled to *choose* a lawyer. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). If requested, appointment of substitute counsel is allowed only on good cause and where the substitution will not unreasonably disrupt the proceedings. *Traylor, supra* at 462.

There are four factors that should be considered by a court when faced with a request for substitute counsel: (1) whether the defendant was asserting a constitutional right; (2) whether the defendant had a legitimate reason for asserting the right; (3) whether the defendant was negligent in asserting his right; and (4) the extent to which previous delays are attributable to the defendant. *People v Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972).

Regarding the first factor, it is undisputed that defendant was seeking to assert his constitutional right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039, 2044; 80 L Ed 2d 657 (1984). But as previously discussed, defendant has failed to overcome the presumption that counsel provided effective assistance. Regarding the second and third factors together, a defendant may not allege a breakdown of the attorney-client relationship based on his own refusal to cooperate with his assigned attorney, and a defendant's mere allegation that he lacked confidence in his attorney is not good cause to substitute counsel. *Traylor, supra* at 462-463. In this case, defendant did not have a legitimate reason for asserting his right because *his* conduct was the cause of the breakdown in his relationship with his attorney and he acted negligently in waiting until the prosecutor had rested her case to raise his claim and then refusing to testify as he had told counsel he would.

Finally, regarding the last factor, defendant's request for new counsel was just one more attempt in a long line of delaying tactics employed by defendant, which the trial court recognized in denying the motion. The trial court's decision comported with applicable law and, therefore, the court did not abuse its discretion in refusing defendant's request for substitute counsel.

Defendant's last issue on appeal is that his conviction for both first-degree home invasion and third-degree home invasion violates double jeopardy. Further, defendant claims that vacating this conviction would change his sentence recommendation under the sentencing guidelines. Issues involving double jeopardy are reviewed de novo. *People v Shipley*, 256 Mich App 367, 377-378; 662 NW2d 856 (2003).

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, sec 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). These guarantees are substantially identical and protect a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. *Herron, supra*; *Rodriguez, supra* at 17.

Defendant contends that his convictions for both first-degree home invasion and third-degree home invasion violate his double jeopardy rights. The prosecution acknowledges in its brief on appeal that the judgment of sentence should be modified to reflect a conviction of first-degree home invasion, without the conviction of third-degree home invasion. Based on defendant's argument and the prosecution's concession, we affirm the first-degree home invasion conviction and vacate the conviction and sentence on the lesser charge of third-degree home invasion.¹

¹ We decline to address, at this point, whether a conviction of first-degree home invasion, with
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Next, defendant argues that vacating the third-degree home invasion conviction will change the recommended range of his minimum sentence. But defendant is mistaken. Removal of the third-degree home invasion conviction does not change the PRV level.² It remains at level D, thus, having no effect on the recommended sentence range. As such, we need not remand for resentencing.

We affirm defendant's convictions and sentences on the charges of first-degree home invasion and aggravated stalking, vacate the conviction and sentence for third-degree home invasion, and remand for modification of the sentencing information report and the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Jane E. Markey

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the underlying felony being aggravated stalking, and third-degree home invasion, with the underlying misdemeanor being malicious destruction of property, would violate double jeopardy. It is unnecessary to address this issue based on the prosecution's concession.

² The trial court imposed twenty points for PRV 7 because defendant had two subsequent or concurrent felony convictions. MCL 777.57. This gave defendant a total PRV score of forty-five. First-degree home invasion is a class B felony; and under the minimum sentence ranges chart for class B felonies, a total PRV score of forty-five falls under PRV level D. MCL 777.16f; MCL 777.63. Defendant and plaintiff both agree that removal of the third-degree home invasion conviction leaves defendant with only one subsequent or concurrent felony conviction, thus, lowering his PRV 7 score from twenty to ten. MCL 777.57. However, even though this change lowers defendant's total PRV score to thirty-five, it does not change the PRV level.