

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERMAN LEE FULTON,

Defendant-Appellant.

UNPUBLISHED

November 30, 2001

No. 220749

Osceola Circuit Court

LC No. 97-002774-FH

Before: Gage, P.J., and Jansen and O’Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2). The trial court sentenced him as a fourth habitual offender, MCL 769.12, to twenty to forty years’ imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that insufficient evidence established his guilt of first-degree home invasion, emphasizing that no evidence showed that he intended to commit larceny at the time he unlawfully broke and entered the victim’s home. In reviewing defendant’s claim, we consider the evidence presented in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that all the necessary elements of the offense were proved beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268; 380 NW2d 11 (1985).

To find a defendant guilty of first-degree home invasion, a prosecutor must show that (1) the defendant broke and entered a dwelling with the intent to commit a felony, larceny or assault once inside, and (2) while the defendant was entering, present in or leaving the dwelling (a) the defendant was armed with a dangerous weapon, or (b) another person was lawfully present in the dwelling. MCL 750.110a(2). In this case the victim testified that while she was at home in bed, defendant without permission broke into and entered her home through a locked door. Before defendant broke into the home, the victim observed him drive his vehicle into her driveway and park it in her back yard, away from the road. When defendant received no response to his knock at the back door, the victim watched as defendant made his way around the home, peering into the windows through which home electronics and other valuable property items were visible. Defendant then returned to his vehicle, and the victim next heard a loud noise and observed defendant standing inside her home and placing a screwdriver into his back pocket. The victim later observed that the back door had been pried open.

We conclude that from this evidence the jury rationally could have found beyond any reasonable doubt that defendant committed the elements of first-degree home invasion. With respect to the specific intent element, the jury reasonably could have inferred from the evidence of defendant's conduct before he entered the victim's home that defendant intended to commit a larceny therein. *People v Hawkins*, 245 Mich App 439, 458-459; 628 NW2d 105 (2001).

Defendant also argues that the trial court erroneously admitted similar acts evidence. We review the trial court's decision whether to admit evidence for a clear abuse of discretion, *People v Starr*, 457 Mich 490, 494; NW2d (1998), which exists when an unprejudiced person considering the facts on which the trial court acted would conclude that no justification or excuse supported the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The trial court did not abuse its discretion in permitting the prosecutor to introduce similar acts evidence because the evidence was introduced for the proper purposes of showing defendant's scheme, plan or system in breaking and entering unoccupied homes, and defendant's intent to commit larceny and lack of mistake at the time that he broke into the victim's home. MRE 404(b)(1); *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Furthermore, the evidence had very significant probative value tending to establish the material element of defendant's specific intent in the instant case, and this probative value was not substantially outweighed by any danger of unfair prejudice. MRE 401, 403; *Sabin, supra* at 56-58. We note that to diminish any potential prejudice to defendant, the trial court properly instructed the jury regarding their appropriate, limited utilization of the similar acts evidence. We conclude that the trial court did not abuse its discretion in admitting the similar acts evidence.

Defendant next asserts that the trial court erred by failing to sua sponte instruct the jury concerning flight, concealment and escape. Because defendant failed to specifically request that the trial court read this instruction, and has not demonstrated that the trial court's alleged failure resulted in plain error affecting his substantial rights, defendant has waived our review of this claim. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999).

Defendant also suggests that the trial court erroneously instructed the jury regarding false exculpatory statements. Even assuming as defendant argues that the trial court's false statement instruction was deficient because it did not clarify that defendant's false statements must have been directed to law enforcement officials, *People v Dandron*, 70 Mich App 439, 442-443; 245 NW2d 782 (1976), and thus that the jury should not consider as evidence of defendant's guilt any false statements that defendant made to the victim, we find that the court's instructions as a whole fairly presented to the jury the issues tried and adequately protected defendant's rights. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998). To the extent that any error occurred, we cannot conclude that it resulted in a miscarriage of justice. *Id.* at 144. Consequently, we reject defendant's related argument that defense counsel provided ineffective assistance by failing to object to the trial court's incomplete and inaccurate instructions.¹ See

¹ We note that defense counsel did object timely to the false exculpatory statement instruction. Defendant's vague argument presumably refers to defense counsel's allegedly improper failure to
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People v Pickens, 446 Mich 298, 303; 521 NW2d 797 (1994) (explaining that ineffective assistance will not be found absent the defendant's showing that the representation so prejudiced him that it deprived him of a fair trial).

Defendant further contends that the trial court failed to adequately articulate its reasons for imposing his sentence. Defendant's claim wholly lacks merit. The trial court on the record elaborated its consideration of proper factors, including defendant's numerous prior convictions, his family and personal backgrounds, his employment and educational histories, and the inapplicability of the sentencing guidelines given defendant's fourth habitual offender status, which sufficiently facilitated our appellate review. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000); *People v Peña*, 224 Mich App 650, 661; 569 NW2d 871 (1997), modified in part on other grounds 457 Mich 885 (1998). Furthermore, in light of defendant's extensive criminal history exhibiting his unwillingness to conform his conduct to the law, we conclude that the trial court did not abuse its discretion when it imposed an enhanced sentence within the statutory limits. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

Affirmed.

/s/ Hilda R. Gage
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

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request a flight instruction.