STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 8, 2002
v	No. 226962 Monroe Circuit Court
BRYAN LEE LOOP, Defendant-Appellant.	LC No. 99-030253-FC

Before: Cavanagh, P.J., and Neff and B. B. MacKenzie*, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree criminal sexual conduct, MCL 750.520b(1)(c) and (f),[1] and first-degree home invasion, MCL 750.110a(2). He was sentenced to consecutive prison terms of 150 months to 45 years' imprisonment for the CSC conviction and forty months to twenty years' imprisonment for the home invasion conviction. He appeals as of right. We affirm.

Defendant challenges his conviction for first-degree home invasion and his sentences for both convictions.

I. INTENT & FIRST-DEGREE HOME INVASION

Defendant argues that the circuit court erred by failing to more fully instruct the jury on the specific intent element of first-degree home invasion, and he argues that there was not sufficient evidence to sustain his conviction on that charge. These related arguments are dependent on one common thread, i.e., whether defendant intended to commit another felony (the criminal sexual conduct) at the specific time he broke and entered his estranged wife's trailer. These arguments are based on a misapprehension of the home invasion statute.

[1] The Judgment of Sentence lists only subsection (c) (penetration committed during another felony), but the jury convicted defendant of a single offense under both theories.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The statute was amended, effective October 1, 1999 (shortly before this offense). Apparently the circuit court and the prosecutor were unaware of the amendment. Under the prior version of the statute, first-degree home invasion occurred when a defendant broke and entered a dwelling with the intent to commit a felony, larceny or assault, and while the defendant was entering, present in, or exiting the dwelling he was armed with a dangerous weapon or another person was lawfully present in the dwelling. The statute, as amended, substantially altered the intent element and now provides:

> (2) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, *or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault 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 exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling. [MCL 750.110a(2) (emphasis added).]

Thus, defendant misses the mark by focusing on his intent at the precise time when he broke and entered the dwelling. Because defendant committed first-degree criminal sexual conduct (a felony) while present in the dwelling, his intent when he entered is immaterial.

Jury Instructions

We note that, at the time of trial and at the time this opinion was drafted, the standard jury instructions had not been updated to reflect the statutory amendment.

Turning to the specifics of defendant's argument that the court should have given additional instructions on specific intent, it is arguable that CJI2d 3.9 should have been read to the jury because intent was disputed and the jury may have been confused about the charges. *See* CJI2d 25.2a, Use Note 2.[2] Defendant, however, twice agreed to the instructions given and has therefore failed to preserve this claim of error for appellate review. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). If no objection has been raised, reversal is required only when a plain error resulted in prejudice, that is, the conviction of an actually innocent defendant, or it seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant cannot show that his substantial rights were affected by the omission. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

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[2] With the amendment of MCL 750.110a(2), it is possible that first-degree home invasion is not always a specific intent crime, since guilt may now be established by a defendant's actions and not only by intent.

Jury instructions are to be read as a whole. *People v Ritsema*, 105 Mich App 602, 609; 307 NW2d 380 (1981) (1982). Here, the court also instructed the jury on the specific elements of first-degree CSC pursuant to CJI2d 20.1, 20.5 and 20.9. Reading the instructions as a whole, prejudice did not occur when the court first properly instructed the jury on the elements of first-degree CSC and later instructed the jury that it must find that defendant intended to commit first-degree CSC when he committed the home invasion.

Sufficiency of the Evidence

As to defendant's argument that the proofs were insufficient to sustain his conviction of first-degree home invasion, we must again disagree. Defendant's argument that the prosecution did not sufficiently prove his intent at the time he broke and entered does not negate the evidence of the felony committed while he was present in the dwelling.

Defendant also argues that the two convictions rely on identical facts and, therefore, the proofs are insufficient to sustain his conviction. Defendant does not explain how circular proofs render the proofs insufficient. He has cited no authority for his position and we have found none. Dual convictions are entirely consistent with MCL 750.110a(9), which states "[i]mposition of a penalty under this section does not bar imposition of a penalty under any other applicable law." See *People v McCrady*, 244 Mich App 27; 624 NW2d 761 (2000).

II. SENTENCING ISSUES

The offense was committed on November 6, 1999. Therefore, the statutory sentencing guidelines apply. MCL 769.34(2). Trial courts are afforded broad discretion in the calculation of sentencing guidelines and our review is very limited. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). We will uphold a scoring decision if there is "any evidence" to support it. *Id.*

Offense Variable 4

Defendant argues the circuit court erred by assigning ten points to OV 4.

MCL 777.34 provides:

> (1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Serious psychological injury requiring professional treatment occurred to a victim . . . . . 10 points
>
> (b) No serious psychological injury requiring professional treatment occurred to a victim . . . . . 0 points
>
> (2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

Although defendant argues that there was no evidence that the complainant was actually receiving counseling, the circuit court correctly observed that serious psychological damage was present even if the complainant was not seeking professional treatment. The court's reasoning is directly supported by MCL 777.34(2).

Offense Variable 7

The circuit court scored OV 7 at fifty points. Under the guidelines, MCL 777.37 prescribes the scoring of OV 7 as follows:

> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was treated with terrorism, sadism, torture, or excessive brutality . . . . . 50 points
>
> (b) No victim was treated with terrorism, sadism, torture, or excessive brutality . . . . . 0 points
>
> (2) As used in this section:
>
> (a) "Terrorism" means conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.
>
> (b) "Sadism" means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification. [MCL 777.37.]

Defendant argued at sentencing that this should be scored as zero points, but offered no explanation as to why. The circuit court ruled that the choking and bruising exceeded the level of violence necessary to accomplish the crime. Choking and bruising were excessive brutality as contemplated by the guidelines. In addition, the death threats can be considered "terrorism" under the instructions because defendant "substantially increase[d] the fear and anxiety a victim suffers during the offense." MCL 777.37(2)(b).

Offense Variable 9

With regard to the scoring of OV 9, MCL 777.39 provides as follows:

> (1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Multiple deaths occurred . . . . . 100 points
>
> (b) There were 10 or more victims . . . . 25 points
>
> (c) There were 2 to 9 victims . . . . . 10 points

(d) There were fewer than 2 victims . . . 0 points

(2) All of the following apply to scoring offense variable 9:

(a) Count each person who was placed in danger of injury or loss of life as a victim.

(b) Score 100 points only in homicide cases.

Ten points were assigned to OV9 on the home invasion sentence.

Defendant argues that there was only one victim of the home invasion (the homeowner). The circuit court ruled that the children were also victims of the home invasion. Defendant passed through the children's room while on his rampage. When one child came out of her room, defendant grabbed her, put her in her room, told her not to leave, and shut the door on her. There is evidence on the record that the two children were each placed in danger of injury or loss of life by the defendant's violence.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Janet T. Neff
/s/ Barbara B. MacKenzie