# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAFAEL ROSADO,

Defendant-Appellant.

UNPUBLISHED
January 28, 2010

No. 289461
Oakland Circuit Court
LC No. 2008-220029-FH

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree home invasion, MCL 750.110a(2). Because defense counsel was not ineffective for choosing to pursue an all-or-nothing misidentification defense over the alternative defense that defendant entered the house but lacked the intent to steal, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of breaking into the residential home of Brad Felt. On the day of the offense, defendant was riding around with his younger cousin, McDarian Givens. Unbeknownst to them, they were under police surveillance. Givens drove to a parking lot. Defendant got out of the car, retrieved an orange safety vest from the trunk, put it on, and returned to the car. Givens then drove into a residential subdivision. A police officer observed Givens drop defendant off and then drive around the corner. The officer last saw defendant disappearing around the back of Felt's house. At about the same time, Felt was awakened by the sound of his bedroom door opening. He looked up and saw a man in an orange safety vest standing in the doorway. The man said that he was from the cable company, that someone had just broken into Felt's house, and that he had called the police. The man had disappeared by the time Felt got up to investigate. Givens testified at trial that defendant was looking for work as a mason, and that he dropped defendant off at a house that was under construction near Felt's house. Givens also admitted that defendant was also looking for houses to break into.

Defendant's sole claim on appeal is that trial counsel was ineffective for pursuing a defense of misidentification rather than admitting that defendant entered Felt's house and requesting an instruction on the lesser included offense of breaking and entering without permission, MCL 750.115(1). Because defendant did not preserve this issue by raising it below in a motion for a new trial or request for an evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish that he was denied the effective assistance of counsel, defendant "must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted). Counsel is presumed to have provided effective assistance, and defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. *Id*.

The misdemeanor offense of breaking and entering without permission is a necessarily included lesser offense of first-degree home invasion. *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002). The trial court is required to instruct the jury on a necessarily included lesser offense if such an instruction is requested and is supported by a rational view of the evidence. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002); *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

The record shows that counsel did not request any lesser included offense instructions and never admitted that defendant entered Felt's house. Instead, he admitted that someone committed home invasion, but argued from various facts that the intruder was more likely to have been Givens than defendant. Defendant argues that defense counsel should have argued instead that he had entered Felt's home, not to commit a larceny but to look for work, and then requested a lesser included offense instruction on breaking and entering without permission, which may have resulted in conviction of the misdemeanor offense rather than the felony offense.

A defense attorney's decision whether to request an instruction on a lesser included offense is a matter of trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). The decision to forgo a charge on a lesser included offense and instead force the jury into an "all or nothing" decision is a legitimate trial strategy and does not constitute ineffective assistance. *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982); *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981). The decision to argue one defense over another is also considered a matter of trial strategy. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). The decision to employ one of two possible defense strategies, neither of which is without problems, does not constitute ineffective assistance of counsel. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). "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 Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Although there was some evidence to suggest that defendant was looking for work, it was implausible to argue that defendant entered Felt's house to inquire about work. Felt's house was not under construction, so there was no reason to believe that Felt required the services of a mason. Further, such a theory would not explain why defendant broke into Felt's house to look for Felt, rather than knock on Felt's door and wait for Felt to answer. And even assuming that defendant felt it necessary to break into Felt's house to inquire about work, defendant's proposed theory does not explain why he claimed to be a representative of the cable company who happened to have witnessed a break-in, rather than inquire about work. Under the circumstances, counsel was not constitutionally ineffective for choosing to pursue a misidentification defense and argue that defendant never entered Felt's house rather than admit

that defendant entered Felt's house without permission and argue that defendant did not intend to steal anything but was looking for work. "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).

Affirmed.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray