

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM KEITH CLARK,

Defendant-Appellant.

UNPUBLISHED

September 28, 2006

No. 262690

Oakland Circuit Court

LC No. 2005-200221-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of third-degree home invasion, MCL 750.110a(4). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal is that trial counsel was ineffective for failing to request an instruction on the defense of duress. Defendant preserved this issue by moving for a new trial below, but because the trial court did not conduct an evidentiary hearing, review is limited to the facts apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To prevail on a claim of ineffective assistance of counsel, a defendant must prove both that his counsel's performance fell below an objective standard of reasonableness, and that the poor representation so prejudiced defendant as to deprive him of a fair trial. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003) (citations omitted). To prove prejudice, defendant must show there was a reasonable probability that the outcome of the trial would have been different but for counsel's error. *Id.* Counsel's conduct is presumed to be "within a wide range of reasonable professional assistance." *Id.*

We find that defense counsel's failure to request a jury instruction on the defense of duress clearly fails to meet this high burden.

The defense of duress must fail ". . . if there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm . . ." *United States v Bailey*, 444 US 394, 410; 100 S Ct 624; 62 L Ed 2d 575 (1980).

Here, defendant claimed that he broke into the marital home in violation of a bond condition because he was concerned about freezing to death and had nowhere else to go. However, the danger created by exposure to the weather was clearly not imminent or impending. Before breaking into the home, defendant stood outside his workplace for 30 to 40 minutes and then walked approximately four miles to his house, during which time he remained conscious and alert. Further, entering his home was not his only alternative to staying outside in the cold. We find that the trial court correctly determined that the defense was not applicable and, accordingly, counsel's failure to request an instruction on duress was not ineffective assistance. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper