STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 287145 Delta Circuit Court
RYAN JOHN ANNEAR, Defendant-Appellant.	LC No. 08-007902-FH

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree home invasion, MCL 750.110a(3), and conspiracy to commit second degree home invasion, MCL 750.157a; MCL 750.110a(3). Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 54 months to 22½ years. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant, Mike Bizeau, and Brock Gundry were involved in the break in of Ricky LaCasse's home. A key to the house, which was normally kept in the garage, was used to enter the home. A safe was taken from a closet in the master bedroom. Footprints in the snow indicated that two individuals entered the house. One was identified as Bizeau's footprint. Defendant claimed he remained in the car and that he was paid $350 afterwards.

Defendant first contends that his attorney rendered ineffective assistance of counsel. This Court denied defendant's motion for a remand to develop this issue. As such our review is limited to mistakes apparent in the existing record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To demonstrate ineffectiveness of counsel, defendant must first show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant must also show that his counsel's "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

A defendant must meet a heavy burden to overcome the presumption that counsel employed an effective trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). "We will not substitute our judgment for that of counsel on matters of trial strategy,

nor will we use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

Defendant asserts that counsel was ineffective for telling the jury in his opening statement that it would hear from Gundry and Bizeau. Although identified on the prosecutor's witness list, neither of these individuals testified at trial. In closing argument, defense counsel told the jury he believed the prosecutor was going to present these individuals as witnesses. Defendant argues that it was irresponsible of counsel to assume that the prosecutor would call these witnesses, and that the jury drew an inference against him because of the failure to "follow through."

Notably, Bizeau and Gundry were both listed on the prosecution's witness list and, on the day of trial, the court indicated that they might be called. As such, it was not unreasonable for defense counsel to reference their anticipated testimony. Presumably, they would have implicated defendant in an attempt to exonerate themselves. This would have called into question defendant's home invasion defense -- that he was merely present -- and his aiding and abetting defense -- that he did not aid before or during the crime, but only afterwards. Assuming that their testimony would have been adverse to defendant, an assessment of their credibility was a necessary component of the defense. Accordingly, it was appropriate to mention these witnesses in the opening statement.

When the prosecutor elected not to call these witnesses, it was a sound trial strategy by defense counsel to not to call them on defendant's behalf. The failure to call witnesses can constitute ineffective assistance only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Presumably, these witnesses would have implicated defendant. Counsel could have determined that the implication would have been unnecessarily detrimental. Counsel instead chose in closing to assert that Bizeau and Gundry were responsible for the break in, highlighting Bizeau's footprint as connecting him to the break in. He painted defendant as more credible by emphasizing that he agreed to speak with law enforcement whereas Bizeau had refused to do so. He suggested that Bizeau had something to hide, and suggested that the prosecutor did not call the witnesses because it would have helped defendant's case. This strategy does not demonstrate ineffective assistance of counsel.

Defendant also argues that counsel should have requested a curative instruction when the prosecutor suggested that defendant could have called these witnesses. Counsel's objection, on the ground that the prosecutor was shifting the burden of proof, was sustained. Counsel could have legitimately determined that the objection sufficed. Coextensively, counsel could have concluded that a request for a curative instruction would have brought undo attention to the prosecutor's implication that defendant should have called these witnesses. Thus, defendant has failed to establish that he received ineffective assistance of counsel.

Defendant next argues that the trial court abused its discretion in allowing evidence regarding other break ins under MRE 404(b), which provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity,

> or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

"Generally, evidence of other acts is admissible under MRE 404(b) if offered for a proper purpose, the evidence is relevant, and its probative value is not substantially outweighed by its prejudicial effect." *People v Orr*, 275 Mich App 587, 589; 739 NW2d 385 (2007). To be relevant, the other act and the charged offense must be sufficiently similar to support a common plan scheme or design. *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000); *People v Dobek*, 274 Mich App 58, 86; 732 NW2d 546 (2007). Relevancy also requires that "the evidence, under a proper theory, has a tendency to make the existence of a fact of consequence in the case more or less probable than it would be without the evidence." *Sabin*, *supra* at 60; MRE 401. Regarding prejudice, unfair prejudice exists where MRE 404(b) evidence is only marginally probative and "there exists a danger that [the] marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

The prosecutor offered this evidence to show a scheme, plan, or system in doing an act, which is a proper purpose. We conclude that there was sufficient similarity between the other break ins and the present crime to establish this purpose. In all three cases, defendant went with Brock and/or Bizeau. Defendant alleged that they entered the homes while he remained in the car. Defendant admitted that he drove them to the homes and picked them up afterwards. Moreover, with regard to one break in, a safe was stolen and defendant acknowledged that he was paid $500 afterwards. This evidence tended to make the conspiracy more probable than it would be without the evidence. Moreover, this evidence was more than marginally probative of the conspiracy. Any undue prejudice was addressed by the limiting instruction.

Affirmed.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Alton T. Davis