STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2001
v	No. 220551 Wayne Circuit Court
WILFER RUFF, Defendant-Appellant.	LC No. 98-011564

Before: Doctoroff, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), felonious assault, MCL 750.82, and domestic violence, MCL 750.812. The trial court sentenced defendant to five years' probation with the first year to be served in jail on the first-degree home invasion conviction, four years' probation with the first year to be served in jail on the felonious assault conviction, and ninety-three days in jail on the domestic violence conviction, to be served concurrently. Defendant appeals as of right. We affirm.

This case arose out of defendant's breaking and entering into the house of his former girlfriend, who is the mother of his twelve-year-old son. Defendant's former girlfriend and her current boyfriend awoke to find defendant standing over them with a knife. After defendant ordered the current boyfriend into a closet, he and the victim engaged in a tug-of-war contest over their twelve-year-old son outside the victim's house. Although in the past the victim obtained a number of personal protection orders (PPOs) prohibiting defendant from entering her house, the record was unclear whether a PPO was in effect at the time of this offense.

Defendant contends that the trial court abused its discretion when it denied defendant's motion for an adjournment, and he contends that the trial court's denial of his motion for an adjournment denied him the right to present a defense. We disagree. This Court reviews a trial court's denial of a motion for an adjournment for an abuse of discretion. *People v Snider,* 239 Mich App 393, 421; 608 NW2d 502 (2000).

In determining whether a trial court abused its discretion in denying a motion for an adjournment, we consider whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) was negligent, and (4) requested previous

adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Defendant must also show that he was prejudiced by the denial of the adjournment. *Id*. at 348.

Here, defendant asserted his right to call witnesses and present a defense. However, he also sought a previous adjournment of his trial. Moreover, the record indicates that defendant made no attempt to contact his attorney despite his counsel's repeated and unsuccessful attempts to contact him prior to the trial date to discuss the case and determine what witnesses to call. Also, defendant's attorney left a message at defendant's residence the night before the trial instructing him to bring any witnesses that he wanted to testify to court the next day. It is apparent that defendant was negligent here as he made no real effort to procure his witnesses' attendance at trial.

Further, defendant failed to demonstrate that he was prejudiced by the trial court's denial of his request for an adjournment. Defendant sought the adjournment to present the testimony of his mother, his sister, and an unidentified neighbor of the victim. Defendant's assertion that these witnesses, who by his own admission were not present at the crime scene, would testify that he lived with the victim was speculative at best. In addition, the probative value of this testimony is questionable in light of testimony from three other witnesses that defendant did not live with the victim. Moreover, defendant's own testimony was contradictory concerning whether he lived with the victim. After initially admitting that he told an investigating officer he did not live with the victim, defendant then claimed that he did live with the victim, but lied to the officer because the victim had a PPO against him. Defendant also claimed that he lived with three other women at three different houses. Considering defendant's negligence and the lack of prejudice, the trial court did not abuse its discretion when it denied the motion for an adjournment.

Additionally, defendant contends the trial court's findings were insufficient to support its conclusion that he intended to commit a felony when he broke and entered the victim's house. We disagree. We review a trial court's findings of fact for clear error. MCR 2.613(C); MCR 6.001(D); *People v Johnson (On Rehearing)*, 208 Mich App 137, 141; 526 NW2d 617 (1994). A finding of fact is clearly erroneous when, after reviewing the entire record, we are left with a definite and firm conviction that a mistake was made. *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). We defer to the trial court's determination of factual issues, especially when it involves the credibility of witnesses. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). A trier of fact may draw reasonable inferences from the facts provided such inferences are supported by direct or circumstantial evidence. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992).

At the time of the offense and defendant's conviction, MCL 750.110a(2) provided in pertinent part:

> 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.

Defendant maintains that assault is a misdemeanor and cannot be used as the underlying felony for a first-degree home invasion conviction. Defendant's argument is flawed because, although some assaults are misdemeanors, many other assaults, including felonious assaults, are felonies. MCL 750.82.[1] In this case, the trial court implicitly found that defendant intended to feloniously assault the victim. This finding was amply supported by the evidence presented at trial. The victim and her boyfriend testified that they awoke to find defendant standing over them with a knife and were frightened. Defendant admitted ordering the victim's boyfriend into a closet. The victim also testified that defendant told her that he could kill her and her boyfriend with impunity.

Defendant also says that the violation of a PPO is a misdemeanor that cannot be used as the underlying felony for a first-degree home invasion conviction. Defendant is correct that the violation of a PPO is a misdemeanor and cannot be the underlying felony for a first-degree home invasion conviction. MCL 600.2950(23); MCL 750.110a(2). To the extent that the trial court's conclusion that defendant was guilty of first-degree home invasion was based on a finding that defendant intended to violate a PPO, the trial court clearly erred. However, this error was harmless and does not warrant reversal of defendant's conviction where the trial court concluded that defendant intended to feloniously assault the victim when he entered her home. This finding was supported by the evidence, and the intent to commit the assault was sufficient to support a conviction of home invasion. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Henry William Saad
/s/ Kurtis T. Wilder

[1] It should be noted that MCL 750.110a(2) was amended in 1999 to include the intent to commit an assault as a predicate offense supporting a conviction for first-degree home invasion, and the amended version of the statute does not specify that the assault be felonious.