STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL CRITTLE,

Defendant-Appellant.

UNPUBLISHED
February 28, 1997

No. 175023
Detroit Recorder's Court
LC No. 93-004166

Before: Gribbs, P.J., and Holbrook, Jr., and Martlew,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of breaking and entering an occupied dwelling with the intent to commit malicious destruction of property over $100.00, MCL 750.110; MSA 28.305. Defendant appeals as of right. We affirm.

Defendant was arrested in connection with a robbery which occurred at the home of Shirley Bowman. Defendant was Bowman's ex-boyfriend. Bowman's house was vandalized and a television set and VCR were stolen.

On appeal, defendant contends that the trial judge erred in relying on extraneous evidence in determining his guilt. A judge in a bench trial must arrive at his or her decision based upon the evidence presented in the case. The judge may not go outside the record in determining the guilt of the accused. *People v Simon*, 189 Mich App 565, 568; 473 NW2d 785 (1991); 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 630, p 285. When the trier of fact relies on extraneous evidence, the defendant is denied his constitutional right to confront all of the witnesses against him, and to have all of the evidence against him placed on the record at trial. *People v Ramsey*, 385 Mich 221, 224-225; 187 NW2d 887 (1971).

Although factfinders may and should use their own common sense and everyday experience in evaluating evidence, *Simon*, *supra*, 189 Mich App 567, the trial judge in this case based his theory of

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

the case, in part, on the fact that he himself had been a robbery victim. Nevertheless, even assuming arguendo that the trial court relied on specialized knowledge, defendant is not entitled to a new trial on this basis. Where the trier of fact is exposed to extraneous evidence, the error may be harmless if the other evidence introduced at trial was overwhelming. See *People v Spearman*, 195 Mich App 434, 442; 491 NW2d 606 (1992), modified 443 Mich 870; 504 NW2d 185 (1993). Here, Michael Bowman testified that he saw defendant running out of his backyard with a television set in his hands. Cleo McDougle testified that he saw a bald man running from Michael's backyard carrying a television set. Defendant was bald. Shirley Bowman asked defendant whether he broke into her house. Defendant allegedly replied "So what if I did, bitch." We find that the evidence against defendant was overwhelming. Therefore, any error was harmless beyond a reasonable doubt.

Next, defendant contends that he was denied the effective assistance of counsel. The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art I, sec 20, is the right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039, 2044; 80 L Ed 2d 657, 664 (1984). To establish a denial of effective assistance, the defendant must prove that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant's motion for an evidentiary hearing regarding this issue was denied, this Court's review is limited to the record. *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991).

Defendant argues that his trial counsel was ineffective in failing to call certain witnesses to testify at trial, including his sisters Debra and Cassandra Lewis. The failure to call witnesses can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 711; 538 NW2d 465 (1995). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). In the instant case, there is nothing in the record to suggest that the witnesses referred to by defendant could have provided exculpatory testimony. Absent such evidence, defendant has failed to establish ineffective assistance on this basis.

Moreover, the decision whether to call witnesses is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must overcome the presumption that counsel's assistance constituted sound trial strategy. *Stanaway*, *supra*, 446 Mich 687. This was defendant's second trial. Defendant was represented by Eric S. Handy, the same attorney who won a new trial for defendant on this basis. As a result of his prior involvement with this case, Handy was obviously aware of the witnesses referred to by defendant on appeal. Under these circumstances, we find that defendant has failed to overcome the presumption that counsel's strategy was sound.

Defendant next contends that his trial counsel was ineffective in failing to present evidence showing that he was physically unable to commit the robbery. In addition, defendant argues that his trial counsel should have sought to prove that the Bowmans had a motive to lie. We disagree. Defendant's first trial resulted in a conviction despite the fact that such evidence was presented. Thus, it is unlikely

that trial counsel's assistance at the second trial deprived defendant of a substantial defense. Furthermore, there is nothing in the record which would suggest that counsel's trial strategy was improper. Accordingly, reversal is not warranted on this basis.

Finally, defendant contends that he is entitled to be resentenced because the trial court relied upon a presentence report which was not reasonably updated. There is no merit to this issue. A reasonably updated presentence report is required if a defendant is resentenced. *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980). In this case, an initial presentence report was prepared on November 1, 1993, after defendant's first trial. Defendant was subsequently granted a new trial, and was convicted in the instant case on April 26, 1994. A new report was prepared on May 13, 1994. Defendant is not entitled to resentencing.

Affirmed.

/s/ Roman S. Gribbs
/s/ Donald E. Holbrook, Jr.
/s/ Jeffrey L. Martlew