STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 19, 2011
v	No. 295023 Wayne Circuit Court
BILLY JAMES-EDWARD MARSEE, Defendant-Appellant.	LC No. 09-006888-FH

Before: CAVANAGH, P.J., and TALBOT and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of second-degree home invasion, MCL 750.110a(3), larceny in a building, MCL 750.360, and assaulting/resisting/obstructing a police officer causing injury requiring medical care, MCL 750.81d(2). Defendant was sentenced to 10 to 20 years' imprisonment for the second-degree home invasion conviction, 8 to 15 years' imprisonment for the larceny in a building conviction, and 8 to 15 years' imprisonment for the assaulting/resisting/obstructing a police officer causing injury requiring medical care conviction. We affirm defendant's convictions, but remand for resentencing.

Defendant argues there was insufficient evidence to prove he was the thief. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). In reviewing the sufficiency of the evidence, this Court should not interfere with the fact finder's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992).

The elements of second-degree home invasion are that the defendant (1) entered a dwelling, either by a breaking and entering or without permission, (2) with the intent to commit a felony or a larceny in the dwelling." MCL 750.110a(3); *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004). The elements of larceny in a building are: (1) an actual or constructive taking of goods or property; (2) a carrying away or asportation; (3) the carrying away must be with a felonious intent; (4) the goods or property must be the personal property of another; (5) the taking must be without the consent and against the will of the owner; and, (6) the taking must occur within the confines of the building. MCL 750.360; *People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1998).

Identity is an essential element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008), citing *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The prosecution must present sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crimes alleged. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

In reviewing the record in the light most favorable to the prosecution, a rational trier of fact could find that there was sufficient evidence to prove beyond a reasonable doubt that defendant was the thief. Douglass Schneider and Officer Easton testified that defendant admitted that he was the thief once to Schneider and later to Easton in Schneider's presence. Defendant offered a very different version of the events and denied ever making any admission of responsibility. Schneider also testified at some length about footprints found at the scene and the way in which those prints compared to defendant's shoes. Defendant argues that the footprints were either not his or were made on the day after the theft. The court clearly found the testimony of the officer and complainant credible and there is no reason for this court to disturb that finding since "[q]uestions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Rather, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A rationale trier of fact was not precluded from finding defendant guilty of the charged offense where there was substantial evidence that defendant admitted to committing the offense and where that admission was corroborated by physical evidence. While defendant offered contrary testimony, the trier of fact found the testimony of the officers and complainant credible as to the identity of the thief. .

Defendant next asserts he was denied the effective assistance of counsel when defense counsel failed to investigate or call James Hoover as a witness, failed to introduce defendant's phone records into evidence, and failed to file a motion in limine to exclude defendant's shoe prints from evidence. We disagree. A defendant must make a testimonial record in the trial court with a motion for a new trial that will evidentially support his claim of ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), quoting *People v Jelks*, 33 Mich App 425, 431; 190 NW2d 291 (1971). When there is no evidentiary hearing or motion for a new trial at the trial level, review is limited to the errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). Here, defendant filed with this Court an untimely motion to remand for a *Ginther*[1] hearing. Because defendant did not make a motion for a new trial or seek an evidentiary hearing at the trial court level review is limited to errors apparent on the record. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. The trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[1] *Ginther*, 390 Mich at 443.

To establish a claim for ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, the defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

Regarding defendant's assertion that defense counsel should have investigated and called Hoover as a witness and introduce defendant's phone records as evidence, decisions on whether to call or question witnesses are presumed to be matters of trial strategy that will not be second-guessed on appeal. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Thus, the failure to call witnesses constitutes ineffective assistance of counsel only when it deprives defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Likewise, the failure to present evidence only rises to ineffective assistance if the defense is deprived of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Also, although a failure to reasonably investigate could violate a defendant's right to the effective assistance of counsel, deference is given to defense counsel's strategic decisions. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

To begin, we note that we do not consider defendant's own unsigned affidavit because our review is limited to the lower court record. *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992). In reviewing the existing record, defendant has not proven that counsel's failure to investigate or call Hoover or submit defendant's phone records constituted deficient performance because the existing record provides no basis for concluding that defendant was denied a substantial defense. Counsel competently cross-examined the prosecution's two main witnesses, and defendant took the stand in his own defense. Defense counsel could have had numerous reasons for choosing only to call defendant to the stand and for deciding not to submit defendant's phone records into evidence, including the need to maintain consistency in the defense theory that someone else had broken into Douglas's house and defendant was merely trying to help Douglas recover the stolen items. Furthermore, given the evidence against defendant, as previously discussed, *supra*, any deficiency in counsel's performance did not prejudice defendant.

Regarding defendant's assertion that defense counsel should have filed a motion in limine, claims of ineffective assistance of counsel based on defense counsel's failure to object or make motions that could not have affected defendant's chances for acquittal are without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). Defendant asserts that defense counsel should have filed a motion in limine to exclude the shoe prints from evidence because there was no evidence to prove when the shoe prints were made in Douglas's backyard and the scuff marks on Douglas's house were inconsistent with defendant's shoe's sole. Generally, evidence is admissible if it is relevant. *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002), citing MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence." *Id*., quoting MRE 401. Because the shoe prints evidence showed that defendant's shoe prints matched the shoe prints found in the sand at the base of the office window, it was relevant to the determination regarding whether defendant was the thief. Thus, the admission of the shoe prints into evidence was proper, and any objection by defense counsel would have been futile. Counsel is not ineffective for failing to make a futile objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Furthermore, given the evidence against defendant, as previously discussed, *supra*, any deficiency in counsel's performance did not prejudice defendant.

Next, defendant argues the trial court misscored OV 3 and OV 9. We agree, and remand for resentencing. Because defendant filed an untimely motion to remand, he did not properly preserve this issue. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Therefore, our review is limited to plain error affecting the defendant's substantial rights. *Id*. at 312, citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A sentencing court has discretion in determining the number of points to be scored, provided the evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). This Court must affirm a sentence within the applicable guidelines range, absent an error in the scoring or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *Kimble*, 470 Mich at 310-311.

Under MCL 777.33(1)(e) (OV 3), five points are scored if "[b]odily injury not requiring medical treatment occurred to a victim." In scoring any offense variable, "'[t]he sentencing offense determines which offense variables are to be scored in the first place, and then the appropriate offense variables are generally to be scored on the basis of the sentencing offense.'" *People v McGraw*, 484 Mich 120, 124; 771 NW2d 655 (2009), quoting *People v Sargent*, 481 Mich 346, 348; 750 NW2d 161 (2008). This means that "[o]ffense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *Id*. at 135.

In this case, the sentencing offense was second-degree home invasion, thus, according to *McGraw*, OV 3 should only be scored in reference to the second-degree home invasion conviction. *McGraw*, 484 Mich at 124, 135. The record reflects that no one was present in the house at the time of the home invasion, thus, there was not a victim who sustained a bodily injured under the sentencing offense. OV 3 is properly scored at zero points.

Under MCL 777.39(1)(c) (OV 9), ten points are scored if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." MCL 777.39(2)(a) states to "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim." Also:

> [o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable. OV 9 does not provide for consideration of conduct after completion of the sentencing offense.

> Therefore, it must be scored … solely on the basis of [the] defendant's conduct during the [sentencing offense]. [*McGraw*, 484 Mich at 133-134.]

Schneider testified that neither he nor Edie Schneider, his wife, were present at the house at the time of the home invasion, thus, there were no victims placed in danger of physical injury or death at the time of the second-degree home invasion. Likewise, there is no evidence that anyone other than Schneider and his wife were exposed to the possibility of property loss. OV 9 is properly scored at zero points.

We note that although defendant raised the scoring of OV 13 in his statement of questions presented, he failed to address this issue in his argument section. Because defendant failed to engage in a meaningful analysis regarding this portion of the issue, we consider it abandoned and decline to address it. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Defendant's total OV points are reduced from 60 to 45, placing him in OV-level IV. Thus, defendant's minimum sentencing guidelines range, as a fourth habitual offender, changes from 58 to 228 months to 50 to 200 months. MCL 777.64; MCL 777.21. Because defendant's minimum sentencing guidelines range has changed, he is entitled to resentencing. *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006).

Finally, defendant asserts counsel was ineffective for failing to object to the scoring of OV 3 and OV 9. Because defendant is already receiving the relief he requested, we find this issue moot, and decline to address it. *People v Mansour*, 206 Mich App 81, 82; 520 NW2d 646 (1994).

We affirm defendant's convictions, but remand for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens