STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARNEY LEE BROOKS,

Defendant-Appellant.

UNPUBLISHED
February 14, 2003

No. 234450
Kalamazoo Circuit Court
LC No. 00-000357-FH

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of burglar's tools, MCL 750.116, and attempt to enter a coin-receiving device with intent to steal, MCL 752.811. He appeals as of right. We affirm.

This appeal arises from an incident at the Arcadia Commons at Kalamazoo Community College where a coffee machine had been partially pried open. Charles Pratt, a custodian/security guard at the Commons, observed defendant standing in the entrance to the vending machine area with a hammer under his arm and further observed pry marks on the coffee machine. Defendant was arrested two days later with the hammer in his possession.

The sole issue on appeal is whether defendant's trial counsel rendered ineffective assistance of counsel for allegedly failing to impeach Charles Pratt, the prosecution's key witness, with a previous statement he made regarding the pry marks he observed on the coffee machine. To establish ineffective assistance of counsel under the federal and state constitutions, a defendant must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that the representation so prejudiced the defendant as to deprive him of a fair trial. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

There is no merit to this claim. Contrary to defendant's claim, his trial counsel did not fail to question Pratt about his previous testimony that the marks on the coffee machine could be consistent with many other tools [other than defendant's hammer]. At the preliminary hearing, defense counsel asked Pratt if the marks on the coffee machine "could be consistent with a lot of different tools?" In response, Pratt testified at the preliminary hearing that the marks "could be consistent with a lot of different tools." At trial, defense counsel asked Pratt if "other tools are

used that can make pry marks?" Similar to his previous testimony, Pratt admitted at trial that "You can use anything to make a pry mark."

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio