

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONNIE CULBERT,

Defendant-Appellant.

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UNPUBLISHED

August 21, 1998

No. 198435

Recorder's Court

LC No. 95-013999

Before: Corrigan, C.J., and MacKenzie and R. P. Griffin\*, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and assault with intent to commit first-degree criminal sexual conduct, MCL 750.520g(1); MSA 28.788(7)(1). Defendant was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to concurrent sentences of ten to thirty years' imprisonment for the first-degree home invasion conviction and seven to fifteen years' imprisonment for the assault with intent to commit first-degree criminal sexual conduct conviction. We affirm.

I

Defendant first argues that insufficient evidence was presented to convict him of first-degree home invasion, and that the trial court erred in denying his motion for a directed verdict. Specifically, defendant contends that the evidence did not show that he intended to commit a rape or larceny when he entered the victim's apartment. In reviewing a trial court's decision regarding a motion for a directed verdict, we must view the evidence presented up to the time the motion was made in the light most favorable to the prosecution to determine if a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

The elements of first-degree home invasion are set forth in MCL 750.110a(2); MSA 28.305(a)(2):

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\* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

A person who breaks and enters a dwelling with intent to commit a felony or a larceny in the dwelling or a person who enters a dwelling without permission with intent to commit a felony or a larceny in the dwelling 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 exist:

(a) The person is armed with a dangerous weapon.

(b) Another person is lawfully present in the dwelling.

Intent to commit a larceny or a felony cannot be presumed solely from proof of the breaking and entering. *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). However, the intent may be reasonably inferred from the nature, time, and place of the defendant's acts before and during the breaking and entering. *Id.* Because of the difficulty in proving an actor's state of mind, circumstantial evidence may be used to establish the element of intent. *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997).

Our review of the lower court record reveals that several other tenants of the victim's apartment building reported someone banging on apartment doors during the evening the crimes occurred. Defendant knocked on the victim's door and asked about a person named Dee who owed him money. A few minutes later, defendant returned and told the victim that if she did not open the door, he would "shoot through the door." Defendant kicked in the apartment door, grabbed the victim by her throat, and pinned her on the couch. While defendant asked her where the money was, he kept his hands around the victim's throat. Defendant told the victim that if she did not give him some money that he was going to "take [her] ass." The victim understood this to mean that defendant was going to rape her. Defendant eventually managed to partially disrobe the victim and made her take off the remainder of her clothes. Defendant then took money from the victim's wallet. After ordering her to put her clothes back on, defendant forced the victim to carry one of her stereo speakers outside.

Viewing this evidence in the light most favorable to the prosecution, we find that a rational finder of fact could have inferred that defendant had the intent to either steal or commit criminal sexual conduct when he kicked in the door of the victim's apartment. The trial court therefore did not err in denying his motion for a directed verdict.

## II

Next, defendant argues that he was denied effective assistance of counsel. Defendant's motion to this court to remand for a *Ginther* hearing<sup>1</sup> was denied because the motion was not filed within the time required by MCR 7.211(C)(1)(a), defendant failed to identify an issue sought to be reviewed on appeal and demonstrated by affidavit or an offer of proof the facts to be established at a hearing, MCR 7.211(C)(1)(a)(ii), and defendant failed to demonstrate that the issue should be decided initially by the trial court, MCR 7.211(C)(1)(a)(i). Because there was no *Ginther* hearing,, our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, a defendant must demonstrate that defense

counsel's performance fell below an objective standard of reasonableness under prevailing norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). Effective assistance of counsel is presumed, and a criminal defendant bears a heavy burden of proving counsel was ineffective. *Id.*

Defendant first contends that he was denied effective assistance because his trial counsel failed to call alibi witnesses. Whether to call witnesses at trial is a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). We will not attempt to second-guess trial counsel's strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). At the beginning of the defendant's case, defense counsel told the court that he needed to see which witnesses were present. Counsel noted that he expected to call at least two alibi witnesses, and the prosecutor confirmed that defendant had filed notice of his intent to call alibi witnesses. Counsel then called defendant to testify. Defendant testified that he visited two different friends on the evening the crime occurred, and that he was driving to pick up his girl friend's mother from work when the police stopped him. After defendant's testimony, the court convened a recess for lunch. After the break, defense counsel rested.

Defendant now argues that his counsel's assistance was constitutionally defective because he failed to call these two individuals. However, the victim identified defendant from a police lineup the day after the crime. The manager of the victim's apartment building testified at trial that she watched defendant leave her building and back his car the wrong way down a one-way street. Officer Morris testified that he saw defendant's car driving backwards through an intersection in the vicinity of the victim's apartment building shortly after the crime occurred. During the traffic stop of defendant's car, the apartment manager approached and informed the officer that defendant had just assaulted a tenant in her building. Defendant had stereo speaker wire in his pocket when he was stopped by Officer Morris. Given this evidence, there is not a reasonable probability that the results of the proceedings would have been different if the alibi witnesses had testified.

Defendant next claims he was denied effective assistance of counsel because his trial counsel failed to produce res gestae witnesses at trial. "A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts." *People v O'Quinn*, 185 Mich App 40, 44; 460 NW2d 264 (1990). Defendant argues that one of the tenants in the victim's apartment building, Dawn Carnegie, gave a description to the police of a man who tried to force his way into her apartment. Defendant also argues that another tenant, Reverend Warrington, saw a person walking through the apartment building, and that person could have been the victim's assailant. Defendant has failed to provide trial transcript page references to support these assertions, as required by MCR 7.212(C)(7). Moreover, our review of the lower court record reveals that Carnegie and Warrington are not res gestae witnesses. The apartment manager testified that Carnegie stated that someone had banged on her apartment door and tried to kick it in. The manager also testified that Warrington reported that someone tried to break into his apartment. No evidence was presented that either of these potential witnesses saw defendant or any other perpetrator or witnessed the crime. Defense counsel's failure to seek production of these witnesses therefore was not constitutionally defective representation.

Defendant also argues that he was denied effective assistance of counsel because his trial counsel did not request a pretrial hearing to suppress the victim's lineup identification of him. A trial court's decision to admit identification evidence will not be reversed on appeal unless it was clearly erroneous. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). Because he was represented by counsel at the lineup, defendant bears the burden of showing that the lineup was impermissibly suggestive. *Id.* The suggestiveness of a lineup must be examined in light of the totality of the circumstances. *People v Kurylczuk*, 443 Mich 289, 311-312; 505 NW2d 528 (1993). Generally, physical differences between the suspect and the other lineup participants do not, by themselves, constitute impermissible suggestiveness. *Id.* at 312. The test is not whether the lineup was suggestive, but rather whether the totality of the circumstances shows the identification to be reliable. *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985).

In the present case, the totality of the circumstances shows that the victim's identification of defendant was reliable. Although there were some age and height discrepancies in the lineup participants, defendant was quite similar in age, height, and general physical characteristics to the lineup participants on either side of him. Therefore, the trial court's decision to admit the identification was not clearly erroneous, and defendant was not prejudiced by his trial counsel's failure to move to exclude the identification before trial.

Defendant's final claim of ineffective assistance of counsel stems from his counsel's failure to subpoena Roy Smoots. At trial, the building manager testified that she had seen defendant in the building and in the neighborhood with a man named Roy Smoots prior to the night of the crime. Smoots was an associate of Larry Harvey, the apartment building's maintenance man. Defendant argues that had Smoots been called as a witness, he would have testified that he did not know defendant and that he had not been in the apartment building with him.

Defendant cites *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996) for the proposition that trial counsel is ineffective when it fails to call supportive witnesses for the defense. However, in *Johnson*, the witnesses not called were exculpatory eyewitnesses, and their testimony could have changed the outcome of the trial. *Id.* at 122. In the present case, the record does not support defendant's contention that Smoots would have testified that he did not know defendant. Moreover, Smoots was not an eyewitness to any events on the night of the crime. There is not a reasonable probability that the outcome of the trial would have been different if Smoots had testified. Failure to call him as a witness did not constitute ineffective assistance of counsel.

### III

Defendant next argues that improper remarks made by the prosecutor during closing arguments denied him a fair trial. We disagree. Defendant did not object to these remarks at trial, which would generally preclude appellate review of this issue. *People v Dixon*, 217 Mich App 400, 407; 552 NW2d 663 (1996). However, we will review a claim of improper prosecutorial comments if a curative instruction at trial could not have eliminated the prejudicial effect of the remarks or when failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The test for prosecutorial misconduct is whether a defendant was denied a

fair and impartial trial. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). Questions regarding prosecutorial misconduct are decided on a case-by-case basis, and we evaluate each question within the context of the particular facts of the case. *Id.*

Defendant first argues that the prosecutor improperly appealed to the jury to sympathize with the victim. Appeals to the sympathies of the jurors are improper. *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988). We agree that some of the comments were improper appeals for jury sympathy.<sup>2</sup> However, any prejudice caused by these statements could have been eliminated by a curative instruction to disregard these comments from the trial court. Furthermore, the trial court did instruct the jury that neither prejudice nor sympathy should enter into its decision.

Defendant also claims the prosecutor made improper remarks during closing arguments by arguing from facts not in evidence. The prosecutor commented to the jury that defendant had banged on a number of apartment doors the evening of the offense, and the police had already been summoned because of the noise defendant made in the building. Although a prosecutor may not make arguments regarding evidence that was not admitted at trial, a prosecutor is free to argue the evidence and all reasonable inferences that can be drawn from the evidence as it relates to the prosecutor's theory of the case. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Here, the building manager had testified that several tenants informed her that someone was banging on their doors and trying to break into their apartments. A reasonable inference of this testimony is that the other tenants heard defendant trying to break into apartments, and the prosecutor was free to argue this inference. Moreover, the trial court did instruct the jury that the lawyer's statements and argument were not evidence.

#### IV

Finally, defendant argues that he is entitled to be resentenced because the trial court failed to recognize that imposing the maximum sentence under the habitual offender statute was discretionary. The court initially sentenced defendant to eight to twenty years' imprisonment for the home invasion conviction and five to ten years for the assault with intent to commit criminal sexual conduct conviction. After vacating those sentences, the court sentenced defendant as a second habitual offender to concurrent terms of ten to thirty years' imprisonment and seven to thirteen years' imprisonment. We review a trial court's sentencing of an habitual offender for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995). Sentencing law is largely a question of legislative intent. *Id.*

Under MCL 769.10; MSA 28.1082, the trial court had the discretion to sentence defendant as a second offender to a maximum term not longer than one and one-half times the term prescribed for a first conviction. At the sentencing hearing, the trial court allowed the prosecutor, defense counsel, and defendant to speak. The court responded to defendant's request for leniency by describing the crime and the evidence and sentencing defendant within the statutory maximum. The record does not support defendant's contention that the trial court did not comprehend its sentencing discretion.

Affirmed.

/s/ Maura D. Corrigan  
/s/ Barbara B. MacKenzie  
/s/ Robert P. Griffin

<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

<sup>2</sup> For example, “[t]hink about what she was feeling when she came into this courtroom and sat on that stand and had to reveal something that was very, very painful to her. A very painful memory” and “think about yourself on that stand and how difficult it might be for you to relate something very painful and very personal about your own life in minute detail” were improper appeals to the jury to sympathize with the victim.