STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 22, 2011
v	No. 299788 Kalamazoo Circuit Court
JAWAN MICHAEL MACON, Defendant-Appellant.	LC No. 2009-000475-FH

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of first-degree home invasion, MCL 750.110a(2); and one count of second-degree home invasion, MCL 750.110a(3). Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent terms of 78 months to 40 years' imprisonment for both first-degree home invasion convictions, and to 36 months to 30 years' imprisonment for the second-degree home invasion conviction. Because we find defendant has failed to demonstrate that he was provided ineffective assistance of counsel at trial, we affirm.

Three home invasions took place in Kalamazoo County between March 7 and 14, 2009, and various items were taken from two of the homes. During the March 14 home invasion, the resident was at home when she saw a man standing in her yard, and observed him get into an older, black and gray four-door sedan with another man and drive away. The homeowner called dispatch and gave police a description of the car. Shortly after calling the police, the resident noticed that the car had returned to her home. She called 9-1-1, and heard her door being kicked in and the sound of someone walking through her house. Officers responded to her home, and the resident indicated that her purse, digital camera, and television were missing. Police located and pursued a vehicle matching the given description in the area of the invaded home. Officers lost sight of the car during the pursuit, but within five minutes found it parked and unoccupied. The officers were able to unlock the vehicle and conduct an inventory search. Pursuant to the search, officers seized a television and a purse that were identified as the items stolen from the homes that were broken into on March 7 and March 14. It was discovered that defendant was in the process of buying the car, and documents and mail in his name were recovered from inside the car. The car was impounded and transported back to the police station for further processing. Officers also searched the route of pursuit and were able to recover a camera and a purse from the side of the road that were identified as the items stolen from the house invaded on March 14.

Defendant was questioned by Detective Sergeant James VanDyken twice, once on March 16 and once on March 17. Defendant was read his *Miranda*[1] rights before both interrogations, and he agreed to talk to VanDyken both times. VanDyken testified that the first interrogation lasted about 3 to 3 1/2 hours. During the first interrogation, VanDyken and defendant drove to the homes that were invaded, and defendant gave directions to one of the homes. Defendant was somewhat hesitant to provide VanDyken with complete information the first time VanDyken questioned him. During the second interrogation, defendant admitted his involvement in the home invasions. Further, VanDyken testified at trial that during the interrogations defendant was given food and a drink, and that defendant was never threatened. Defendant testified at trial that he was not given any food, was threatened and was not allowed to use the telephone until he confessed. During the interrogations, defendant admitted he was involved in the home invasions.

On appeal, defendant claims that he is entitled to a new trial because he was denied effective assistance of counsel. Specifically, defendant maintains that defense counsel was ineffective because he did not move to suppress defendant's statements to the police before trial.

Defendant failed to preserve the issue of ineffective assistance of counsel; consequently, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Findings of fact are reviewed for clear error and the constitutional issue of ineffective assistance of counsel is reviewed de novo. *Id.*

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009), quoting *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To establish a claim of ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To show prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

"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. A confession or waiver of constitutional rights must be made without intimidation, coercion or deception, and must be the product of an essentially free and unconstrained choice by its maker." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003) (citations omitted). "Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law, which the court must determine under the totality of the circumstances." *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005).

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

Because there was no evidentiary hearing held to create a record for his appeal,[2] defendant relies on his trial testimony to support his claim that defense counsel should have moved to suppress his statements. During trial, defendant testified that he denied involvement in the home invasions when he was first interrogated and while he and VanDyken were driving around. Defendant testified that he was not given any food during the interrogations. Defendant indicated that he was threatened by VanDyken, who was yelling and slamming his hand on the desk. Defendant testified that VanDyken threatened him by claiming defendant would go to prison for 60 years and would not be permitted to speak to his mother until he admitted his involvement. Defendant said he eventually told VanDyken he was involved in the home invasions, but he specifically testified that he lied about being involved because he wanted to go home and see his mother.

On the record before us, we cannot conclude that defense counsel's performance was deficient. We begin by noting that defendant's testimony was self-serving and directly contradicted the testimony of VanDyken. Further, we note that defense counsel clearly was aware of defendant's version of the interrogation before defendant testified because he made reference to it in opening statement. Under these circumstances and in light of the presumption of effective assistance, *Seals*, 285 Mich App at 17, it is reasonable to assume that trial counsel investigated defendant's claims and determined that a suppression motion would be meritless. Defense counsel cannot be found ineffective for failure to file a meritless motion. *Riley*, 468 Mich at 142. Accordingly, defendant has not satisfied his burden of establishing defense counsel's performance was constitutionally ineffective.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello

[2] We note that appellate defense counsel did not move the trial court for a hearing pursuant to *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).