STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 27, 2013
v	Nos. 307878; 311805 Muskegon Circuit Court
BYRON KEITH AUTMAN, Defendant-Appellant.	LC No. 11-060998-FH

Before: BORRELLO, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

In Docket No., 307878, defendant appeals as of right his bench trial convictions for first-degree home invasion, MCL 750.110a(2); assaulting, resisting, or obstructing a police officer, MCL 750.81d(1); and larceny, MCL 750.356(5) (property less than $200). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 7 to 20 years' imprisonment for his first-degree home invasion conviction; 2 to 15 years' imprisonment for his assaulting, resisting, or obstructing a police officer conviction; and 93 days' imprisonment for his larceny conviction. The trial court granted defendant's request for resentencing and resentenced defendant on May 29, 2012. In Docket No., 311805, defendant appeals as of right the judgment entered after a hearing for resentencing. The cases have been consolidated on appeal. For the reasons set forth in this opinion we affirm the convictions and sentences of defendant.

On August 19, 2011, Timothy Palmer telephoned 911 and alleged that defendant stole his identification, $302, and a lighter from his vehicle. Police officer Julie Sanderson located defendant about a half of a mile away from where the alleged larceny took place. Sanderson asked defendant to sit in her police cruiser until his identity could be determined, and he ran from her. Sanderson and Deputy James Christianson pursued defendant and ordered him to stop running. Defendant ignored their orders and dove into a patch of brush. Sanderson testified that defendant disappeared after he went into the brush. According to Sanderson, every police officer who was on duty that evening looked for defendant in the surrounding neighborhood for at least an hour.

Defendant was eventually found inside the apartment of Sara Vandenbosch after she reported that a man was hiding in her utility room. Defendant was arrested and searched. Palmer's lighter and identification were found on defendant's person; however, the $302 that

Palmer alleged defendant stole was not found. Defendant was given his *Miranda*[1] warnings, and he told Sanderson that he ran away from her because he knew that there were warrants for his arrest. Defendant was charged with first-degree home invasion; assaulting, resisting, or obstructing a police officer; and larceny. During the preliminary examination, and against the advice of counsel, defendant testified that he ran away from the police. He also testified that he entered the apartment where he was found but denied any intent to cause anyone any harm inside the apartment. At trial defendant testified that while he was running from the police, he noticed that the back door to Vandenbosch's apartment was "wide open." The back door led to a small utility room, and defendant alleged that he was able to get inside without touching the door or the door knob. He also admitted to entering Vandenbosch's apartment without permission. However, defendant testified that a man, who was later said to be named Tyrone, entered the utility room and told defendant that he could stay there until the police left the neighborhood. Defendant was convicted of all the charged crimes.

In Docket No., 307878, defendant argues that he is entitled to a new trial because his defense counsel was ineffective in several respects. This Court reviews a trial court's decision to deny a motion for a new trial based on ineffective assistance of counsel for an abuse of discretion, and we review the lower court's factual findings for clear error. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). In order to merit a new trial based on ineffective assistance of counsel, defendant must demonstrate that trial counsel's performance "fell below an objective standard of reasonableness" and that this deficient performance prejudiced the defense such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). When the trial court does not hold an evidentiary hearing, review for ineffective assistance of counsel is limited to facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000), lv den 463 Mich 975 (2001). We find that the record does not establish that counsel was ineffective for any of the reasons cited by defendant.

Defendant asserts that he was denied effective assistance of counsel because his trial counsel failed to investigate defendant's claims that Tyrone granted him permission to be in Vandenbosch's apartment and because trial counsel failed to call Tyrone as a witness at trial. A defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), quoting *People v Ginther*,[2] 390 Mich 436, 442-443; 212 NW2d 922 (1973). We find that there is no evidence on the record that trial counsel failed to adequately investigate defendant's claims. Further, defendant has not established the factual predicate, the existence of Tyrone as a witness, for his claim of ineffective assistance of counsel. *Hoag*, 460 Mich at 6. Accordingly, defendant has not met his burden of showing that defense counsel's performance fell below an objective standard of reasonableness. *Armstrong*, 490 Mich at 289-290.

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

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

However, even if this Court were to presume that Tyrone did exist and granted defendant permission to remain in Vandenbosch's apartment, it is unclear how his testimony would have contributed to defendant's defense. Defendant admitted that he initially entered Vandenbosch's apartment without permission and claimed that he was told that he could stay after he was already present in the apartment. We find that, based on the plain language of the first-degree home invasion statute, because defendant entered the dwelling without first obtaining permission, the element of "entry without permission" was established regardless of whether he was granted subsequent permission to stay. MCL 750.110a(2). Moreover, based on the record, Tyrone would not have had the authority to grant defendant permission to remain in the utility room because there was no evidence that he was the owner, lessee, or person in lawful control of Vandenbosch's apartment. MCL 750.110a(1)(c). Thus, unlike the result reached by our Supreme Court in *Armstrong*, 490 Mich at 289-290, because defendant admitted to the crime during his testimony both at the preliminary examination and at trial, we cannot find that defendant has demonstrated the requisite prejudice to prevail on this claim. See also, *Strickland v Washington*, 466 US 668. 694-696; 104 S Ct 2052; 80 L Ed2d 674 (1984), holding that for the defendant to prove prejudice: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694. Given the testimony of defendant and the evidence presented, we cannot find any reasonable probability that would undermine our confidence in the outcome. Accordingly, even assuming that trial counsel's failure to call Tyrone or investigate his existence constituted ineffective assistance of counsel, such a finding does not lead us to conclude that had trial counsel done so, the result of these proceedings would have been different.

Defendant further argues that his trial counsel misunderstood the law and misinformed him that he could not be convicted of first-degree home invasion unless it was proven that he broke into Vandenbosch's apartment. Defendant alleges that, because his trial counsel advised him that a breaking could not be proven based on the evidence, he rejected a favorable sentencing agreement and opted to go to trial. Defendant was ultimately convicted of first-degree home invasion because the trial court found that he entered Vandenbosch's apartment without permission and committed a felony upon entering while Vandenbosch was lawfully present. MCL 750.110a(2). Defendant alleges that he received a harsher sentence as a result of counsel's advice to reject the settlement agreement. He argues that he is entitled to a new trial or to be resentenced under the terms of the rejected agreement. However, we find that defendant's allegation that he rejected the sentencing agreement based on the advice of his attorney is not supported by the record. The record establishes that defendant turned down the agreement because he did not want to plead guilty to first-degree home invasion and face the possibility of a minimum of 84 months' imprisonment. Thus, it was defendant who rejected the offer after being fully advised by the trial court as to the consequences of the potential agreement. Accordingly, we cannot find that defense counsel's performance fell below an objective standard of reasonableness. *Armstrong*, 490 Mich at 289-290.

Even assuming ineffective assistance of counsel on this issue, defendant has again failed to prove that he was prejudiced. In so finding we concur with the findings of the trial court on this issue when it stated that defendant was not prejudiced by his attorney's alleged misguided advice concerning the agreement because defendant received the same sentence after being

convicted that he would have received if he had accepted the agreement. We further concur with the findings of the trial court that even if trial counsel misunderstood the law of home invasion, defendant was not prejudiced because he "made his bed at the preliminary examination over the advice of his attorney by insisting on testifying and admitting he entered in there and didn't have permission." Accordingly, defendant is not entitled to relief on this issue. *Strickland,* 466 US at 694.

Finally, defendant argues that, because of trial counsel's misunderstanding of the law, he allowed defendant to testify that he entered Vandenbosch's apartment without permission on August 19, 2011. It is well established that this Court presumes that a defendant's decision to testify or exercise his privilege not to testify is a matter of trial strategy that is best left to an accused and his counsel. *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). We do not substitute our judgment for that of trial counsel in matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). We cannot find under the circumstances of record that defense counsel's strategy was unreasonable. In fact, trial counsel had little choice in deciding the matter of whether defendant should testify. The record clearly reveals that defendant, against the advice of trial counsel, testified at his preliminary examination. During his preliminary examination testimony defendant admitted that he fled from the police and entered a dwelling without permission. Thus, trial counsel was left with how to contend with defendant's preliminary examination testimony, forcing trial counsel to make a strategy decision. Based on the record before us, we cannot find that the decision to have defendant testify at trial fell below an objective standard of reasonableness. Moreover, we note that defendant has not explained how a different outcome would have resulted at trial if he had not testified. As a result, defendant has failed to establish that he was prejudiced. *Strickland*, 466 US at 694.

In the alternative, defendant requests that this Court remand this case to the trial court for a *Ginther* hearing. To be entitled to a remand, defendant must show by affidavit or offer of proof that there are facts to support his claims. MCR 7.211(C)(1)(a). Here, defendant did not make an offer of proof or attach an affidavit to show any factual development that would justify remand. As a result, defendant has failed to show that these issues warrant remand and his request is denied.

In Docket No., 311805, defendant argues that the trial court erred in scoring offense variable (OV) 19, MCL 777.49, at 10 points to reflect that he "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). This Court reviews a trial court's scoring of a sentencing guidelines variable for an abuse of discretion. *People v Endres (On Remand)*, 269 Mich App 414, 417; 269 NW2d 398 (2006). Scoring decisions for which there is any evidence in support will be upheld. *Id.*

MCL 777.49(c) requires that a defendant be scored at 10 points for OV 19 if the "offender otherwise interfered with or attempted to interfere with the administration of justice." Our Supreme Court has previously held that OV 19 has a broad application, and "interference, or attempted interference, with the administration of justice" includes those acts that constitute an "obstruction of justice." *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004). Conduct that occurred after a defendant's sentencing offense was completed may be considered when scoring OV 19. *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010).

It is uncontroverted that defendant concealed himself in Vandenbosch's apartment after the first-degree home invasion was completed in an effort to evade discovery and arrest. Defendant remained in the apartment and did not turn himself in even though he could see police officers looking for him pursuant to their active investigation of the larceny of Palmer's property. Our Supreme Court has previously held that interfering with a police officer's attempt to investigate a crime constitutes interference with the administration of justice and justifies scoring OV 19 at 10 points. *Barbee*, 470 Mich at 288. We find that defendant interfered with law enforcement's attempt to investigate the larceny when he concealed himself in Vandenbosch's apartment and did not turn himself into the police even though defendant knew that they were looking for him. Accordingly, this evidence supports that defendant interfered with the administration of justice. *Id.*

Additionally, we note that defendant argues that the application of OV 19 is too broad because evasive and uncooperative behavior occurs in almost every criminal case. In making this argument, defendant relies on *People v Deline*, 254 Mich App 595, 597-598; 658 NW2d 164 (2003). Defendant's argument is without merit because *Deline* was overruled by our Supreme Court in *Barbee*, which interpreted OV 19 to have a broad application. *Barbee*, 470 Mich at 283, 286. Accordingly, we find that the record supports that defendant interfered with the administration of justice and that the trial court did not abuse its discretion when it scored OV 19 at 10 points. *Endres*, 269 Mich App at 417.

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ Deborah A. Servitto