STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 17, 2017
v	No. 333851 Kent Circuit Court
JOHN JUNIOR GORDON, Defendant-Appellant.	LC No. 16-002109-FH

Before: MURRAY, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of unarmed robbery, MCL 750.530. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 10 to 50 years' imprisonment. We affirm.

Defendant entered Smitty's Specialty Beverage (Smitty's) in Grand Rapids on December 26, 2015, at approximately 7:10 p.m. Defendant was greeted by the store clerk but did not return the greeting. The clerk became suspicious of defendant based on his lack of response and because defendant appeared on edge, so the clerk followed defendant through the store. While following defendant, the clerk observed defendant put a bottle of liquor into his pants and appear to hook the bottle to his belt. The clerk told defendant to stop and give the bottle back, and defendant handed the bottle to the clerk. After defendant handed the clerk the bottle, the clerk placed one hand on defendant's upper arm, grabbed the bottle with the other, and said "hold up a sec." Defendant then turned to the clerk and said "the f*** I am," shoved the clerk into a liquor display, and ran out of the store. Another clerk who was working chased after defendant. Upon noticing the other clerk chasing him, defendant turned around and confronted the clerk, repeatedly asked the clerk, "what are you going to do," and then punched the clerk with a closed fist on the clerk's right temple. Surveillance video captured these incidents and was played for the jury at trial.

Detective Eric Boillat of the Grand Rapids Police Department obtained the surveillance video shortly after these events occurred. The detective took still images of the perpetrator and distributed them to various law enforcement agencies, including parole and probation officers. Agent William Decker with Kent County Parole contacted Detective Boillat and stated that he believed that defendant was the man in the still image. On January 19, 2016, Agent Decker told the detective that defendant was at his office for a parole meeting, and the detective interviewed

defendant at the office. Defendant was not read his *Miranda*[1] rights. Defendant identified himself in the still images but indicated to the detective that he was unaware of any incident at Smitty's. Defendant also indicated that he had been drinking over Christmas, was "blacked out," and could not remember what had happened around the time that the incidents occurred.

On appeal, defendant first argues that the trial court erred by not instructing the jury with regard to attempted unarmed robbery and abandonment. We disagree. "This Court reviews for an abuse of discretion the trial court's decision regarding the applicability of a jury instruction to the facts of a specific case." *People v Armstrong*, 305 Mich App 230, 239; 851 NW2d 856 (2014). "The trial court abuses its discretion when its outcome falls outside the range of principled outcomes." *Id*.

"A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). "Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence." *Id*. "Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury." *Id*.

Defendant first argues that he was entitled to an instruction for attempted unarmed robbery because that instruction was supported by the evidence. As an attempt to commit the greater crime, attempted unarmed robbery is a permissible instruction pursuant to MCL 768.32(1). However, under *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002), a requested instruction under MCL 768.32(1) is proper only if "a rational view of the evidence would support it."

MCL 750.530 provides the statutory basis for unarmed robbery and states as follows:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

The elements of larceny are "(a) a trespassory taking and (b) the carrying away (c) of the personal property (d) of another (e) with intent to steal that property." *People v March*, 499 Mich 389, 401; 886 NW2d 396 (2016). "[A]n 'attempt' consists of (1) an attempt to commit an

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

Here, defendant argues that a rational view of the evidence supports that he did not satisfy the "carrying away" requirement for larceny. This argument is without merit. "[A]s soon as criminal intent is present, the slightest movement of goods within a self-service store constitutes asportation, and the crime [of larceny] is complete." *People v McFarland*, 165 Mich App 779, 782; 419 NW2d 68 (1988). "Concealment is one way of expressing criminal intent." *Id*. The undisputed testimony at trial was that defendant grabbed a bottle of liquor and placed it in his pants. Defendant's act of attempting to conceal the bottle in his pants evidences that he intended to steal the bottle. See *id*. Because defendant intended to steal the bottle, his act of moving the bottle from the shelf to his pants satisfied the "carrying away" requirement of larceny. See *id*. Contrary to defendant's suggestion, the fact that defendant did not "move past a cash register" is irrelevant to whether the carrying away requirement of larceny was satisfied.

After completing the larceny, defendant pushed one clerk into a display before running out of the store, and then punched another clerk in the face when the clerk chased after him. Thus, the undisputed testimony shows that defendant used force against two people during his flight after the larceny. See MCL 750.530. Therefore, the evidence showed that a larceny occurred when defendant took the liquor bottle from the shelf and placed it in his pants, see *March*, 499 Mich at 401, and an unarmed robbery was completed when defendant used force against two clerks during flight after the commission of the larceny, see MCL 750.530. Accordingly, because the evidence only supported that a completed unarmed robbery occurred in this case, no rational view of the evidence presented at trial could lead a rational jury to find that defendant attempted an unarmed robbery but did not complete one.

Next, defendant argues that he was entitled to an abandonment instruction because he handed the liquor bottle to the clerk upon the clerk's request. "Abandonment is an affirmative defense, and the burden is on the defendant to establish by a preponderance of the evidence voluntary and complete abandonment of a criminal purpose." *People v Akins*, 259 Mich App 545, 555; 675 NW2d 863 (2003) (citation and quotation marks omitted). "The abandonment defense is not available where the defendant fails to complete the attempted crime because of unanticipated difficulties, unexpected resistance, or circumstances which increase the probability of [detection] or apprehension." *People v Cross*, 187 Mich App 204, 206; 466 NW2d 368 (1991) (citation and quotation marks omitted). However, of note, "voluntary abandonment is an affirmative defense to a prosecution for criminal attempt." *People v Kimball*, 109 Mich App 273, 286; 311 NW2d 343 (1981), mod on other grounds 412 Mich 890 (1981).

Because defendant was not entitled to an attempt instruction, a voluntary abandonment instruction was improper. See *id*. Moreover, the evidence clearly established that defendant's act of giving the liquor bottle to the clerk was not "voluntary," see *Akins*, 259 Mich App at 555, because defendant only returned the bottle after the clerk caught defendant placing the bottle in his pants, see *Cross*, 187 Mich App at 210. Accordingly, the trial court did not abuse its discretion by concluding that defendant was not entitled to a jury instruction for abandonment. *Armstrong*, 305 Mich App at 239.

Next, defendant argues that the trial court gave the jury an improper supplemental instruction after the jury was deadlocked during deliberations. However, defendant waived challenge to this issue at trial. A defendant waives appellate challenge to a supplemental instruction when he fails to object "at the time the instruction was given[.]" *People v Hardin*, 421 Mich 296, 322-323; 365 NW2d 101 (1984). Here, after the trial court read the supplemental jury instruction, it asked defense counsel whether he had any objections, to which defense counsel answered that he did not. Thus, this issue is waived. See *id*. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Even if defendant did not waive this issue, we find no merit to his claim. There was nothing in the trial court's supplemental instruction that was coercive. See *People v Rouse*, 477 Mich 1063 (2007); *Hardin*, 421 Mich at 316. Defendant also asserts that trial counsel was ineffective for not objecting to the supplemental instruction. However, because an objection would have been meritless, trial counsel was not ineffective for not objecting to the trial court's supplemental instruction. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Next, defendant argues that certain remarks by the prosecutor during closing arguments improperly appealed to the jury's sympathy. We disagree. "Issues of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010).

"A defendant who chooses a jury trial has an absolute right to a fair and impartial jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). "A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence." *Dobek*, 274 Mich App at 63-64. For instance, "prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members or express their personal opinion of a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). Yet prosecutors are still "accorded great latitude regarding their arguments and conduct," *id*. at 282, and their "comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial," *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003).

Here, defendant takes issue with the following statement made by the prosecutor during closing:

> One of the other things I want to talk about is I assume there's two good reasons for having this sort of law. One is we want to protect shopkeepers, so to speak, managers, owners of these types of stores, and not only them, but their employees and their customers, right, because when stores are stolen from, who pays the ultimate price for that? The rest of us, right, in higher prices or prices—

Defense counsel objected and the trial court overruled the objection, and then the prosecutor continued:

> At any rate, there's laws in place to protect those individuals for those reasons, but that's not all that this is. This is not the case of a—you know a 13-

> year-old kid who goes in, puts a pack of gum in his pocket and gets out of the store without being caught. This isn't the case of a single adult mother going into Target and stealing diapers she can't afford and not fighting with the clerks when she's caught. This was a decision made by the defendant that he was going to drink, and he was going to steal it, and he was either going to get away with it doing whatever he needed to or, as you saw, once he got caught he was going to get away doing whatever he needed to.

Defendant argues that the prosecutor's statement was akin to the "golden rule" argument in that it attempted to appeal to jurors' sympathy by placing them in the victim's position. See *People v Howard*, 226 Mich App 528, 546-547; 575 NW2d 16 (1997). Defendant then takes this argument one step further and argues that the prosecutor's statement amounted to arguing that the jurors themselves were the victims of the crime in this case because it resulted in higher prices at the store.

However, in light of defendant's arguments, see *Ackerman*, 257 Mich App at 452, the prosecutor's remarks were not improper. In his opening statement, defense counsel began by stating what he believed the evidence was going to show, and finished by questioning whether the jury should believe that this evidence was enough to find defendant guilty of unarmed robbery. Specifically, defense counsel stated as follows:

> Now, is this little thing that happens in the corner – is that going to be enough for you to find Mr. Gordon guilty of robbery? I hate this phrase "really." I never use it, but I'm going to in this case. That is what you're going to have to assess. Does the law fit these facts? Is that justice? Is that fairness? Is that the law?

Based on these remarks by defense counsel, the prosecutor's limited statement during closing about the purpose of the law was a fair rebuttal. The prosecutor attempted to emphasize that, although defense counsel characterized this incident as a "little thing," defendant's actions were nonetheless prohibited by law with good reason. The prosecutor then contrasted defendant's case with cases that the unarmed robbery law would not apply to and were more sympathetic: a young child that steals a pack of gum without hurting anyone and a single mother who gets caught trying to steal diapers for her baby. The prosecutor used these examples to drive home the fact that this was not a case where the law was unfair or unjust; defendant used violence in an attempt to steal something merely because he wanted it. Contrary to what defendant asserts on appeal, the prosecutor's statement was more akin to asking jurors to take emotion and sympathy out of their decision rather than inciting sympathy. Therefore, viewing the prosecutor's comments "as a whole and evaluated in light of defense arguments," *Ackerman*, 257 Mich App at 452, the prosecutor did not resort to civic duty arguments that appealed to "the fears and prejudices of jury members or express their personal opinion of a defendant's guilt, and

[] refrain[ed] from denigrating a defendant with intemperate and prejudicial remarks," *Bahoda*, 448 Mich at 282-283. Accordingly, there was no prosecutorial misconduct.[2]

Defendant also raises a number of issues in a Standard 4 Brief.[3] Defendant argues that he was entitled to a competency examination at trial. We disagree. Because defendant failed to preserve this issue, we review for plain error. *People v Abraham*, 256 Mich App 265, 283; 662 NW2d 836 (2003).

"[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *People v Kammeraad*, 307 Mich App 98, 137; 858 NW2d 490 (2014) (alteration in original; citation and quotation marks omitted). This due process right is protected in Michigan by MCL 330.2020(1), which states as follows:

> A defendant to a criminal charge shall be presumed competent to stand trial. He shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial.

Pursuant to MCL 330.2022(1), "A defendant who is determined incompetent to stand trial shall not be proceeded against while he is incompetent." Pursuant to MCR 6.125, "The issue of defendant's competence . . . may be raised at any time during the proceedings against defendant," and "may be raised by the court . . . or by motion of a party." See also MCL 330.2024 ("The issue of incompetence to stand trial may be raised by the defense, court, or prosecution.").

"[A] trial court has the duty of raising the issue of incompetence where facts are brought to its attention which raise a bona fide doubt as to the defendant's competence." *Kammeraad*, 307 Mich App at 138 (citation and quotation marks omitted). "[T]he test for such a bona fide doubt is whether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." *Id*. at 138-139 (alteration in original; citation and quotation marks

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[2] Even if the prosecutor's comment was improper, any minimal prejudice was cured by the trial court's instructions. When an improper remark is made, "an appropriate response . . . is the issuance of a curative instruction," *People v Mann*, 288 Mich App 114, 121-122; 792 NW2d 53 (2010), which is generally considered "sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements," *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

[3] See Michigan Supreme Court Administrative Order 2004-6, Standard 4.

omitted). "Evidence of a defendant's irrational behavior, a defendant's demeanor, and a defendant's prior medical record relative to competence are all relevant in determining whether further inquiry in regard to competency is required," but "[t]here are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed." *Id.* at 139 (citation and quotation marks omitted). Thus, "the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Id.* (citation and quotation marks omitted).

Here, defendant argues that there was a bona fide doubt regarding his competency based on his numerous mental disorders. However, defendant's medical history, alone, does not create a bona fide doubt as to defendant's competency. See *People v Johnson*, 58 Mich App 473, 478; 228 NW2d 429 (1975). There is nothing in the lower court file to indicate that, based on defendant's behavior or demeanor, see *Kammeraad*, 307 Mich App at 139, he was unable to understand "the nature and object of the proceedings against him or of assisting in his defense in a rational manner," MCL 330.2020(1). To the contrary, defendant's actions during the proceedings evidenced that he was "oriented to time, place, person, and immediate situation." *Johnson*, 58 Mich App at 478. Defendant had a significant exchange with the trial court during the preliminary examination in which defendant appeared to be aware of the immediate situation and understand the nature of the proceedings against him. After his preliminary hearing, defendant wrote a letter to the trial court requesting different appointed counsel. Defendant indicated that he was displeased with counsel's performance during his preliminary examination because the witness gave varying accounts of the events, but his counsel did not point out the inconsistencies in the witness's testimony. This letter also shows that defendant understood the nature of the proceedings against him and was actively assisting in his defense in a rational manner, even if he was displeased with how defense counsel was handling the case. This same evidence of defendant's competence was displayed at the hearing on defense counsel's motion to withdraw in which defendant articulated his reasons for requesting new counsel. Specifically, defendant stated that he was having problems communicating with counsel and that he felt like counsel was not listening to his opinion and advice on the case.

Lastly, defendant testified at his trial. Although the testimony was brief, lasting only approximately nine pages of transcript, defendant's testimony nonetheless showed that he was "oriented to time, place, person, and immediate situation." *Johnson*, 58 Mich App at 478. He responded appropriately and coherently to each question posed by defense counsel and did not interject or appear confused when the trial court and counsel dealt with the prosecution's objections. Nothing in the events leading up to trial or the events during trial evidenced that defendant did not possess "the ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial." MCL 330.2020(1). As such, the trial court did not plainly err by not sua sponte ordering a competency examination for defendant. *Abraham*, 256 Mich App at 283.[4]

[4] Defendant also appears to assert that defense counsel was ineffective for not requesting a competency examination. However, given that there is no basis to conclude that defendant was

Next, defendant argues that he was deprived of his due process rights when he was subjected to an interrogation by police without being read his *Miranda* rights or the assistance of counsel. However, defendant waived this issue by not specifying when the allegedly unconstitutional interrogation occurred, who interrogated defendant, or any reference to the lower court record from which this Court could piece together the factual basis for defendant's claim. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). And even assuming that defendant is referring to his interview with Detective Boillat and Agent Decker, defendant's argument that his Fifth Amendment rights were violated is without merit.

Next, defendant argues that trial counsel was ineffective for failing to investigate his mental health issues and use those issues to defend the charge at trial. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id*. "The trial court's factual findings [if any] are reviewed for clear error, while its constitutional determinations are reviewed de novo." *People v Lopez*, 305 Mich App 686, 693; 854 NW2d 205 (2014). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002). Because defendant failed to preserve this issue, "our review is limited to errors apparent on the record." *Lopez*, 305 Mich App at 693 (citation and quotation marks omitted).

Generally, to warrant a new trial based on a claim of ineffective assistance of counsel, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). However, there are "three rare situations in which the attorney's performance is so deficient that prejudice is presumed." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "One of these situations involves the complete denial of counsel, such as where the accused is denied counsel at a 'critical stage' of the proceedings." *Id*., quoting *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984). "The other two situations in which prejudice is presumed are as follows: (1) 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing'; and (2) where counsel is called upon to render assistance under circumstances where competent counsel very likely could not." *Id*. at 478 n 10, quoting *Cronic*, 466 US at 659-660.

Here, defendant argues that prejudice should be presumed under the first situation identified in *Cronic*. Specifically, defendant contends that he was constructively denied the assistance of counsel at a critical stage in the proceedings because defense counsel wholly failed to investigate defendant's case, specifically his mental health. Defense counsel at trial "has a duty to make reasonable investigations." *Trakhtenberg*, 493 Mich at 52 (citation and quotation marks omitted). Based on the facts apparent on the record, *Lopez*, 305 Mich App at 693, it appears that defense counsel investigated and was fully aware of defendant's mental health

incompetent, defense counsel's failure to request an examination did not fall below an objective standard of reasonableness. See *Kammeraad*, 307 Mich App at 141-142.

problems. When defense counsel cross-examined Detective Boillat, defense counsel attempted to elicit whether the detective was aware of defendant's mental health diagnoses. Defense counsel later elicited that information from defendant during defendant's testimony. Thus, contrary to defendant's assertion, defense counsel investigated and was familiar with defendant's mental health history. Accordingly, the *Cronic* standard is not applicable to this case because it only "applies when the attorney's failure is *complete*." *Frazier*, 478 Mich at 244.

Defendant's claim of ineffective assistance is properly analyzed under the standard two-part test for ineffective assistance. Because it is clear that defense counsel, at the very least partially, investigated defendant's mental health history, defendant's issue is better framed as whether defense counsel's decision to not pursue a defense based on defendant's mental health issues constituted ineffective assistance. The decision of whether to pursue a particular defense theory is a matter of trial strategy. See *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Defense "counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *Unger*, 278 Mich App at 242. "[T]his Court will not substitute its judgment for that of [defense] counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). When determining whether a decision by defense counsel was strategic, this Court must "affirmatively entertain the range of possible reasons that counsel may have had for proceeding as he or she did." *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012) (citation and quotation marks omitted).

Here, defense counsel's decision to not pursue a defense based on defendant's mental health was reasonable trial strategy. Defendant appears to argue that defense counsel should have presented a diminished capacity defense by arguing that defendant's mental state was less culpable based upon his mental health issues. However, diminished capacity is not a valid defense in Michigan because "the Legislature has created an all or nothing insanity defense." *People v Carpenter*, 464 Mich 223, 235-237; 627 NW2d 276 (2001). Defense counsel's performance in failing to assert a defense that is not available does not fall below an objective standard of reasonableness.

At best, defense counsel could have asserted a defense of insanity pursuant to MCL 768.21a(1). However, defendant admitted that he was voluntarily intoxicated when he entered Smitty's on December 26, 2015. "[A]n individual who is voluntarily intoxicated does not have grounds for an absolute defense based upon his insanity." *People v Caulley*, 197 Mich App 177, 187; 494 NW2d 853 (1992); see also MCL 768.21a(2) ("An individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances."). Although defendant's voluntary intoxication may not have entirely precluded an insanity defense based on the language of MCL 768.21a(2), defense counsel appeared to make a strategic decision to not pursue an insanity defense because it would place defendant's drunkenness at the forefront of the jury's deliberations. Specifically, the jurors would have to decide whether defendant's actions were the result of his "black-out" drunkenness or his mental health issues. Defense counsel apparently decided that, rather than place defendant's potentially unsympathetic drunken behavior before the jury, defense counsel would use defendant's mental health issues to garner sympathy with the jurors and ask them to conclude that defendant's actions were not sufficient to find him guilty of

unarmed robbery. See *Gioglio (On Remand)*, 296 Mich App at 22. Attempting to garner sympathy for a defendant is clearly trial strategy, and "this Court will not substitute its judgment for that of [defense] counsel regarding matters of trial strategy." *Davis*, 250 Mich App at 368. Accordingly, defendant has failed to overcome the heavy burden of showing that defense counsel's performance was not objectively unreasonable. *Trakhtenberg*, 493 Mich at 51.[5]

Lastly, defendant argues that the culmination of errors at the trial court entitle him to a new trial. However, [b]ecause no errors were found with regard to any of the above issues, a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Jane E. Markey

[5] Also, defendant asserted that he was entitled to a diminished capacity defense, not an insanity defense. Thus, defendant did not contend that he "lack[ed] substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1). Accordingly, defendant failed to establish the factual predicate of his claim, see *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), or establish that he was prejudiced by defense counsel's failure to assert an insanity defense, see *Trakhtenberg*, 493 Mich at 51.