

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 15, 2014

v

RALPH DAVID JACKWAY,

Defendant-Appellant.

No. 313703
Lapeer Circuit Court
LC No. 12-011003-FH

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second-degree home invasion, MCL 750.110a(3), and unlawfully driving away an automobile (UDAA), MCL 750.413. We affirm, but remand for the ministerial task of correcting defendant's sentencing guidelines score.

This case arises out of the break-in of Mark and Mary Becker's home and the theft of Herbert Cornette's pickup truck. The truck was found stuck in a snow bank near the Beckers' home, and police later found defendant in possession of the Beckers' jewelry and camcorder.

Defendant first argues that his convictions must be vacated and the case dismissed because the 180-day rule was violated. After de novo review, we disagree. See *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

The statute codifying the 180-day rule, MCL 780.131(1), provides in part:

Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.

MCL 780.133 addresses the failure to comply with MCL 780.131(1):

In the event that, within the time limitation set forth in [MCL 780.131], action is not commenced on the matter for which request for disposition was made, no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

However, if the prosecutor acts in good faith well within the period and proceeds promptly toward readying the case for trial, the requirement that action be commenced within 180 days of notice is satisfied unless the prosecutor's initial conduct is followed by inexcusable delay and an evident intent to not proceed promptly. *People v Lown*, 488 Mich 242, 256-258; 794 NW2d 9 (2011), quoting *People v Hendershot*, 357 Mich 300, 303-304; 98 NW2d 568 (1959). This Court has previously held that the prosecution can show that it made good-faith efforts in promptly readying the case for trial when the arraignment and preliminary examination occur within the 180-day period and there is no indication that it delayed the start of trial in bad faith. *People v Davis*, 283 Mich App 737, 743-744; 769 NW2d 278 (2009).

Although trial began after the 180-day period, the preliminary examination concluded 97 days after the prosecution received notice of defendant's imprisonment and defendant was arraigned approximately two weeks later. Then defendant's original attorney withdrew from the case after a breakdown of their relationship, which required the appointment of substitute counsel. In any case, after review of the entire record, we conclude that the 180-day rule was not violated because the prosecution made good-faith efforts to proceed promptly with readying the case for trial and the record does not demonstrate that the delay "was inexcusable or demonstrated an intent not to promptly bring the case to trial." *Id.* at 743. Consequently, this claim is without merit.

Next, defendant argues that there was insufficient evidence to support his second-degree home invasion conviction. We disagree.

We review de novo sufficiency of evidence issues. *People v Osby*, 291 Mich App 412, 415; 804 NW2d 903 (2011). A court "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crimes were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (citation omitted). "We do not interfere with the jury's assessment of the weight and credibility of witnesses or the evidence . . . and the elements of an offense may be established on the basis of circumstantial evidence and reasonable inferences from the evidence." *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013) (citations omitted).

Defendant argues that the evidence was insufficient to establish that he was the person who broke into the Beckers' home. Identity is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence for a rational juror to find beyond a reasonable doubt that defendant committed the crime. Christine Roberts, defendant's then girlfriend, testified that defendant admitted to her that he broke into a home and stole property. She also

saw him possess this property. Police officers found some of the stolen property in defendant's home. And defendant admitted at trial that he possessed the stolen property. He also admitted to Roberts that he had Cornette's truck and footprints in the snow led from the truck to the Beckers' home. Accordingly, this issue is without merit.

Defendant also challenges the sufficiency of the evidence with regard to his UDAA conviction. This argument is also without merit.

The UDAA statute, MCL 750.413, provides:

Any person who shall, wilfully and without authority, take possession of and drive or take away, and any person who shall assist in or be a party to such taking possession, driving or taking away of any motor vehicle, belonging to another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years.

The crime of UDAA "requires the defendant to take possession of the motor vehicle without the owner's permission." *People v Hayward*, 127 Mich App 50, 61; 338 NW2d 549 (1983). In relevant part, MCL 257.37 defines the "owner" of a motor vehicle as any of the following:

- (a) Any person, firm, association, or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period that is greater than 30 days.
- b) Except as otherwise provided in section 401a, a person who holds the legal title of a vehicle.

Defendant argues that there was insufficient evidence showing that he took the truck without the owner's permission because Cornette did not hold legal title to the truck. However, MCL 257.37(a) provides that an individual who has exclusive use of a motor vehicle for more than 30 days is considered an "owner" of that vehicle. The facts, viewed in a light most favorable to the prosecution, were sufficient for a rational juror to find that Cornette exclusively used the truck for more than 30 days. That is, Cornette's actions of purchasing the truck, installing a new motor in it, keeping it on his property for six months, deciding to sell it after the crime, and then receiving the proceeds of its sale, permitted the jury to reasonably infer that he exclusively used the truck for more than 30 days.

Further, there was sufficient evidence for a rational juror to find that the other elements of UDAA were proven beyond a reasonable doubt. It is undisputed that Cornette never granted defendant permission to use the truck on the night at issue. Roberts testified that defendant admitted to her that he had Cornette's truck. Testimony established that defendant called an acquaintance on the night of the crime and asked for help because he was "stuck." The area where the truck was found, and the truck itself, visibly showed that it was stuck. Moreover, the evidence connecting defendant to the home invasion supported that he drove the truck. Accordingly, there was sufficient evidence for a rational juror to convict defendant of UDAA.

Next, defendant argues that the trial court erroneously scored 20 points for prior record variable (PRV) 7. The prosecution concedes that PRV 7 should have been scored at 10 points, and we agree. Although correction of this error does not change defendant's recommended minimum sentence range under the legislative guidelines, we remand this matter for correction of defendant's sentencing guidelines score. See *People v Melton*, 271 Mich App 590, 593; 722 NW2d 698 (2006), superseded by statute on other grounds MCL 777.39.

Finally, in his Standard 4 brief, defendant argues that he did not receive the effective assistance of counsel. We disagree. Because this Court previously denied defendant's request for a *Ginther*¹ hearing, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

"To prevail on a claim of ineffective assistance of counsel, defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable." *People v Bryan Brown*, 294 Mich App 377, 387-388; 811 NW2d 531 (2011). "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (citation omitted).

Defendant first asserts that his counsel was ineffective for failing to call Christa Robbins as an alibi witness. Defendant claims that Christa would have provided the actual dates and times that he was at the home of her mother, Kimberly Robbins, who had testified that defendant was never away from her for more than a few hours. However, defendant has failed to establish that he was denied a substantial defense, i.e., a defense that might have made a difference in the trial's outcome. See *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Decisions regarding what witnesses to present are matters of trial strategy that we do not second-guess on appeal and there is nothing in the record that would support defendant's claim of favorable testimony. See *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Next, defendant asserts that his counsel was ineffective because he failed to effectively confront the witnesses against him through cross-examination regarding material facts. In particular, defendant claims that his counsel should have questioned Kimberly Robbins "as to exact times when [he] was with [her] between December 2010 and May 2011" and counsel should have questioned "police officer witnesses on critical matters after the prosecution had questioned them." However, "[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). We will not second-guess counsel on matters of trial strategy or assess counsel's competence with the benefit of hindsight. *Rockey*,

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

237 Mich App at 76. And, in this case, defendant presents no facts that rebut the presumption that counsel's decisions were sound trial strategy.

Finally, defendant argues that his counsel was ineffective because he failed to have adequate contact with him before trial. However, the record demonstrates that counsel was present and assisted defendant during the pretrial proceedings, as well as the trial proceedings. Because defendant is unable to establish that counsel was absent during a critical stage, no presumption of prejudice arises. See *People v Vaughn*, 491 Mich 642, 671; 821 NW2d 288 (2012). In summary, defendant has not established that he was denied the effective assistance of counsel.

Affirmed, but remanded for the ministerial task of correcting defendant's sentencing guidelines score. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen