STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 19, 2004
v	No. 241145 Macomb Circuit Court
PAUL ALAN SIENKIEWICZ, JR., Defendant-Appellant.	LC No. 01-002175-FH

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for attempted breaking and entering, MCL 750.110; MCL 750.92. Defendant was sentenced, as a habitual third offender, MCL 769.11, to twenty-three to sixty months in prison, and ordered to pay restitution of $840. We affirm.

I. FACTS

On July 1, 2001, at approximately 12:45 a.m., Dan Chisholm, a resident of the Quail Run Mobile Home Complex, spotted defendant and a young man walking across the park toward the Quail Run clubhouse and community pool. Chisholm was sitting on his deck, less than two hundred feet from the clubhouse, at the time he spotted defendant and the boy. Chisholm had lost sight of defendant and the boy for approximately five to ten minutes when he heard a noise that sounded like breaking glass coming from the clubhouse area. Chisholm instructed his wife to call the police and then walked to the corner of his neighbor's house and peeked around the corner.

Chisholm saw defendant and the boy walking away from one of the clubhouse entrances. Defendant walked between two houses, while the boy hid behind a near-by building. Chisholm approached the boy, who was carrying a pellet gun, and asked him what he was doing. Defendant approached the boy and Chisholm and asked what was the problem. Chisholm responded, "you know what the problem is," and defendant replied, "must be some kids," and started walking away. Chisholm started following defendant and the boy, but the two began running. Chisholm ran after them, but could only keep up with defendant. Defendant attempted to duck into the woods, but hit a dead end, at which time he lunged at Chisholm, with the pellet gun in his hand. Chisholm backed off and defendant proceeded to run away. The police arrived

shortly thereafter and eventually apprehended defendant. Approximately 1-1/2 hours later, Chisholm positively identified defendant.

Upon investigation of the clubhouse by the police and the manager of Quail Run, it was determined that two glass light fixtures had been broken in the outdoor pool area, one of the entrance doors to the clubhouse appeared to have been kicked in, and the framework to the clubhouse office door was cracked. The lifeguard for the Quail Run community pool testified that the light fixtures and the doors were not broken when he locked up the pool area at approximately 9:00 p.m. that night.

II. CHARGES

Defendant first argues that he was deprived of his right to due process because the prosecution overcharged him. We disagree.

A. Standard of Review

To preserve an issue for appellate review, it must be properly raised, addressed, and decided at trial. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Defendant has failed to preserve the issue regarding prosecutorial overcharge, as he did not raise it before the trial court. Therefore, we will review this issue for a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. Analysis

The prosecution is given broad charging discretion. *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999). The prosecutor has discretion to bring any charges supported by the evidence. *People v Yeoman*, 218 Mich App 406, 413-414; 554 NW2d 577 (1996).

In this case, defendant was charged with breaking and entering. The elements of breaking and entering are "(1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny or felony therein." *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993). Defendant argues that there was no evidence regarding his intent to commit a larceny or felony therein.

Based on the facts of this case, we find that there was enough evidence of intent for which the prosecution could reasonably rely in charging defendant with breaking and entering. *People v Gould*, 225 Mich App 79, 84-85; 570 NW2d 140 (1997) (specific intent may be inferred from the surrounding facts, especially from one's actions). A resident of the mobile home complex testified at trial that he saw defendant walking toward the clubhouse late at night. He also testified that he heard glass breaking near the clubhouse and witnessed defendant walking away from one of the clubhouse entrances. When the witness confronted defendant, defendant fled. The police testified that one of the entrance doors was kicked in and that two glass light fixtures had been broken out. The manager of the complex testified that the office door located inside the clubhouse had been broken. The pool lifeguard testified that the light fixtures and the doors were not broken when he locked up the clubhouse at 9:00 p.m. that night. Because there was sufficient evidence presented at trial for which a reasonable jury could infer

that defendant broke into the clubhouse with intent to commit a larceny or felony therein, defendant has failed to show that the prosecution committed a plain error affecting his substantial rights by charging him with breaking and entering.

III. MOTION FOR DIRECTED VERDICT

Next, defendant argues that he was deprived his right to due process by the trial court's denial of his motion for a directed verdict.

A. Standard of Review

"When reviewing a trial court's decision on a motion for a directed verdict, we review the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002), citing *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

B. Analysis

As previously stated, there was evidence that defendant broke into and entered the clubhouse. And since specific intent may be inferred based on the evidence presented at trial, we find that the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *Werner*, *supra* at 530.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that he was deprived his right to due process and effective assistance of counsel. We disagree.

A. Standard of Review

Defendant properly preserved this issue, as he moved for a new trial below. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002), citing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). "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). "[A] trial court's finding of fact are reviewed for clear error." *Id.* 579. "Questions of constitutional law are reviewed by this Court de novo." *Id.* 579.

B. Analysis

Defendant first claims that because the record was silent regarding the basis for the restitution, his trial counsel should have moved for a hearing to determine the proper restitution amount. However, we find that the record was not silent regarding the basis for restitution or to the proper amount of restitution. This information was properly contained in the pre-sentence investigation report, as permitted by MCL 780.767.

Defendant next claims his attorney failed to move for a restitution hearing. To establish a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998), citing *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. Second, 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." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), citing *Strickland*, *supra* at 689-95.

Defendant has failed to overcome the strong presumption that his trial counsel's failure to dispute the restitution amount constituted sound strategy. The items requested by the complex to be replaced and the amount requested for reimbursement were reasonable in light of the facts of the case. Based on the reasonableness of restitution requested, trial counsel may have decided not to dispute the amount, fearing that the amount may be raised. Even if defense counsel had disputed the amount, defendant presented no evidence that there was a reasonable probability that the amount to replace the items would have been less than the amount requested. Since defendant has failed to show that his trial counsel's performance fell below an objective standard of reasonableness that prejudiced his defense so as to deny him a fair trial, defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Donald S. Owens
/s/ Bill Schuette
/s/ Stephen L. Borrello