

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EARL BRACKEN,

Defendant-Appellant.

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UNPUBLISHED

February 1, 2005

No. 250589

Oakland Circuit Court

LC No. 2003-188196-FH

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from jury convictions of first-degree home invasion, MCL 750.110a(2), second-degree home invasion, MCL 750.110a(3), and unlawfully driving away a vehicle, MCL 750.413, for which he was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of twelve to twenty years. We affirm.

Defendant first contends that he is entitled to a new trial due to ineffective assistance of counsel. Because the trial court did not conduct an evidentiary hearing, review is limited to the facts on the record. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. *Id.*

Defendant contends that counsel was ineffective for failing to find and call as witnesses various residents of the neighborhood where the crimes occurred to testify that defendant had been there selling DSL units.

“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters 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.” *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). See also *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

There is nothing in the record to show that defendant had a business relationship with the victims’ neighbors, who these neighbors were, or what testimony they would offer if called. Defendant’s representations as to what these unnamed witnesses would have testified to is not sufficient to show “that these witnesses exist, or that their testimony would have benefited defendant had they been called. Thus, there are no errors apparent on the record. Therefore, defendant’s argument that he was denied ineffective assistance of trial counsel is without merit.” *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

In any event, evidence that defendant had a legitimate reason for being in the neighborhood would do little to explain why he walked into one house uninvited, what he was doing in the backyard of another house when no one was home, and why he stole another neighbor’s vehicle.

During trial, a videotape was played for the jury. It showed various events from the officers’ arrival on the scene through defendant’s arrest. Defendant next contends that counsel was ineffective for failing to stipulate to the fact that defendant was arrested following the vehicle pursuit and traffic stop, eliminating the need to show the jury the videotape of the arrest itself. Defendant has not cited any law or other authority to support his claim that the tape or at least the final portion of it would have been inadmissible had counsel stipulated to the fact of defendant’s arrest and thus the issue is deemed abandoned. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). We note that the tape was relevant because it corroborated and illustrated the police officer’s testimony and was not rendered inadmissible simply because the officer could have testified to the information depicted therein. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Because the tape was admissible, counsel was not ineffective for failing to object. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant next contends that he was denied a fair trial due to prosecutorial misconduct. This issue has not been preserved because defendant failed to object at trial. Therefore, review is precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

During closing argument, the prosecutor speculated that had defendant not been interrupted by the homeowner, he might have injured the homeowner’s dog. Defendant contends that such a statement was improper because it was unsupported by the evidence. A prosecutor may not make a statement of fact that is unsupported by the evidence, but may argue the evidence and all reasonable inferences therefrom as it relates to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

The evidence showed that defendant suddenly appeared inside a woman's foyer armed with a pipe or pipe wrench and apparently hesitated to enter further because of the sudden appearance of her excited dog. Although there was no direct evidence to show that defendant intended to harm the dog, it is reasonable to infer from the facts that defendant wanted to get into the house and that but for the woman's appearance, defendant might have used the implement against the dog so its barking would not draw unwanted attention to defendant's presence. Thus, defendant has not shown plain error. Because defendant has not established error with respect to the prosecutor's argument, counsel was not ineffective for failing to object. *Kulpinski, supra*.

Affirmed.

/s/ Brian K. Zahra  
/s/ Janet T. Neff  
/s/ Jessica R. Cooper