

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK Z. HOAG,

Defendant-Appellant.

UNPUBLISHED

March 24, 1998

No. 182196

Recorder's Court

LC No. 94-001962

Before: Markman, P.J., and McDonald and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of entering without breaking, MCL 750.111; MSA 28.306. The trial court sentenced defendant to ten to twenty years' imprisonment as a fourth habitual offender, MCL 769.12; MSA 28.1084. We reverse and remand for a new trial.

Defendant raises several claims of error; however, we find one to be dispositive. Defendant claims that he was denied the effective assistance of counsel at trial, and we agree.

A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121 (1995).

Defendant maintains that defense counsel's performance was deficient because counsel failed to discover that the complainant did not have a legal interest in the property. Prior to trial, defense counsel conducted a title search of the property located at 6303 McGraw. However, the property at issue is located at 6503 McGraw. Subsequently, it was determined that the complainant's sons had purchased the property on a land contract, but that in January 1993, a State Treasurer Deed was issued on the property for nonpayment of taxes. The incident at issue occurred in February 1994. Therefore, at the time of the incident, the complainant did not have a legal possessory interest in the property to assert.

Defendant was originally charged with breaking and entering, MCL 750.110; MSA 28.305. A defendant who has the right to enter a building does not commit a breaking and entering in entering the building. *People v Brownfield (After Remand)*, 216 Mich App 429, 432; 548 NW2d 248 (1996). Therefore, if defendant had permission to be in the building, he could not have committed the crime of breaking and entering. The complainant essentially testified that defendant did not have permission to be in the building. Thus, whether the complainant was a person who could give such consent, or who was knowledgeable as to whether consent had been given by the lawful owner, was a proper subject for the jury's consideration.¹

Defense counsel's lack of preparation constitutes ineffective assistance of counsel where a proper investigation would have revealed information to benefit the defendant. See *People v Cabellero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). In the instant case, defense counsel's failure to ascertain the ownership of the building in question resulted in ignorance of information that could have aided the defense. A reasonable probability exists that, had the jury been aware that neither the complainant nor his sons owned the building, the outcome of the proceedings would have been different. See *Pickens, supra*. In the alternative, if defense counsel had prepared more carefully, the defense's theory of the case might have changed and thereby altered the outcome. Accordingly, we reverse defendant's conviction and remand for a new trial.

We note that, in determining that counsel's performance was not deficient, the trial court misinterpreted the entering without breaking statute. At the time of the offense, the statute provided:

Any person who, without breaking, shall enter any dwelling, house, tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, boat, ship, railroad car or structure used or kept for public or private use, or any private apartment therein, with intent to commit a felony or any larceny therein, shall be guilty of a felony punishable by imprisonment in the state prison not more than 5 years, or fined not more than \$2,500.00. [MCL 750.111; MSA 28.306.]

Contrary to the trial court's interpretation, the statute, by its plain terms, does not protect a business entity, but rather the building where the business entity is located. See generally *People v Jacques*, 456 Mich 352, 356; ___ NW2d ___ (1998).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ Mark J. Cavanagh

¹ We agree with our dissenting colleague that lack of permission to enter the building is not an element of the offense. However, under the circumstances, we cannot conclude that the evidence that the complainant did not give defendant permission to enter the building was immaterial. If defense counsel had done his homework, the defense theory of the case likely would have been altered.