STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DENNIS JEROME FOUST,

Defendant-Appellant.

UNPUBLISHED
May 13, 2004

No. 246635
Oceana Circuit Court
LC No. 02-003283-FH

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

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of breaking and entering a building with intent to commit larceny, MCL 750.110. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to thirty months to twenty years in prison. Defendant now appeals as of right. We affirm.

At trial, the victim, Valentin Garcia, testified that he is the owner of Val's Tire Service located in the Village of Rothbury. On August 1, 2002, he locked up and left the shop at approximately 5:00 p.m., and returned the following morning at approximately 9:00 a.m., and found that the shop had been broken into. Approximately $100 in cash, a stereo, and a phone had been stolen. According to the victim, about two weeks after the break-in, defendant called the victim and told him that he needed to talk with him. Defendant told the victim, "I'm the one who broke into your shop." Defendant also told the victim that defendant had been drunk at the time and did not remember what had happened, and defendant offered to repay the victim and work for free to pay for the damages and losses sustained by the victim. The victim declined defendant's offer and told him to return the property to the victim's brother, Alfredo. Defendant thereafter returned the property to Alfredo and told Alfredo that he had been drunk and did not remember what happened.[1]

Defendant testified on his own behalf at trial and denied stealing the property from the victim's store. According to defendant, he was with his mother at his aunt's house all evening on the night in question. Defendant's mother and aunt testified that defendant was at the house the entire night and did not drink any alcohol during the time in question. According to

[1] Apparently, defendant was well acquainted with the victim and the victim's brother.

defendant and his mother, on August 4, 2002, defendant purchased a phone and stereo for $40 from an individual named Jimmy Adkins as a gift for defendant's cousin. Defendant testified that he later found out from Alfredo that the victim's shop had been broken into so defendant called Adkins and Adkins told him that the items were stolen. According to defendant, he called the victim and told him he knew who had broken into the victim's shop and he could get the items back. Defendant thereafter returned the items to Alfredo.

Defendant first argues that the prosecution presented insufficient evidence to convict defendant of breaking and entering. We review de novo a defendant's claim that there was insufficient evidence to support the conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In doing so, we view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id*.

The elements of breaking and entering with intent to commit larceny include: (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 in the building. *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998).

Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). This Court will not interfere with the jury's role in determining the weight of the evidence or the credibility of witnesses, *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), as questions of intent and credibility should be left to the trier of fact to resolve, *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

The victim testified that several weeks after the break-in, defendant met with him to inform him that it was defendant who had broken into the victim's shop. During the meeting, the victim told defendant to return the stolen property to the victim's brother, Alfredo. Alfredo testified that defendant brought the stolen property to his house and told him that defendant had been drunk and did not know what had happened. While defendant and his mother testified that defendant had been at home all evening on the night of the break-in and that defendant had purchased the stolen items from another individual, it was for the jury to decide the credibility of the witness testimony. *Wolfe*, *supra*. A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence that defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Defendant claims that he was innocently in possession of the stolen property and that the victim and Alfredo misinterpreted defendant's admissions to each of them. However, it was for the jury to decide which version of the facts was more credible. Viewing the evidence in the light most favorable to the prosecution, we find a reasonable jury could have concluded that defendant was the perpetrator of the break-in.

Defendant also argues that he received ineffective assistance of counsel because defense counsel failed to raise the defense of intoxication as an alternative defense. Because defendant failed to preserve this issue with the proper motion and evidentiary hearing below, our review is limited to errors apparent on record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish a claim of ineffective assistance of counsel, a

defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant claims trial counsel was ineffective because he did not present the defense of intoxication after the victim and the victim's brother testified that defendant told them he was so drunk he did not recall what happened. 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); *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Decisions as to what evidence and defenses to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). 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). Moreover, counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

In this case, defense counsel presented alibi witnesses claiming that defendant was at his aunt's house on the night of the break-in and did not leave the house the entire night. These witnesses testified that they did not see defendant consume any alcohol that night. Defendant himself testified that he was at home the entire night. Had the jury believed this testimony, defendant would have likely been acquitted. The only basis for the proposed intoxication defense was the testimony of the victim and the victim's brother, who both claimed that defendant told them that he had been drinking on the night of the break-in. If defense counsel had presented the defense of intoxication, he would have had to alternatively ask the jury to disbelieve defendant's testimony, as well as that of the defense's alibi witnesses, that defendant had been at home the entire evening and that he did not have anything to drink that night. Defense counsel made the strategic decision to present the defense that defendant did not commit the crime rather than alternatively argue that defendant lied during his version of the facts. We will not second-guess defense counsel's strategy.

Affirmed.

/s/ Hilda R. Gage
/s/ Peter D. O'Connell
/s/ Brian K. Zahra