STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY MICHAEL STEELE,

Defendant-Appellant.

UNPUBLISHED
May17, 2007

No. 267337
Emmet Circuit Court
LC No. 05-002450-FH

Before: Schuette, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant was tried before a jury and convicted of attempted breaking and entering with intent to commit larceny, MCL 750.110; MCL 750.92, conspiracy to commit breaking and entering with intent to commit larceny, MCL 750.110; MCL 750.157a, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The circuit court sentenced defendant to concurrent prison terms of 76 months to 152 months on the attempted breaking and entering and felon in possession convictions, and 152 months to 25 years on the conspiracy conviction (as a fourth habitual offender, MCL 769.12). Defendant also received a consecutive prison term of two years for felony-firearm. He appeals as of right. We affirm.

Defendant's convictions arose from a break-in at an outdoor power equipment store. The primary witness against defendant was Mark Cooper. Cooper met defendant while both were incarcerated. Cooper testified that he drove defendant to the equipment store on the night of the break-in, and that they intended to steal a snow blower. Cooper also explained that the two had used illegal drugs together and had had committed other break-ins.

In two separate issues, defendant asserts that he received ineffective assistance of trial counsel. Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. To fulfill the defendant's right, the defense counsel must be effective. *Strickland v Washington,* 466 US 668, 686; 1045 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens,* 446 Mich 298, 338; 521 NW2d 797 (1994). To establish a claim of ineffective assistance, a defendant must first show that counsel's "representation fell below an objective standard of reasonableness." *Strickland*, *supra* at 688. Second, 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. Even if counsel committed errors, reversal is warranted only if defendant can show that

counsel's performance was so deficient that the trial result was unreliable, and that the result would have been different but for counsel's errors. *People v Johnson,* 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant's first challenge is based on the jury instructions. Defendant contends that defense counsel was ineffective for agreeing that the jury would not be instructed on specific intent. This argument is without merit. In *People v Maynor*, 470 Mich 289, 295-297; 683 NW2d 565 (2004), our Supreme Court made the following observation regarding the necessity of instructing on specific intent when the charge is first-degree child abuse:

> The prosecution must prove that by leaving her children in the car, the defendant intended to cause serious physical or mental harm to the children or that she knew that serious mental or physical harm would be caused by leaving them in the car. The recommended standard jury instruction for first-degree child abuse, CJI2d 17.18, correctly focuses the jury by directing it to this method of analysis. We find it is unnecessary for the jury to be given further instruction on "specific intent," such as that found in CJI2d 3.9. The need to draw the common-law distinction between "specific" and "general" intent is not required under the plain language of the statute, as long as the jury is instructed that it must find that defendant either knowingly or intentionally caused the harm. Moreover, the enactment of MCL 768.37, which abolished the defense of voluntary intoxication except in one narrow circumstance, has significantly diminished the need to categorize crimes as being either "specific" or "general" intent crimes.

The same reasoning applies in the case at hand. The instructions given by the trial court indicate that the prosecution must prove more than the intent to commit an act. *Id.* at 295. Indeed, in deleting CJI2d 3.9 ("Specific Intent") from the standard jury instructions, the standing committee cited *Maynor* and made the following observation: "Since the offense instructions each contain any required mens rea element, the committee was of the view that CJI2d 3.9 is redundant at best and potentially confusing at worst." CJI2d 3.9, note. Under these circumstances, defense counsel's agreement regarding not having the jury instructed on specific intent was not objectively unreasonable.

Defendant also argues that counsel erred in failing to object to the trial court's failing to give an instruction on the elements of larceny. In fact, counsel waived any claim of error regarding this matter by accepting the instructions as given. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). However, in light of the evidence adduced, defendant cannot show that the trial result was unreliable and that the result would have been different but for counsel's error. *Johnson, supra* at 124. The evidence indicated that defendant and Cooper intended to commit larceny when breaking into the store. The two needed a snow blower to fulfill a personal favor. Defendant and Cooper went to the store during the day and looked at a particular snow blower. In the middle of the night, they returned with a gun, which defendant used to break a window in order to gain entry to the store. When defendant discovered that the owners of the store were present, he and Cooper fled the scene. From this evidence, the jury could conclude that defendant intended to steal a snow blower. Furthermore, defendant's theory at trial was that the evidence was insufficient to establish that he was the perpetrator, and we are not convinced that waiving this instruction would have made a difference in light of his trial strategy based on identity.

Defendant also argues that his counsel was deficient for failing to object to the admission of other acts evidence. Again, we disagree. Here, the evidence of defendant's other acts was admissible under MRE 404(b) to show defendant's intent, his motive, and his plan regarding the attempted breaking and entering. See *People v Rice* (*On Remand*), 235 Mich App 429, 441; 597 NW2d 843 (1999). The prejudicial effect of the evidence did not substantially outweigh its probative value. *Id*. Moreover, the trial court instructed the jury on the proper and improper use of evidence of other crimes in accordance with *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). As such, because the admission of evidence of defendant's other crimes was not error, counsel cannot be faulted for failing to challenge it.

Defendant also maintains that his counsel should have offered to stipulate to a prior conviction, citing *Old Chief v United States*, 519 US 172, 117 S Ct 644; 136 L Ed 574 (1997). While *Old Chief* stands for the proposition that a trial court may not refuse a defendant's offer to stipulate to a prior offense, *id.* at 174, it does not establish that a defense counsel's decision not to follow such a procedure renders counsel's assistance ineffective.

Moreover, based on the record, defendant cannot show that the lack of a stipulation altered the outcome of the trial. The overwhelming evidence supports the convictions. And again, we presume the jury adhered to the court's instructions regarding the proper use of evidence regarding crimes for which defendant was not on trial. *People v Taylor,* 252 Mich App. 519, 522-523; 652 NW2d 526 (2002). Accordingly, the lack of stipulation did not affect the outcome of the trial.

Affirmed.

/s/ Bill Schuette
/s/ Peter D. O'Connell
/s/ Alton T. Davis