

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL EUGENE STEWART, a/k/a
MICHAEL D. STEWART,

Defendant-Appellant.

UNPUBLISHED

May 25, 2001

No. 217286

Genesee Circuit Court

LC No. 98-002473-FH

Before: Neff, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant was charged with three counts of second-degree home invasion, MCL 750.110a(3); MSA 28.305(a), and one count of conspiracy to commit second-degree home invasion, MCL 750.157a; MSA 28.354(1). He was convicted of one count of second-degree home invasion and sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a prison term of 7 ½ to fifteen years. He appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion when it allowed the prosecutor to introduce evidence that defendant was on a tether at the time of the charged crimes. We disagree. The prosecutor's theory of the case was that, while defendant did not accompany his three teenage codefendants to the scene of the crime and directly participate, he encouraged the commission of the charged crimes as an aider and abettor. The prosecutor found it necessary, as a central theme of the case, to argue that defendant's lack of direct participation at the crime scene was prompted by the fact that he could not leave his home because he was on a tether. The trial court agreed that the evidence was relevant and that its probative value was not substantially outweighed by the danger of unfair prejudice.

We agree that the evidence was relevant and admissible. MRE 401; MRE 402. Defendant was tried on a charge of second-degree home invasion under an aiding and abetting theory.

[T]he elements of home invasion include either (1) breaking and entering a dwelling with the intent to commit a felony or larceny in the dwelling or (2) entering a dwelling without permission with the intent to commit a felony or larceny in the dwelling. [*People v Warren*, 228 Mich App 336, 347-348; 578

NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000); MCL 750.110a(3); MSA 28.305(a)(3).]

In addition,

"[a]iding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime.... To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. [*People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999) (citations omitted).]

The prosecutor had the burden of proving that defendant intended the commission of the charged crimes, which required proof that defendant intended the entry of the victim's home for the purpose of committing a larceny. Necessary to this proof was proof of defendant's state of mind with regard to the crimes. An explanation about why defendant did not directly participate but encouraged the commission of the crime was necessary and appropriate under the circumstances. The prosecution was entitled to admit evidence about the extent of defendant's participation and his intent and to admit evidence to rebut possible defenses, including a defense that defendant did not have the requisite state of mind or he would have gone to the crime scene himself. In addition to the evidence being highly relevant of defendant's state of mind and his intent, which were issues of consequence, the evidence explained the full context of the situation for the jury. It is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which the disputed events took place. The more the jurors know about the full transaction, the better equipped they are to perform their sworn duty. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996).

We also reject defendant's contention that the evidence was unfairly prejudicial, i.e. that the jurors would weigh the evidence out of proportion to its obviously damaging effect or that it was given undue weight by the jury. See *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). The manner in which the evidence was admitted kept prejudice at a minimum and there was no other means for the prosecutor to rebut any argument or inference that defendant had no "intent" because he did not go to the crime scene himself.

Defendant next argues that the trial court improperly refused to give an alibi instruction. We disagree. Alibi testimony is testimony offered for the purpose of placing defendant elsewhere than at the scene of the crime. *People v Mott*, 140 Mich App 289, 292; 364 NW2d 696 (1985). Where no alibi defense is raised, it is proper for a trial court to refuse to issue an alibi instruction. *Id.* at 293. Here, by defendant's own admission, he did not raise an alibi defense. Moreover, our review of the trial record does not support defendant's claim that the

prosecution pursued an alibi defense on defendant's behalf. Further, defendant was charged as an aider and abettor. His presence at the crime scene was therefore not required for conviction. Thus, alibi was not an issue in the case and defendant was not entitled to the instruction. *People v Matthews*, 163 Mich App 244, 247-248; 413 NW2d 755 (1987).

Defendant next argues that the prosecutor engaged in misconduct by arguing to the jury that he "claimed an alibi defense." This argument has no merit because the record does not support that the prosecutor made the challenged argument or that he created an "imaginary defense." Rather, in keeping to his theory of the case, the prosecutor argued that defendant had the requisite state of mind to commit the crimes even though he did not go to the crime scene. As part of the theory, the prosecutor explained that defendant's intent was such that he did not think he would be caught given his circumstances. Defendant believed that he could participate without any risks because his tether would prove that he never left his house. The argument presented was that defendant thought he had an alibi and this motivated his participation.

Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000) (citations omitted).]

The evidence at trial supported the prosecutor's theory of the case. There was evidence that defendant encouraged and instructed the teenagers with regard to the home invasions, that defendant shared in the proceeds, and that defendant was in a situation that minimized his risks because he was unable to directly participate. The prosecutor's argument was appropriate and was based on the evidence and reasonable inferences. There was no misconduct and thus, failure to review this unpreserved issue will not result in a miscarriage of justice.

Defendant next asserts that the evidence was insufficient to support the second-degree home invasion conviction. We disagree. When reviewing the sufficiency of the evidence in a criminal case, we are required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

Defendant first argues that there was insufficient evidence that he aided and abetted. In this case, defendant was convicted of the second count of the criminal complaint, which involved the second home invasion at the victim's home. With regard to the second home invasion, there was sufficient evidence that defendant performed acts and gave encouragement to the principles and that defendant intended for the crime to be committed. One teenage codefendant testified that, after the initial break into the victim's home and theft of a Nintendo game, the teenagers returned to defendant's location. They showed defendant what they took. Defendant chided them for not taking more items. The teenagers, at defendant's suggestion, decided to return to the victim's home to steal more items. They asked defendant for keys to the car and, he obliged. Thereafter, they returned to the victim's home, entered a second time, and stole more items. They subsequently returned to defendant's location and showed him the items. Defendant again

chided them and told them to take “everything” when they went back. Through his statements and suggestions, defendant encouraged the second home invasion and he facilitated it by giving the car keys to his codefendant, knowing full well that the teenagers were going back to the victim’s home to enter and steal more items. Thus, viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to prove that defendant aided and abetted the second count of second-degree home invasion.

Defendant also argues that there was insufficient evidence to establish the “breaking” element for the second count of second-degree home invasion. However, second-degree home invasion can be proved either with evidence of a “breaking and entering” or with evidence of entry without permission. *Warren, supra* at 347-348. The former offense of breaking and entry, unlike the current offense of home invasion, required evidence of “breaking and entering.” *Id.* This is no longer the case. And, at trial, the evidence established that the teenagers entered the house without permission the second time and removed more items. This evidence was sufficient to support the conviction on the second count of second-degree home invasion.

Defendant also argues that the trial court did not properly instruct the jury because it only instructed the jury on home invasion by breaking and entering and not on home invasion by entry without permission. Defendant did not preserve this issue because he did not request the instruction about which he now complains. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997). Claims of unpreserved error are reviewed under the plain error rule. *Carines, supra* at 763-764.

The trial court’s instruction for second-degree home invasion on a breaking and entry theory was modeled after CJI2d 25.2b. The trial court did not, however, instruct on the alternate theory for second-degree home invasion, that being entry without permission. See CJI2d 25.2d. The instruction on the theory of entry without permission pertained to a basic and controlling issue in the case and should have been given. *People v Joseph*, 237 Mich App 18, 25; 601 NW2d 882 (1999). Nevertheless, we find that reversal is not warranted. Defendant was not prejudiced by the trial court’s failure to give the instruction. Defendant admits on appeal that the evidence supports the element of entry without permission. Given that the other elements of second-degree home invasion were also satisfied by the evidence, it is impossible for defendant to demonstrate that the error at issue affected his substantial rights. *Carines, supra*.

Defendant next contends that the trial court erred by ordering restitution for the full amount of the victim’s losses even though defendant was convicted of only one of the four counts for which he stood trial. Defendant’s argument has no merit. MCL 780.766(2); MSA 28.1287(766)(2) and MCL 769.1a(2); MSA 28.1073(2) permit a trial court to order a defendant to compensate a victim for all losses attributable to the “illegal scheme that culminated in” the defendant’s conviction, even if some of the losses “were not the factual foundation of the charge that resulted in the conviction.” *People v Gahan*, 456 Mich 264, 271-272; 571 NW2d 503 (1997); *People v Greenberg*, 176 Mich App 296; 439 NW2d 336 (1989). Restitution may be ordered for related crimes that have not resulted in conviction. *People v Letts*, 207 Mich App 479; 525 NW2d 171 (1994). In this case, there was evidence to support that defendant was culpable for the entire criminal episode that resulted in the total loss to the victim. The order of restitution was therefore proper. In making our ruling we note that defendant’s reliance on

People v Blaney, 139 Mich App 694; 363 NW2d 13 (1984) is misplaced because *Blaney* was decided before the effective date of the statutes that are controlling in this case.

Finally, defendant argues that his counsel was ineffective for several reasons. In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant has to overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Moreover, defense counsel is not required to make frivolous or meritless motions, *People v Darden*, 230 Mich App 597, 604-605; 585 NW2d 27 (1998), or objections, *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant first complains that his counsel was ineffective for failing to request an instruction on misdemeanor receiving or concealing stolen property. After the evidentiary hearing, the trial court disagreed, finding that even if the instruction was requested, it would not have been given.

The decision to request or refrain from requesting lesser offense instructions is often a matter of trial strategy. *People v Robinson*, 154 Mich App 92, 93; 397 NW2d 229 (1986); *People v Armstrong*, 124 Mich App 766, 769; 335 NW2d 687 (1983). This Court presumes that a challenged action might be considered sound trial strategy that will not be second-guessed. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *Id.* at 332.

In this case, having reviewed the entire record and the trial court's well reasoned opinion on this issue, we find that defendant's trial counsel was not ineffective for failing to request the misdemeanor instruction. The record indicates that counsel did not request the misdemeanor instruction because he did not believe that it would be given on the facts of the case. Further, the trial court clearly articulated that it would not have given the instruction under the circumstances. Defendant therefore has not met his burden of demonstrating ineffective assistance of counsel with regard to the misdemeanor instruction.

Defendant next argues that his counsel was ineffective for failing to request an instruction on second-degree home invasion, entry without permission. We disagree. As noted above, the failure to request the instruction did not prejudice defendant or affect the outcome of his trial. Defendant admits that the evidence indicated that there was an entry without permission the second time the teenagers went to the house to steal more items. Entry without permission is an alternative theory for conviction of second-degree home invasion and the penalty is the same. *Warren, supra* at 347-348; See MCL 750.110a(3); MSA 28.305(a)(3). It is not a lesser offense, contrary to defendant's argument on appeal. Thus, there is no reasonable probability that the

result would have been different if instruction on the alternative theory of entry without permission was given to the jury. *Stanaway, supra*.

Defendant also argues that counsel was ineffective for not challenging his obligation to pay restitution in the entire amount of the victim's loss. As discussed above, the restitution order was proper. Counsel was not required to make a frivolous or meritless motion, *Darden, supra*, or objection, *Torres, supra*. Here, a motion or objection would have been frivolous in light of the prevailing law and the circumstances.

Finally, defendant argues that his counsel was ineffective for failing to call his fiancé, the mother of one of the codefendants, as a witness. After the evidentiary hearing, the trial court rejected defendant's claim that counsel was ineffective with regard to the witness. We agree with the trial court's reasoning. The decision to call certain witnesses is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *Id.* In this case, defendant cannot make the requisite showing with regard to the witness at issue. It was clear that trial counsel considered calling the witness and consciously chose not to do so because he believed her testimony was peripheral to the main issue in the case and because, given her attitude and relationship to the case, she might not be perceived as credible and could damage the defense. Also, the record demonstrates that the witness' testimony was cumulative of some of her son's testimony. Moreover, her testimony did not affect the central issue of whether defendant aided or abetted the home invasions. Given the strong reservations that counsel had with regard to the witness' attitude and credibility, we will not second guess counsel's trial decision not to call her. Defendant has not demonstrated that his counsel's performance fell below an objective standard of reasonableness or that, without the challenged error, the result of the trial would have been different.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey