STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 10, 2009
v	No. 283450 Wayne Circuit Court
DAMON KEITH PERREO, Defendant-Appellant.	LC No. 07-014660-FH

Before: Donofrio, P.J. and K.F. Kelly and Beckering, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and sentenced as an habitual offender, fourth offense, MCL 769.12, to 9 to 18 years' imprisonment. He appeals as of right. We affirm.

I. Basic Facts

On September 8, 2007, the police responded to the complainant's house, where defendant was being detained in an attached garage by the complainant's son-in-law, Richard Mitchell. The complainant's daughter, Lisa Mitchell, testified that when she and Richard left for the evening, the garage door was closed and locked. Both Lisa and Richard explained that when they returned at about 2:30 a.m., the garage door was open, the light was on, and defendant was inside. Richard testified that when he confronted defendant, he was startled and attempted to "get out the door." Lisa called the police, Richard and defendant wrestled, and Richard pinned defendant on the ground and held him there until the police arrived. A police officer testified that defendant had an injury on his elbow and was bleeding, but was treated and bandaged at the scene.

Defendant testified that he lived in the neighborhood, was coming from a friend's house, and was on his way to work when a dog bit him on his elbow, causing him to bleed. Defendant outran the dog and sought shelter in the yard next to the complainant's yard. When defendant saw that the dog was gone, he went to the complainant's house in search of a water spigot to wash off. As defendant was standing between the front door and the open garage door, Richard confronted him. Richard then grabbed him by the neck and pulled him into the open garage, while Lisa hit him with an umbrella or a stick. Defendant testified that he had no intention of entering the garage or stealing anything from the garage.

II. Effective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel at trial. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000), lv den 463 Mich 1010 (2001).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *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 was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

A. Failing to Subpoena Medical Records

Defendant argues that defense counsel was ineffective for failing to subpoena medical records from the jail "relative to the dog bite defendant suffered." Decisions about what evidence to present are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

Initially, we first note that defendant has not provided any proof that the records exist or what they show. Furthermore, even if such records exist, defendant has not demonstrated that they could have provided a substantial defense. While the medical records could have corroborated the existence of an injury to defendant's elbow, that fact was not disputed. Although there was conflicting testimony whether defendant's elbow was injured by a dog or during the struggle with Richard,[1] the trier of fact was not required to resolve that issue in determining defendant's guilt or innocence. The critical issue at trial was whether defendant illegally entered the complainant's garage. The medical records would not have shed light on that issue. Accordingly, defendant has failed to demonstrate that counsel's failure to provide the records fell below an objective standard of reasonableness, or that he was prejudiced by their absence.

[1] Richard believed that defendant's elbow was injured during their struggle.

B. Failing to Prepare for Trial

Defendant also argues that defense counsel visited him only once in jail, only wanted to discuss a guilty plea, did not want to hear his version of the facts, and was unprepared for trial. "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Despite defendant's complaints about defense counsel's proposed strategy, the record discloses that defendant did not plead guilty, that defendant and defense counsel had an opportunity to discuss defendant's version of the events before trial, and that defendant's version of events was presented to the trier of fact. It is clear from defense counsel's questions and remarks at trial that he was familiar with defendant's version of events. Defendant testified at trial and defense counsel's questions allowed defendant to present his version of events in detail, i.e., that he was bitten by a dog, ran to the house to retrieve water, and was pulled into the garage by Richard. In closing argument, defense counsel noted that there were two conflicting versions of events, argued that defendant's version was more credible, and argued that defendant did not have the requisite intent to support the charge of first-degree home invasion.

Defendant does not indicate what additional arguments defense counsel should have made. To the extent that defendant relies on the fact that defense counsel's arguments were not successful, nothing in the record suggests that defense counsel's presentation of the arguments was unreasonable or prejudicial. Decisions about how to argue the evidence are a matter of trial strategy. "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." *Rockey, supra* at 76-77. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). On this record, defendant has not overcome the presumption that defense counsel's representation was effective. *Effinger*, *supra*.

III. Trial Court's Conduct

Defendant argues that the trial judge denied him a fair trial when it briefly left the bench during defendant's testimony, going approximately ten feet to obtain coffee. Because defendant did not raise this issue in the trial court, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Defendant acknowledges that there is no reference to this matter in the record. Defendant states, however, that when defense counsel stopped questioning to wait for the trial judge to return, the judge directed counsel to continue his questioning. As plaintiff points out, this indicates that the judge could still hear defense counsel's questions and defendant's testimony. Moreover, in the court's findings of fact, the court accurately set forth defendant's version of the events, thus further supporting that it continued to hear the testimony. Under the circumstances, defendant has not established a plain error affecting his substantial rights.

IV. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to support his conviction of first-degree home invasion. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. *People v Sands,* 261 Mich App 158, 162; 680 NW2d 500 (2004); MCL 750.110a(2).

Lisa and Richard both testified that defendant was inside the garage when they returned home. They also both testified that when they left earlier, the garage door was closed and locked. Richard explained that as they walked out, he observed his wife lock the door. Richard further explained that because of the condition of the door lock, it would only take "a pop of a screwdriver" or "a shoulder nudge" to get the door open, and both witnesses testified that defendant had a screwdriver with him when they saw him in the garage. Lisa also observed scrapes on the door lock. Although defendant argues that there was no evidence that he intended to commit a larceny inside the garage, Lisa testified that defendant was "stacking tools," and Richard testified that defendant "was pulling tool boxes and stacking them up on the floor." Viewed most favorably to the prosecution, the evidence was sufficient to enable the trier of fact to conclude beyond a reasonable doubt that defendant broke into the garage with the intent to commit a larceny.

V. Sentence Credit

Defendant's final argument is that the trial court erred by failing to award him credit against his new minimum sentence for the time he served in jail before sentencing. Because defendant did not request an award of sentence credit or object to the court's failure to award credit, this issue is not preserved. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). We therefore review this claim for plain error affecting substantial rights. *Carines*, *supra*.

Defendant was on parole when he committed the offense. In *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004), this Court explained:

> When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit

> for time served in jail on the sentence for the new offense. MCL 791.238(2). A parole detainee who is convicted of a new criminal offense is entitled, under MCL 791.238(2), to credit for time served in jail as a parole detainee, but that credit may only be applied to the sentence for which the parole was granted. A parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he serves the term imposed for the subsequent offense. MCL 768.7a(2). [Citation omitted.]

See also *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324 (2006) ("a parole detainee convicted of a new offense is entitled to have jail credit applied *exclusively* to the sentence from which parole was granted") (emphasis added).

Defendant asserts that because he had served his minimum sentence for the prior offense and the Department of Correction had taken no action toward imposing an additional sentence, the time served in jail is "dead time." This Court addressed this issue in *People v Filip*, 278 Mich App 635, 642; 754 NW2d 660 (2008):

> MCL 791.238(2) specifically dictates that a parole violator "is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment." And any remaining portion of the original sentence must be served before a sentence for a second offense may begin. Thus, just because a parolee has served his or her minimum sentence, it does not follow that the credit must therefore be applied against his or her new sentence when he or she remains liable to continue serving out the maximum sentence. Moreover, *if a defendant is not required to serve additional time on the previous sentence because of the parole violation, then the time served is essentially forfeited.* [Citations omitted; emphasis added.]

Therefore, even if defendant had served the minimum portion of his prior sentence and was not required to serve additional time for violating his parole, he was not entitled to credit against his new sentence in this case. Consequently, the failure to award credit was not plain error.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering