STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MONTY JAMES ALLORE,

Defendant-Appellant.

UNPUBLISHED
June 28, 1996

No. 174480
LC No. 93025685 FH

Before: Wahls, P.J., and Young and Beach,* JJ.

PER CURIAM.

A jury convicted defendant of attempted breaking and entering, MCL 750.110; MSA 28.305; MCL 750.92; MSA 28.287, and defendant pleaded guilty to being a second felony habitual offender, MCL 769.10; MSA 28.1082.[1] The court sentenced him to a prison term of eighteen months to seven-and-a-half years. Defendant appeals as of right. We affirm.

Defendant first contends that he was denied the effective assistance of counsel because trial counsel failed to move to suppress the statement defendant made to the police and failed to object to the admissibility of an extrajudicial statement. To establish ineffective assistance of counsel, defendant must: (1) show that counsel's error was serious under an objective standard of reasonableness; (2) show that the deficient performance prejudiced the defense so that the error

may have affected the outcome; and (3) overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Hurst*, 205 Mich App 634, 640-641; 517 NW2d 858 (1994).

Defense counsel testified at his *Ginther*[2] hearing that he concluded that defendant's statement to the police was voluntary. Similarly, he did not file a motion to suppress defendant's statement to his parole officer because the district court found that the communication was not privileged. Because we agree that counsel made a reasoned strategy decision that moving to suppress the statements would be

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* Circuit judge, sitting on the Court of Appeals by assignment.

futile, we conclude that defendant's counsel was not ineffective. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant next argues that the trial court had a *sua sponte* duty to conduct a *Walker*[3] hearing on the voluntariness of his statement to the police. On this record, we disagree with defendant's claim. If the factual circumstances of a confession clearly and substantially raise a question regarding the voluntariness of a confession, or implicates other due process concerns, the trial court has a *sua sponte* duty to inquire into the issue. *People v Ray*, 431 Mich 260, 269, 271; 430 NW2d 626 (1988). Alerting circumstances may include a defendant's mental, emotional or physical condition, evidence of police threats, or other obvious forms of physical or mental duress. *Id.* at 271.

Here, there were no alerting circumstances indicating that defendant's statement was involuntary. While voluntary intoxication from alcohol can affect the validity of a waiver of Fifth Amendment rights, such is not dispositive. *People v Leighty*, 161 Mich App 565, 571; 477 NW2d 778 (1987). The testimony at trial revealed that defendant understood his actions, could carry on a conversation, and could easily be understood. Thus, the trial court did not have a *sua sponte* duty to conduct a *Walker* hearing. *Ray*, *supra* at 269, 271.

Defendant also contends that there was insufficient evidence to support his conviction. In reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Williams*, 212 Mich App 607, 608; 538 NW2d 89 (1995). We conclude that there was sufficient evidence to support the jury verdict. Defendant attempted to sell the tools at his home to a neighbor. The neighbor recalled seeing defendant near the rental home earlier in the day and surmised that the tools belonged to the complainant. The neighbor told defendant that he knew where defendant got the tools. A short time later, when the police, the complainant, and the neighbor investigated the rental home, there was evidence of a forced entry, and the tools were dumped in an area other than the place that complainant recalled leaving them. The neighbor identified the tools as the same tools he observed in defendant's possession. Hence, there was sufficient evidence to support defendant's conviction of attempted breaking and entering.

Defendant further argues that the trial court erred in denying his motion for directed verdict because the prosecution failed to prove the corpus delicti by evidence other than defendant's statements. We reject defendant's argument. The corpus delicti rule is designed to prevent the use of a defendant's confession to convict him of a crime which did not occur. *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995). A defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing: (1) the occurrence of the specific injury, and (2) some criminal agency as the source of the injury. *Id.* at 269-270; *People v Hayden*, 205 Mich App 412, 413; 522 NW2d 336 (1994).

Here, other evidence established that defendant broke into complainant's rental home to steal his carpentry tools. Defendant's neighbor testified that he observed defendant with the complainant's tools in his possession. When complainant arrived at his rental home after hearing that his tools may be missing, he found that the home had been broken into and his tools were in a different location. The neighbor confirmed that those tools were in defendant's possession earlier in the day. Thus, because the corpus delicti was proven without reference to defendant's statement, the trial court properly denied defendant's motion for directed verdict.

Lastly, defendant's argument that his conviction was against the great weight of evidence has not been preserved for appellate review. *People v Johnson*, 168 Mich App 581, 585; 425 NW2d 187 (1988). We decline to address it.

Affirmed.

/s/ Myron H. Wahls
/s/ Robert P. Young, Jr.
/s/ Harry A. Beach

[1] Defendant was originally charged with breaking and entering with intent to commit larceny. MCL 750.110; MSA 28.305.
[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).
[3] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).