STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2004
v	No. 245180 Macomb Circuit Court
DANIEL ALLEN GOSSARD, Defendant-Appellant.	LC No. 02-001612-FH

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree home invasion, MCL 750.110a. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to twelve to twenty-two years and six months' imprisonment. We affirm.

I. Facts and Procedure

Cheryl Gorman was sitting in a back bedroom in her home watching television when someone began knocking on her front door and ringing her doorbell. Gorman looked through the peephole of the door and saw defendant. Because she did not know defendant, she did not open the door. Gorman watched defendant as he looked both ways down the street and put on a pair of gloves. Defendant then grabbed the storm door, which was locked, and pulled it open, breaking the lock in the process. As defendant used his body in an attempt to break down the steel front entry door, Gorman locked herself in the bathroom and called 911. From the bathroom, Gorman heard defendant trying to break down the front door and then heard a crash from somewhere else in the house. The police then arrived and arrested defendant outside of Gorman's house. The police found a pair of gloves in defendant's pocket. Defendant told police that he had a crack problem and that he did not know anyone at the home.

Upon inspection of the house, it was discovered that the screen to the kitchen window had been pried off, the window had been broken, the latching device had been broken off the window frame, and the window treatments had been knocked down. The window frame had been pushed in approximately six or seven inches, knocking to the floor a number of knickknacks that had been sitting on the windowsill. The lock on the front storm door was broken and there was structural damage to the steel front entry door.

The next day, defendant gave a written statement to the police admitting that he attempted to break into Gorman's house to get money for drugs. Defendant denied having the intent to harm anyone inside the house. Before trial, defendant filed a motion for a *Walker*[1] hearing, seeking to suppress his written statement on the ground that the statement was not voluntary because he was coerced into giving the statement by a promise of leniency. After an evidentiary hearing, the trial court denied defendant's request to suppress the statement, finding that defendant had given a knowing, intelligent, and voluntary waiver of his rights before making the statement.

II. Analysis

A. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to support his conviction for first-degree home invasion. In reviewing the sufficiency of the evidence, this Court must review the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399, 400; 614 NW2d 78 (2000). We must draw all reasonable inferences and make credibility choices in support of the jury verdict. *Id.* at 400. "'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.'" *Id.*, quoting *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

The home invasion statute provides, in pertinent part:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
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> * * *
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> (b) Another person is lawfully present in the dwelling. [MCL 750.110a(2).]

Defendant argues that the evidence was not sufficient to prove that he entered the dwelling. We disagree. "It is a well established doctrine that '[w]here an entering is a necessary element of the offense, it is sufficient if any part of defendant's body is introduced within the house.'" *People v Gillman*, 66 Mich App 419, 429-430; 239 NW2d 396 (1976), quoting 3 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 1133, p 1528. There is evidence that

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

the window to the house had been broken and the window frame pushed in approximately six or seven inches. As a result, the latching device had been broken and the items behind the window had been knocked off the windowsill. The window treatments had also been knocked to the floor. From this evidence, a reasonable juror could infer that defendant put part of his body into the house during his attempt to break in. Therefore, there was sufficient evidence to prove that defendant entered the dwelling and was guilty of first-degree home invasion.

B. Admissibility of Defendant's Statement to Police

1. Voluntariness

Next, defendant argues that his statement to police should have been suppressed at trial because it was coerced by a promise of leniency. We disagree.

> This Court reviews de novo a trial court's ultimate decision on a motion to suppress evidence. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). Although this Court engages in a review de novo of the entire record, this Court will not disturb a trial court's factual findings with respect to a *Walker* hearing unless those findings are clearly erroneous. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). "A finding is clearly erroneous if it leaves us with a definite and firm conviction that the trial court has made a mistake." *People v Manning*, 243 Mich App 615, 620; 624 NW2d 746 (2000).
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> A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *Daoud*, *supra* at 632-639. A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception, *id.* at 633, and must be the product of an essentially free and unconstrained choice by its maker. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). The burden is on the prosecution to prove voluntariness by a preponderance of the evidence. *Daoud*, *supra* at 634. In *Cipriano*, *supra* at 334, our Supreme Court set forth a nonexhaustive list of factors that should be considered in determining the voluntariness of a statement:
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> "[T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse."
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> No single factor is necessarily conclusive on the issue of voluntariness, and "the ultimate test of admissibility is whether the totality of the circumstances

> surrounding the making of the confession indicates that it was freely and voluntarily made." *Id.* [*People v Akins*, 259 Mich App 545, 563-565; 675 NW2d 863 (2003).]

Here, defendant contends that the police coerced his statement by telling him that he would "be better off" if he admitted that he broke into the house in order to steal to get money for drugs. Defendant argues that he was under the impression that if he did not make the statement, he would be charged with some form of violent crime. However, while defendant asserts that he was coerced into making his statement, there is no evidence to support this assertion other than defendant's own testimony. "The trial court is in the best position to assess the crucial issue of credibility." *Id.* at 566. Additionally, before defendant made his statement, he signed a document setting forth his constitutional rights, and indicated that he understood those rights. There is no evidence that defendant was under the influence of any intoxicants or drugs, that he was deprived of food or sleep, or that he was injured or physically abused. Defendant had been in custody less than twenty-four hours at the time he gave the statement, and there is no indication that the police officer's questioning of defendant was repeated or prolonged. Defendant was thirty-one years old when he was arrested, has a GED education, and is a fourth habitual offender, so he has had extensive experience dealing with police. Given the circumstances surrounding defendant's waiver of rights and written statement and the trial court's assessment of defendant's credibility, we conclude that the trial court did not err in denying defendant's motion to suppress his statement.

2. Corpus Delicti

Defendant also argues that the admission of his statement to police violated the corpus delicti rule. Because defendant failed to preserve this issue for appeal, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Ish*, 252 Mich App 115, 116; 652 NW2d 257 (2002), citing *Carines, supra* at 763. The corpus delicti rule "bars the prosecution from using a defendant's confession in any criminal case unless it presents direct or circumstantial evidence independent of the defendant's confession that the specific injury or loss occurred and that some criminal agency was the source or cause of the injury." *Ish, supra* at 116. The purpose of the rule "is to prevent the use of a defendant's confession to convict him of a crime that did not occur." *Id.*

Defendant argues that his statement to police should not have been admitted into evidence because the prosecution failed to establish the intent element of first-degree home invasion before his statement was admitted. However, "it is not necessary that the prosecution present independent evidence of every element of the offense before a defendant's confession may be admitted." *Id.* at 117, citing *People v Williams*, 422 Mich 381, 391; 373 NW2d 567 (1985).[2] Here, Gorman actually saw defendant through her peephole. She testified that she saw

[2] Defendant's reliance on *People v Allen*, 390 Mich 383; 212 NW2d 21 (1973), and *People v Uhl*, 169 Mich App 217; 425 NW2d 519 (1988), for the proposition that the prosecution must submit evidence on all of the elements of the crime before admitting a defendant's confession into evidence, is misplaced. See *Ish, supra* at 117 n 1. In *People v Williams*, 422 Mich 381, 391; 373 NW2d 567 (1985), our Supreme Court specifically held that the prosecution *need not* (continued…)

and heard defendant trying to break down her front door. The police arrested defendant outside of Gorman's home. An inspection of the house revealed that the kitchen window and the latch on the window frame had been broken and the items behind the window had been knocked off the windowsill. The lock on the front storm door was broken and there was structural damage to the steel front entry door. This evidence was sufficient to establish that an injury occurred and some criminal agency was responsible for the injury. Once this evidence was presented, defendant's statement was properly admitted to establish defendant's intent. *Ish, supra* at 117. The trial court's admission of defendant's statement was not a plain error that affected defendant's substantial rights.

C. Jury Instructions

Next, defendant raises two claims of instructional error. Defendant first claims that the trial court erred in refusing to define larceny as part of the jury instructions setting forth the elements of first-degree home invasion. This issue was properly preserved for appeal and is reviewed de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). Defendant also claims that the trial court erred in failing to give the jury an instruction on breaking and entering without permission, MCL 750.115(1). This issue was not preserved for appeal, so is reviewed for plain error affecting defendant's substantial rights. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003).

> Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Accordingly, jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). [*People v McKinney*, 258 Mich App 157, 162-163; 670 NW2d 254 (2003).]

"Even if the instructions are somewhat imperfect, reversal is not required if the instructions fairly presented the issues to be tried and were sufficient to protect the rights of the defendant." *People v Fennell*, 260 Mich App 261, 265; 677 NW2d 66 (2004).

1. Larceny Instruction

Defendant argues that he was denied a fair trial when the trial court refused to define larceny as part of the instruction for first-degree home invasion. We disagree. The trial court instructed the jury on all of the elements of first-degree home invasion. However, the court refused to elaborate on the intent to commit larceny element of the crime. Our Supreme Court has held that where intent to commit larceny is an element of the crime, a trial court need not instruct the jury regarding the definition of larceny where the evidence negates any inference that

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present independent evidence of every element of the offense before a defendant's confession may be admitted.

larceny was not intended. *People v Petrosky*, 286 Mich 397, 401-402; 282 NW2d 191 (1938); see also *People v Rabb*, 112 Mich App 430, 435-436; 316 NW2d 446 (1982). In *Petrosky, supra* at 401-402, the defendant challenged only that he was present at the time and place charged, so it was not error for the trial court to fail to define the larceny element of the crime of breaking and entering with intent to commit larceny.

Here, defendant similarly did not contest the intent to commit larceny element of the crime. At trial, the prosecution introduced defendant's statement where he admitted having the intent to steal, explaining, "I only wanted something to pawn for drugs." Defendant never asserted that he had permission to enter Gorman's home, or otherwise contested the larceny element of the charge. Instead, defendant argued that he was misidentified as the person who broke into Gorman's home, and that the prosecution failed to establish the breaking and entering elements of the crime. Because defendant did not challenge the intent to commit larceny element of the crime, we conclude that the trial court's failure to explicitly define larceny for the jury was not error. *Petrosky, supra* at 401-402.

2. Breaking and Entering Without Permission Instruction

Defendant also argues that the trial court erred in failing to sua sponte instruct the jury on breaking and entering without permission. Breaking and entering without permission is a necessarily included lesser offense of first-degree home invasion, the crime for which defendant was charged and convicted. *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). "Breaking and entering without permission requires (1) breaking and entering or (2) entering the building (3) without the owner's permission." *Id.* First-degree home invasion is distinguished from breaking and entering without permission "by the intent to commit 'a felony, larceny, or assault,' once in the dwelling." *Id.*

Here, as discussed in Part C(1) of this opinion, there was not a legitimate dispute at trial over defendant's intent to commit larceny. Because the charged greater offense (first-degree home invasion) did not require the jury to find a disputed factual element (intent to commit larceny) that is not part of the lesser included offense (breaking and entering without permission), the trial court did not err in failing to sua sponte give the jury an instruction on breaking and entering without permission. *Cornell, supra* at 357.

D. Ineffective Assistance of Counsel

Next, defendant argues that he was denied the effective assistance of counsel. In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000).[3] Where the defendant fails to create a

[3] Defendant moved in this Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), but this Court denied the motion. *People v Gossard*, (continued…)

testimonial record in the trial court with regard to his claims of ineffective assistance, appellate review is foreclosed unless the record contains sufficient detail to support his claims. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). "If review of the record does not support the defendant's claims, he has effectively waived the issue of effective assistance of counsel." *Sabin, supra* at 659. Here, defendant failed to move in the trial court for an evidentiary hearing or a new trial. Therefore, our review is limited to the facts on the existing record. *Id.*

To establish ineffective assistance of counsel, the defendant must first show that the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The reviewing court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant bears the heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *Carbin, supra* at 600. In addition to showing counsel's deficient performance, the defendant must show that the representation was so prejudicial to him that he was denied a fair trial. *Toma, supra* at 302. In order to show prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Carbin, supra* at 600. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, quoting *Strickland, supra* at 694.

1. Defendant's Decision Not to Plead Guilty

Defendant first argues that his counsel was ineffective by advising him to reject the offered plea bargain and to exercise his right to a jury trial. Defendant contends that he pleaded guilty based on his trial counsel's advice that there was no evidence to support a conviction for first-degree home invasion and his incorrect advice that defendant would not be sentenced to more than eighty-nine months' imprisonment if he went to trial and was convicted.[4] The decision whether to plead guilty or go to trial is the defendant's, to be made after consultation with counsel and after counsel has explained the matter to the extent reasonably necessary to allow the defendant to make an informed and voluntary decision. *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). Where a defendant decides to go to trial instead of accepting a plea bargain, counsel is not ineffective where counsel sufficiently informs the defendant of his options regarding the plea bargain, as well as the implications of those options, including sentencing. *People v McCrady*, 213 Mich App 474, 479; 540 NW2d 718 (1995). In determining whether counsel was ineffective, the question is not whether counsel's advice was

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unpublished order of the Court of Appeals, entered April 16, 2004 (Docket No. 245180).

[4] The trial court sentenced defendant to twelve to twenty-two years and six months' imprisonment.

right or wrong, but whether the advice was within the range of competence demanded of attorneys in criminal cases. *People v Thew*, 201 Mich App 78, 89-90; 506 NW2d 547 (1993).

Here, there is no evidence on the record to support defendant's claim that his trial counsel informed him that there was no evidence to support a conviction for first-degree home invasion or that defendant would not be sentenced to more than eighty-nine months' imprisonment if he went to trial and was convicted. Nor is there any indication that trial counsel failed to sufficiently explain to defendant the options regarding the plea bargain to the extent that defendant could not make an informed decision. Instead, the only reference to the matter on the record was at sentencing, where counsel indicated that he and defendant had discussed the matter, decided that defendant was entitled to a better plea offer, and decided to go to trial. This demonstrates that it was counsel's strategy for defendant to go to trial rather than plead guilty. This Court will refrain from second-guessing trial strategy. *People v Reed*, 449 Mich 375, 384; 535 NW2d 496 (1995). Counsel's incorrect prediction concerning the defendant's sentence is not enough to support a claim of ineffective assistance of counsel. *In re Oakland Co Prosecutor*, 191 Mich App 113, 124; 477 NW2d 455 (1991).

2. Cross-Examination of Gorman

Defendant also argues that his counsel was ineffective by failing to cross-examine Gorman regarding her inconsistent statements. Defendant contends that Gorman testified at the preliminary examination that she had to use a hammer to close her front door after defendant tried to break in, but later testified at trial that she had to use a hammer to close the *window* after defendant tried to break in. Defendant argues that counsel should have questioned Gorman regarding these inconsistent statements. We disagree. When read in context, Gorman's testimony is not contradictory. At the preliminary examination, Gorman testified that she had to use a hammer in order to realign the front storm door, and that her kitchen window was pushed in, forming a "V" shape with the point inside of her home. At trial, Gorman testified that her kitchen window was pushed in, and that she *considered* getting a rubber mallet to try to hit the window back into place. Contrary to defendant's assertion, Gorman did not testify at trial that she actually used a hammer to repair her kitchen window.

Furthermore, decisions whether to question witnesses are presumed to be matters of trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, not will it assess counsel's competence with the benefit of hindsight." *Id.* Here, defense counsel chose not to question Gorman's credibility, opting instead to argue that neither Gorman nor anyone else actually saw defendant break Gorman's window or enter Gorman's home with any part of his body. Cross-examining Gorman regarding her statements would not have served this trial strategy, and in fact would have likely simply focused the jury on the evidence regarding the substantial damage done to Gorman's home, making it more probable that the jury would find that defendant had used force sufficient to constitute an entry. Defendant has not shown that counsel's performance did not constitute sound trial strategy, or that the outcome of the trial would have been different if his trial counsel would have questioned Gorman regarding the inconsistent statement. Therefore, defendant has not shown the ineffective assistance of counsel.

E. Sentencing

Defendant argues that he is entitled to resentencing because the trial court improperly based his sentence on his exercise of his right to a jury trial.[5] We disagree. Because defendant committed the first-degree home invasion after January 1, 1999, the statutory sentencing guidelines apply to his sentence. MCL 769.34(2). The trial court sentenced defendant within the applicable statutory sentencing guidelines range. Because the trial court's sentence is within the appropriate guidelines range, and defendant does not argue that the trial court erred in scoring the guidelines or relied on inaccurate information in determining his sentence, we must affirm defendant's sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003), on remand 258 Mich App 679; 672N 533 (2003).

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

[5] A defendant has a constitutional right to a trial and should not be penalized for exercising that right. *People v Mosko*, 190 Mich App 204, 211; 475 NW2d 866 (1991), aff'd 441 Mich 496; 495 NW2d 534 (1992).