

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DALE CRAWFORD,

Defendant-Appellant.

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UNPUBLISHED

January 20, 2004

No. 244416

Midland Circuit Court

LC No. 02-001179-FC

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right a jury conviction of assault with a dangerous weapon, MCL 750.82, and first-degree home invasion, MCL 750.110a(2). We affirm.

Defendant first claims his federal<sup>1</sup> and state<sup>2</sup> double jeopardy rights were violated by his convictions of both first-degree home invasion and felonious assault. We disagree. A double jeopardy claim involves a question of constitutional law which is reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). Whether federal double jeopardy rights have been violated is determined by the test set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 2d 306 (1932), which indicates that double jeopardy is not violated by conviction of two offenses where each offense requires proof of an element that the other does not.

Felonious assault, MCL 750.82, requires an assault and use of a dangerous weapon, while MCL 750.110a requires entering a dwelling either by force or without permission, an assault, and either a dangerous weapon or another person's lawful presence. Because the prosecutor did not need to prove that a dangerous weapon was used to convict defendant of first-degree home invasion, felonious assault contained an element not required to prove first-degree home invasion. In addition, first-degree home invasion required entry of a dwelling by force or without permission, which was not required to prove felonious assault. Thus, defendant's federal double jeopardy rights were not violated. *Blockburger, supra*.

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<sup>1</sup> US Const, Am V and Am XIV.

<sup>2</sup> Const 1963, art 1, § 15.

Whether defendant's state double jeopardy rights were violated is determined by legislative intent rather than the test set forth in *Blockburger, supra*. *People v Denio*, 454 Mich 691, 708; 564 NW2d 13 (1997). Where the Legislature clearly intended to impose multiple punishments for similar crimes, a defendant's double jeopardy rights are not violated because the Double Jeopardy Clause does not apply to legislative acts. *People v Ayers*, 213 Mich App 708, 716; 540 NW2d 791 (1995). Legislative intent may be determined by considering the "subject, language, and history of the statutes." *People v Lugo*, 214 Mich App 699, 706; 542 NW2d 921 (1995). "Imposition of a penalty under [MCL 750.110a] does not bar imposition of a penalty under any other applicable law." *People v Shipley*, 256 Mich App 367, 378; 662 NW2d 856 (2003), quoting MCL 750.110a(9). Thus, defendant's state double jeopardy rights were not violated.

Defendant argues that the court erred by failing to instruct the jury on the defense of mistake in fact where he presented evidence that he entered the house by mistake. We disagree.

"This Court reviews de novo claims of instructional error." *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). The court has a duty to ensure that the jury has a clear and correct understanding of what it must decide, and it must do this by fully informing the jury of the law applicable to the facts. *People v Mann*, 395 Mich 472, 478; 236 NW2d 509 (1975). Instructions must not exclude material issues, defenses, or theories where supported by evidence. *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975). "When a defendant requests a jury instruction that is supported by the evidence, the trial court must give the instruction." *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002), citing *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000).

On the other hand, "[e]ven if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994), citing *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). In the instant case, the court instructed the jury that the prosecutor was required to prove specific intent. Moreover, the trial court instructed the jury regarding the defense of intoxication. Defendant's theory of defense was that he was so intoxicated he mistook the Primes' home for his own. If the jury had believed defendant's version of events it would have determined that defendant's mistake prevented him from forming the requisite intent. *People v Moldenhauer*, 210 Mich App 159, 161; 533 NW2d 9 (1995). Because the instructions taken as a whole sufficiently protected defendant's rights, *id.* at 159, citing *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994), no error requiring reversal occurred.

Defendant next claims several instances of prosecutorial misconduct denied him a fair trial. We disagree.

This Court reviews de novo claims of prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, this Court reviews for plain error unpreserved claims of prosecutorial misconduct. *Id.* "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). With respect to the prosecutor's civic duty statement, a prosecutor may not appeal to fears and prejudices of the jury or inject broader issues in the case than the crime itself. *People v Cooper*,

236 Mich App 643, 651; 601 NW2d 409 (1999). However, a prosecutor's comments will not require reversal when a timely instruction could have cured any prejudicial effect. *Schutte, supra*. In the instant case, the court specifically instructed the jury that it had no civic duty to convict. Because any prejudice occurring from civic duty comments can be cured by a cautionary instruction, *Cooper, supra* at 652, and the trial court gave the cautionary instruction, defendant was not denied a fair trial by the prosecutor's comment.

Defendant next argues that the prosecutor impermissibly argued facts unsupported by evidence. A prosecutor may argue reasonable inferences developed from the evidence as it relates to the theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Regardless, a prosecutor's otherwise improper remark may not require reversal when it is made in response to a defendant's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996), citing *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Any prejudice that may have resulted from the prosecutor's comments could have been eliminated by a curative instruction. *People v Duncan*, 402 Mich 1, 16-17; 260 NW2d 58 (1977). Unpreserved claims of prosecutorial misconduct are precluded from review unless the alleged misconduct resulted in plain error "that seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Schutte, supra* at 720, quoting *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant argues that the prosecutor impermissibly used his unemployment status as evidence of motive. "Evidence of poverty, dependence on public welfare, unemployment, underemployment, low paying or marginal employment, is not admissible to show motive" because it has little probative value and great prejudicial impact. *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980). Nevertheless, our review of the record does not indicate that the prosecutor used defendant's unemployment status or poverty to prove motive so defendant has failed to demonstrate outcome-determinative plain error.

Defendant next claims that the court abused its discretion by failing to impose a lenient sentence because of extenuating circumstances – defendant did not remember the incident, and his previous convictions were at least eighteen years old. We disagree.

A trial court's imposition of a sentence within the legislative guidelines range must be affirmed absent an error in scoring or reliance on inaccurate information. *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003), citing MCL 769.34(10). This sentence is controlled by the legislative guidelines, MCL 769.31 *et seq.*, because the charged offense occurred on December 18, 2001. Defendant's minimum sentence – 72 months – falls within the range of 57 to 95 months. Therefore, defendant's sentence is affirmed.

Affirmed.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Jessica R. Cooper