STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT L. MILLER,

Defendant-Appellant.

UNPUBLISHED
January 18, 2002

No. 222675
Wayne Circuit Court
Criminal Division
LC No. 99-001441

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a jury trial conviction of second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to a term of seven to thirty years' imprisonment. We affirm.

Defendant argues that the trial court erred by failing to fully instruct the jury. Because defendant did not object to the court's instructions at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999). Reversal is warranted "only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. at 774. The crime of second-degree home invasion is set forth in MCL 750.110a(3)[1] which, at the time of the charged offense, provided:

> (3) 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 second degree.

Defendant maintains that, although the trial court properly instructed the jury that the prosecutor must show that he entered the victim's home with the intent to commit a felony or a larceny, the court committed reversible error by failing to instruct the jury on the elements of larceny.

[1] MCL 750.110a was amended, effective October 1, 1999, to add an assault as one of the enumerated offenses.

Generally, "[t]he trial court 'should instruct the jury in criminal cases as to the general features of the case, define the offense and indicate that which is essential to prove to establish the offense, even in the absence of request.'" *People v Rabb*, 112 Mich App 430, 435; 316 NW2d 446 (1982), quoting *People v Liggett*, 378 Mich 706, 714; 148 NW2d 784 (1967). However, while the complete failure to define *any* of the elements of the crime charged is a structural error requiring automatic reversal, our Supreme Court has clearly held that "an instructional error regarding *one* element of a crime, whether by misdescription or omission, is subject to a harmless error analysis." *People v Duncan*, 462 Mich 47, 54-55; 610 NW2d 551 (2000) (emphasis added), citing *Carines, supra* and *Neder v United States*, 527 US 1; 119 S Ct 1827; 144 L Ed 2d 35 (1999). Accordingly, if a nonstructural error occurred in the trial court's instructions, we will affirm a defendant's conviction if the error is harmless beyond a reasonable doubt. *Duncan, supra* at 54.

Our courts have held that, where intent to commit larceny is an element of the crime, such as for home invasion or breaking and entering, a trial court need not give the elements of larceny where none of the elements are placed in issue at trial, *People v Petrosky*, 286 Mich 397, 401-402; 282 NW 191 (1938), or "where the evidence at trial negatived any inference that the articles were taken with the owner's consent." *Rabb, supra* at 435; *Petrosky, supra* at 401. Further, if a defendant flatly denies the charge, asserts an alibi defense or otherwise denies being present at the crime, he will not be heard to complain about lack of detail in jury instructions regarding the conduct required had he been present. *Petrosky, supra* at 402. Moreover, this Court has also declined to find reversible error where it is clear that the jury "understood that defendant had to have intended to take" the property. *Rabb, supra* at 435-436.

Here, the trial court properly instructed the jury on all elements of the crime charged against defendant and failed only to more fully explain the larceny element. Nothing in the record suggests that the jurors could not or did not understand and apply the term "larceny" to the facts of this case or that the jurors had to speculate on the meaning of that term. Further, the larceny element was not placed in issue at trial. Defendant never asserted that he actually entered the victim's home with permission, or otherwise contested the larceny element of the charge. Rather, defendant maintained that he was not the person police caught exiting the victim's home during the commission of the crime. Thus, similar to *Petrosky, supra*, defendant's state of mind was not in issue. Further, "[d]efendant denied being present at the time and place charged and cannot now complain that a detailed explanation of the nature of such crime should have been given on the assumption that if he had been present at such time and place, as the jury found, his conduct was not of such character as to fulfill all the requirements necessary to constitute the crime." *Petrosky, supra* at 402. Moreover, in light of this defense, the instruction was not erroneous because the evidence at trial negated any inference other than that whoever entered the victim's home did so with the intent to commit a larceny.

Thus, were we to find that the trial court's technical failure to give a specific definition of larceny was error, it was clearly harmless beyond a reasonable doubt and in no way prejudiced defendant. Accordingly, appellate relief is not warranted on the basis of this unpreserved issue. *Carines, supra* at 772.

Defendant also alleges that the prosecutor's remarks during closing and rebuttal arguments deprived him of a fair trial. Again, because defendant failed to object to the

challenged remarks at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra* at 761-767.

We review the prosecutor's remarks in context to decide if defendant was deprived of a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267, nn 5-7; 531 NW2d 659 (1995); *People v Spivey*, 202 Mich App 719, 721; 509 NW2d 908 (1993).

Defendant avers that the prosecutor improperly referred to evidence as uncontested and stated that a police officer had no reason to lie. Defendant contends that these remarks constitute improper commentary on his right to remain silent and vouching for the credibility of the police officer. We disagree.

A prosecutor may not comment on a defendant's failure to testify. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996), aff'd 460 Mich 55 (1999). "However, a prosecutor's statement that certain inculpatory evidence is undisputed does not constitute a comment regarding the defendant's failure to testify, particularly where someone other than the defendant could have provided contrary testimony." *Id*. at 538. Further, in *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998), this Court stated:

> It is permissible for a prosecutor to observe that the evidence against the defendant is uncontroverted or undisputed even if the defendant has failed to call corroborating witnesses. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Further, although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument with regard to the inferences created does not shift the burden of proof. *Id*.

Here, the record reveals that the prosecutor made the challenged remarks in response to defendant's theory that the police officers falsely accused him of this crime and lied in an attempt to frame him. Considered in the context of the defense theory and defense counsel's remarks during closing argument, the prosecutor's comments were not improper. See *Fields, supra* at 116-118; *People v Ricky Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). Further, the prosecutor did not improperly vouch for the credibility of the police officer. The prosecutor made the comments in reference to the evidence at trial and did not suggest that he had some special knowledge, unknown to the jury, that the officer was testifying truthfully. Because the prosecutor's remarks were not improper, defendant has failed to show plan error. *Carines, supra.*

Additionally, defendant says that the trial court improperly instructed the jury on reasonable doubt. Again, because defendant did not object to the court's instruction at trial, we review this issue for plain error affecting defendant's substantial rights. The record reveals that the court instructed the jury on reasonable doubt in accordance with CJI2d 3.2(3). The court's instruction did not constitute plain error. *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 493 (1996).

Further, defendant contends that he was denied the effective assistance of counsel at trial. To sustain an ineffective assistance of counsel claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338;

521 NW2d 797 (1994). To establish prejudice, defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant claims that trial counsel was ineffective for failing to object to the matters previously discussed in this opinion. In light of our disposition of those issues, we conclude that defendant has not established that defense counsel was ineffective.

Defendant also argues that exculpatory evidence was withheld by the prosecution, thereby violating his due process rights as established in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).]

Defendant claims that the prosecutor improperly withheld the following evidentiary materials: (1) exculpatory evidence consisting of fingerprints, footprints, and the broken window at the victim's home; (2) evidence of a "911" call for police assistance, the identity of the person who called the victim at work, and the identity of neighbors who witnessed the incident; (3) evidence that the police officers violated defendant's constitutional rights by breaking into defendant's residence without a search warrant in an attempt to plant evidence; (4) the disciplinary records and internal affairs records of four of the police officers involved in this investigation; (5) the assistant prosecutor's file; and (6) expert witnesses for the defense to rebut the prosecutor's false theories.

We find no merit to defendant's claim. A review of the record reveals that many of the items identified do not exist (e.g. fingerprint and footprint evidence was not taken), so there was nothing to disclose. Further, there is no support in the record for concluding that any of the identified materials would have yielded exculpatory evidence. Defendant has not established that the prosecution suppressed any exculpatory evidence or otherwise violated his due process rights by withholding material evidence as he contends.

In a separate brief filed in pro per, defendant also argues that his attorney was ineffective for the following reasons: (1) he failed to investigate the exculpatory evidence previously discussed; (2) he effectively joined the prosecution in seeking defendant's conviction; (3) he failed to collect and produce evidence that defendant requested when preparing the case for trial; (4) counsel improperly remained when he should have testified as a witness; (5) he failed to pursue a defense; and (6) counsel prevented defendant from testifying. The burden is on defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Here, most of defendant's claims are based on generalized assertions that are not factually supported by the record. Having considered each of the claims in light of the trial record, we find that defendant has not demonstrated entitlement to relief on these issues.

Defendant also argues that multiple other errors occurred during his trial that deprived him of his right to due process and a fair trial. However, these alleged errors involve generalized and unsupported claims. Moreover, defendant failed to cite any authority to support his claims. A party may not simply assert a claim and leave it to this Court to search for authority to support a claim. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). Having considered each of defendant's contentions, we find that none presents a cognizable claim for relief.

In sum, we conclude that defendant has failed to identify any errors that either individually or cumulatively denied him a fair trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Peter D. O'Connell