

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON KELLY RIVNACK,

Defendant-Appellant.

UNPUBLISHED

October 9, 2012

No. 304705

Mason Circuit Court

LC No. 10-002350-FC

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, and two counts of possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. For the reasons set forth in this opinion, we affirm.

I. FACTS

On October 29, 2010, the victim, Martin Schilling, returned home to find a blue car with a single occupant in his driveway. Schilling approached the vehicle, and the man inside the car told him that “Aaron” was at the front door looking for the Schilling’s son. Schilling did not find anyone at the front door, but he did notice that a door at the far end of the entryway was opened. He entered the home and loaded a shotgun and began looking through the home. Schilling telephoned 911 and told the operator that he suspected his home had been broken into and items had been removed. While on the telephone with the 911 operator, Schilling opened a metal cabinet where he kept a pistol and noticed the pistol was missing. Schilling informed the 911 operator that his pistol was missing and the 911 operator advised Schilling to get in his car in case someone was still in his home. Schilling complied. When he returned to his vehicle, he noticed that the blue vehicle had driven away. Schilling started driving in the direction he saw the blue car travelling. When Schilling returned to his home a few minutes later, the blue car was back in his driveway, this time with two occupants. The passenger, later identified as defendant, approached Schilling and said that he was looking for Schilling’s son because he owed him money. Schilling again called 911 and followed the blue car for a second time after it

left his home, providing instructions to a 911 operator as to the location of the vehicle. A Mason County Sheriff's Deputy, Shayne Eskew, stopped the vehicle. Eskew testified that defendant was in the passenger seat with his uncle, Donald Knowles, driving.¹

Knowles was wearing a gray sweatshirt and gray sweatpants and defendant was wearing a black, long sleeve shirt with blue jeans. After receiving consent from Knowles to search the car, Eskew was unable to find Schilling's missing pistol. A subsequent search of the car that was conducted after a warrant was obtained, yielded a Michigan hat and a watch belonging to Schilling's son.

Mason County Sherriff's Department Detective Michael Kenney approached Schilling shortly after he arrived at the scene of the traffic stop. According to Kenney, Schilling indicated that he had a "trail camera" at his residence which may have captured images of the suspects, so Kenney returned with Schilling to his home to view the trail camera. At trial, Kenney testified that the clothing of the suspects caught by the trail camera matched that of Knowles and defendant.

Kenney then conducted a search of the property surrounding the Schilling's residence. Kenney testified that a set of footprints were found behind the residence that appeared as if someone was running, and in the same direction, a pair of latex gloves was found next to the pond. However, other than a watch that was found in the car that defendant was a passenger, none of the other items Schilling claimed were stolen were recovered.

II. JURY INSTRUCTIONS

On appeal, defendant first contends that he is entitled to have his sentence reduced to second-degree home invasion because the trial court failed to properly instruct the jury on first-degree home invasion. Specifically, defendant contends he is entitled to the relief requested based on the trial court's failure to instruct the jury that it must find beyond a reasonable doubt that defendant was armed with a weapon when he committed the offense of first-degree home invasion.

A defendant must raise an objection in order to preserve an issue for appeal. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003). Defendant concedes that no objection was made, but argues that trial counsel did not expressly approve the jury instructions. However, with the jury present, the trial court asked the prosecutor and defendant if there was anything that may have been "inadvertently said" that they would like covered after the jury instructions were read but before the jury was sent out to deliberate. Defense counsel replied, "I cannot think of anything right now, Your Honor." After the jury retired, the trial court asked the prosecutor if there were "any instructions you had objected to or any that were not used that you had wanted

¹ Donald Knowles was tried separately and is not a party to this appeal.

to be used?” to which the prosecutor responded, “No, Your Honor, Thank you.” The court then queried, “Defense?”, and defense counsel responded:

Defense counsel: I think the only discussion we had, Your Honor, was the possibility of the lesser included offense of Home Invasion Third. And I believe that the decision was not to include it.

The court: All right. And that was a mutual decision?

Defense counsel: I thought so.

Prosecutor: Under enemy pressure, Your Honor.

Thus, the initial question presented to this Court is whether defendant forfeited his claim of instructional error or waived his claim of error. Defendant argues that trial counsel forfeited his claim of error, whereas the prosecutor argues that defendant waived his claim of error. The distinction is important because forfeited claims of instructional error are reviewed for plain error that affect defendant’s substantial rights. *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). However, appellate review of waived assertions of error is precluded. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

In *People v Kowalski*, 489 Mich 488, 504 n27; 803 NW2d 200 (2011), our Supreme Court stated: “Unlike waiver, forfeiture is ‘the failure to make the timely assertion of a right.’” (quotation marks and citation omitted). As in *Kowalski*, trial counsel in this case failed to timely assert an objection, and based on our review of trial counsel’s statements to the trial court regarding this claim of error, we find that defendant has waived any challenge to the jury instructions. *Kowalski*, 489 Mich at 505. However, our analysis of this issue does not end here, as defendant also asserts on appeal that trial counsel rendered ineffective assistance by failing to bring to the trial court’s attention that it omitted an element of first-degree home invasion.

Our Supreme Court has held that the Michigan Constitution guarantees a defendant the same right to counsel as the United States Constitution, and Michigan has adopted the two-part standard for evaluating the effectiveness of counsel set out by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994). First, the defendant must show that counsel’s “representation fell below an objective standard of reasonableness.” *Strickland*, 466 US at 688. Second, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). A trial court’s factual findings are reviewed for clear error, while constitutional law considerations are reviewed de novo. *Id.* To establish a claim of ineffective assistance of counsel, a defendant bears the heavy burden of showing that counsel’s performance was deficient and that he was prejudiced by the deficiency. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). “[A] defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms and there is a

reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

This Court's review is limited to the facts on the record because defendant did not move for a new trial or an evidentiary hearing before the trial court. *People v Wilson*, 242 Mich App 350, 354; 619 NW2d 413 (2000).

After closing arguments, the jury was instructed on the elements of first-degree home invasion:

Under Count One, the Defendant is charged with Home Invasion in the First Degree. To prove this charge, the Prosecutor must prove each of the following elements beyond a reasonable doubt.

First, that the Defendant broke into a dwelling. It does not matter whether anything was actually broke. However, some force must have been used. Opening a door, raising a window, taking off a screen, are all examples of enough force to count as a breaking. Entering a dwelling through an already open door or window without using any force does not count as a breaking.

Second, that the Defendant entered the dwelling. It does not matter whether the Defendant got his entire body inside. If the Defendant put any part of his body into the dwelling after the breaking, that is enough to count as an entry.

Third, that when the Defendant entered, was present in, or was leaving the dwelling, he committed the offense of Larceny.

The definition of Larceny is that the Defendant took someone else's property, that the property was taken without consent, that there was some movement of the property. It does not matter whether the Defendant actually kept the property or whether the property was taken off the premises.

Fourth, that at the time the property was taken, the Defendant intended to permanently deprive the owner of the property.

If you determine that the Defendant had possession of the property in question here and that this property was recently stolen, you may infer that the Defendant committed the theft. However, you do not have to make this inference.

The term "recently stolen property" has no fixed meaning. You should think about what kind of property it was, how hard it was to transfer, and all of the other circumstances in deciding whether the time between the alleged theft and the Defendant's alleged possession of the property was so short that no one else had time to possess it.

You also may consider under Count One the lesser offense of Home Invasion in the Second Degree. To prove the lesser offense, the Prosecutor must have proven each of the following elements beyond a reasonable doubt.

First, that the Defendant broke into a dwelling. It does not matter whether anything was actually broken; however, some force must have been used. Opening a door, raising a window, taking off a screen, are all examples of enough force to count as a breaking.

Second, that the Defendant entered the dwelling. It does not matter whether the Defendant got his entire body inside. If the Defendant put any part of his body into the dwelling after the breaking, that is enough to count as an entry.

Third, that when the Defendant entered, was present in, or was leaving the dwelling, he committed the offense of Larceny. And again Larceny I gave the definition just a moment ago.

It appears from the record as transcribed that the trial court failed to instruct the jury on an element of the offense of first-degree home invasion by omitting in its instruction that the jury must find that defendant possessed a firearm or that someone was lawfully present in the dwelling at the time the offense occurred.² However, it is unknown if the written instructions given to the jury correctly described this element as a copy of the written instructions is not available in the record. We can glean from the record that a note from the jury suggests that the written instructions provided to the jury did correctly describe this element. The note asks, “I need further explanation of #4 of Home Invasion 1st degree. Possessed a gun. Does that mean at any time during the B & E?” (Emphasis in original). See CJI2d 25.2a(5) (indicating that the fourth element of the crime involves finding either that another person was present in the home or that the defendant “was armed with a dangerous weapon”). This query specifically links possession of a weapon to the charge of first-degree home invasion. Hence, there is direct evidence that the jury was aware that they must find that defendant possessed a weapon in order to find him guilty of first-degree home invasion.

However, this finding does not excuse trial counsel’s failure to object to the jury instructions on this charge as read by the trial court. We therefore find that trial counsel’s failure to object to the jury instructions as read by the trial court on the charge of first-degree home invasion fell below an objective standard of reasonableness. Having found that defendant has established the first prong set forth in *Strickland*, we turn to the issue of whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 US at 694.

The instructions given to a jury in a criminal trial “must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). “Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an

² The jury was properly instructed on the element of possession of a firearm for both the felon in possession and felony-firearm charges.

unreliable vehicle for determining guilt or innocence.” *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999) (emphasis in original). “Even if somewhat imperfect, instructions do not create error if they fairly present the issues to be tried and sufficiently protect the defendant’s rights.” *People v Waclawski*, 286 Mich App 634, 678; 780 NW2d 321 (2009).

Defendant’s home invasion conviction was based on MCL 750.110a(2), which provides:

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

- (a) The person is armed with a dangerous weapon.
- (b) Another person is lawfully present in the dwelling.

The prosecutor’s theory of the case was that defendant possessed a firearm during the home invasion. Defendant contends that the trial court’s failure to instruct the jury that possession of a firearm in this case was necessary for a finding of guilt constituted reversible error. Following our examination of the record, we conclude that defendant cannot establish that there exists a reasonable probability that but for trial counsel’s error, the result of the proceeding would have been different.

Review of the record leads us to conclude that the jury instructions, when read and considered as a whole, fairly presented the issues to be tried and sufficiently protected defendant’s rights. *People v Waclawski*, 286 Mich App at 678. Here, the record reveals that the jury sent a note to the trial judge specifically asking: “I need further explanation of #4 of Home Invasion 1st degree. Possessed a gun. Does that mean at any time during the B & E?” (Emphasis in original). Having found that this question directly corresponds to CJI2d 25.2a(5), we find that the jury was adequately instructed on the element of possession of a weapon, and that the jury specifically understood that they needed to find that defendant possessed a weapon in this case to find him guilty of first-degree home invasion.

Our conclusion that defendant’s rights were not undermined is further supported by the jury finding defendant guilty of the felony-firearm charge. In order to make such a finding, the jury must also have found that defendant was armed during the home invasion. Therefore, we hold that defendant cannot establish that but for trial counsel’s failure to object to the trial court’s instructions as read to the jury on the charge of first-degree home invasion the result of this trial would have been different. Defendant has failed to establish the necessary prejudice for this Court to reverse his conviction on this charge. Hence, no relief is granted on this issue. *Carbin*, 463 Mich at 600.

III. PRIOR CONVICTIONS

Defendant also asserts that trial counsel was ineffective because of his handling of defendant's 2002 breaking and entering with intent conviction, in violation of MCL 750.110. Defendant did not move for a new trial or an evidentiary hearing before the trial court, which is required to preserve this issue. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Failure to do so forecloses appellate review unless the record contains sufficient detail to support defendant's claims. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Therefore, review by this Court is limited to the existing record.

Prior to trial, the prosecutor filed a notice that it intended on using defendant's prior convictions under MRE 404(b) to show that the charged incident was not an accident or mistake. Defendant objected and the trial court agreed that defendant's 1998 receiving and concealing conviction could not be introduced unless defendant testified in such a way that the door was opened. Also, the prosecutor did not oppose defendant's objection to prevent his 2008 larceny by conversion conviction, a misdemeanor, from being introduced. What remained, and is at issue here, is defendant's 2002 breaking and entering conviction. The trial court concluded that unless the prosecutor could identify something that indicated a common pattern or scheme, the prosecutor should focus on using the breaking and entering conviction to establish that defendant had previously been convicted of a felony. When the prosecutor agreed to only use the breaking and entering conviction for this purpose, the trial court stated the following: "All right. And then as far as presenting it, it's a matter of whether there's a stipulation that he does have a prior felony or whether the Prosecutor is entitled to simply read the charge and the conviction. I don't know if we have an issue on that at this point." After a brief off-the-record conference between the two trial counsels, defense counsel stated, "There's no real choice there because that is what the charge is."

Defendant offers two reasons why defense counsel's handling of the 2002 conviction was ineffective: (1) counsel should have offered to stipulate that defendant had a prior felony conviction, and (2) there was no conceivable excuse for asking defendant about the conviction on direct examination.

Having previously explained the proper law and standard of review for claims of ineffective assistance of counsel, we first turn to the issue of whether trial counsel's decision to specifically introduce defendant's 2002 conviction through defendant's testimony fell below an objective standard of reasonableness under prevailing professional norms. *Effinger*, 212 Mich App at 69.

The prosecution would have us hold that trial counsel's decision to elicit defendant's prior conviction was a matter of trial strategy, and correctly cites this Court's holding in *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008), for the proposition that: "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." (citing, *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001)]. The prosecution contends, in part, that trial counsel's decision was based on defendant's decision to testify. During opening statements, trial counsel informed the jury that defendant had a prior record. As such, the prosecution argues, defendant would be subjected to cross examination and therefore it was reasonable trial strategy to elicit the prior conviction by having the defendant "own[] up to that." While the prosecution sets forth a reasonable argument as to why this Court should find trial counsel's decision to be one of trial

strategy and therefore not second guess his intentions, such a finding negates that counsel could have just as easily stipulated to the prior conviction. See, *Old Chief v United States*, 519 US 172, 174; 117 S Ct 644; 136 L Ed 2d 574 (1997). It is not apparent from our review of the record, specifically based on trial counsel's statement: "There's no real choice there because that is what the charge is," that trial counsel was aware of the ruling in *Old Chief*. It therefore becomes difficult for us to find that trial counsel's decision was based on trial strategy, in part, because it appears from the record that trial counsel believed he had no choice but to have defendant testify about his prior conviction. While we find some merit to the arguments set forth by the prosecutor that trial counsel's decision was based on reasonable trial strategy, we conclude for purposes of our review, that trial counsel's performance on this issue fell below an objective standard of reasonableness under prevailing professional norms. *Effinger*, 212 Mich App at 69. Having found that defendant has met the first prong of *Strickland*, we turn to the issue of whether, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. We conclude, based on the amount and type of evidence presented in this trial that there was no reasonable probability that but for trial counsel's error the result of this trial would have been different.

The evidence presented at trial in this matter was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant committed the charged offenses. Testimony revealed that when Schilling initially arrived at his home he saw a blue car being driven and occupied solely by defendant's uncle, Donald Knowles. When asked what he was doing at Schilling's home, Knowles stated that "Aaron's here looking for your son Kyle." Schilling then noticed that his side door was open. Schilling then went into his house and discovered that another door was also opened and reported to the 911 operator that his pistol was missing. After leaving his home to find Knowles, and then returning to his home, Schilling saw Knowles and defendant at his house a second time. Schilling had contact with defendant who told him that he was looking for Schilling's son because he owed him money. Schilling then followed the car in which defendant was a passenger, from the time it left Schilling's home until the car was stopped by the police. Following a search of the car in which defendant was a passenger, a watch was discovered that was identified as belonging to Schilling's son.

Additionally, Schilling's trail camera revealed photographic evidence that depicted someone dressed in the same clothes as defendant going in and out of Schilling's home. One of the photographs showed the person with a latex glove on his hand while turning the doorknob. Another photographic image captured by the trail camera showed what appeared to be a gun belonging to Schilling in the pocket of the person entering the home. A search of the Schilling property found latex gloves similar to those worn by the individual depicted in the photo, discarded near a pond.

Our review leads us to conclude that the prosecution introduced overwhelming evidence of defendant's guilt. Coupled with the fact that the jury would have learned of defendant's prior conviction through stipulation, thus, even presuming that trial counsel's performance fell below an objective standard of reasonableness, defendant cannot demonstrate that but for trial counsel's errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. Accordingly, defendant is not entitled to relief on this issue.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Stephen L. Borrello
/s/ Michael J. Riordan