STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 29, 2004
v	No. 246778 Wayne Circuit Court
MARK ANTHONY TUMPKIN, Defendant-Appellant.	LC No. 02-007520-01

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree home invasion, MCL 750.110a(3). He was sentenced as an habitual third offender, MCL 769.11, to a prison term of thirty-six months to thirty years. He appeals as of right and we affirm.

I

Defendant first argues that there was insufficient evidence to support his conviction of second-degree home invasion because the evidence could not support a finding that the house was a "dwelling" within the meaning of MCL 750.110a. We disagree.

A

In reviewing the sufficiency of the evidence to support a conviction, this Court views the evidence in a light most favorable to the prosecution and decides whether any rational factfinder could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Shipley*, 256 Mich App 367, 374-375; 662 NW2d 856 (2003). Questions of law regarding statutory interpretation are reviewed de novo. *People v Sheets*, 223 Mich App 651, 655; 567 NW2d 478 (1997).

Second-degree home invasion is defined by MCL 750.110a(3):

> 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 second degree. [Emphasis added.]

MCL 750.110a(1)(a) defines a "dwelling" for purposes of the home invasion statute as "a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." The statute does not define the term "abode."

*Random House Webster's College Dictionary (*1997), p 4, defines "abode" used as a noun.[1]

> 1. a place in which a person resides; residence; dwelling; home. 2. an extended stay in a place; sojourn.

B

In the instant case, Anthony Robertson testified that he became the owner of the house at issue on September 11, 2001. Robertson bought the property as an investment and intended to rent or sell it. He owned another house where he lived with his family about six blocks away. After purchasing the house, he had work done to "rehab" it. A new furnace was installed, and the house had electricity and plumbing in May 2002, when the break-in took place. Robertson had a temporary occupancy permit that allowed him to live in or occupy the house temporarily, but he could not rent it out because it was not up to code. The house did not have a stove or refrigerator. Robertson testified that he started spending some evenings at the house in either late December 2001 or early January 2002, when the first break-in occurred at the premises. Robertson explained that "when I moved in. I couldn't sleep at night. I couldn't stay at home. I had to stay there and try to protect my property." He also had a burglar alarm installed. When asked how many nights a week he spent at the house since late December 2001 or early January 2002, Robertson replied:

> Some weeks I was there every night. Some three. Some four. You know, it varied about how comfortable I felt. If I thought I was going to be lucky enough to get by that night.

On cross-examination, defense counsel asked Robertson whether, with regard to the nights that he spent at the house "It wasn't meant that you were living there; you weren't moving in?" Robertson replied, "I was living there. But it wasn't meant to – I didn't mean to – for to live there." Robertson then added, "I had to stay there because like I said they broke in so many times." When asked if he kept any property at the house, Robertson replied "a couple changes of clothing," a clock radio, a fold-out bed,[2] a sleeping bag, and a toothbrush. He also said that he kept tools at the house.

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[1] There is another entry for "abode" used as a verb, but it is plain that "abode" is used as a noun in the phrase "a place of abode" in MCL 750.110a(1)(a).

[2] Presumably, this is the same as the item that Robertson called a "fold out cot" on cross-
(continued…)

Robertson testified that he was at the house on the evening of May 27, 2002, cleaning up, or working on a project in the house. When asked if he recalled the time that he arrived there that day, he indicated it might have been 8:00 a.m. but then said, "I think I may have spent the night before. I don't recall." He was there "off and on up until close to midnight." At about midnight, he "went home to try and take a nap, you know, to be with my family." Robertson checked to see that the doors to the house were locked when he left, that he had padlocks on three of the doors, and that "everything" was secured when he left. There were no broken windows at the house on the evening of May 27, 2002.

C

We conclude that Robertson's testimony was sufficient to establish the house as a place of abode. An abode need not be the owner's primary residence. As used in MCL 750.110a(1)(a), the term "abode" encompasses a place where a person stays repeatedly over an extended period. MCL 750.110a(1)(a)'s allowance for a temporary place of abode is inconsistent with a view of an abode as only a permanent residence.

There was sufficient evidence to support a conclusion that Robertson temporarily used the house as a place of abode. His testimony indicated that during the relevant time period he sometimes spent every night at the house and some weeks spent three or four nights there. He testified that he had a "couple changes of clothing," a clock radio, a fold-out bed or cot, a sleeping bag, and a toothbrush at the house. These items are indicative of use of the house for sleeping purposes, a traditional hallmark of a place of abode. Further, Robertson referred to having "moved in" to the house and to "living there." Accordingly, viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to reasonably support a conclusion that the house was a dwelling for purposes of second-degree home invasion.

II

Defendant next asserts that his right to remain silent was violated by the prosecution's argument to the jury that he failed to explain his presence in the house to police when he was arrested. We disagree.

Defendant testified that codefendant Barron Bey, a stranger, approached him at a gas station and asked him for a ride to the house to pick up some things. Defendant expected to be paid for his efforts. He drove Bey to the house and Bey invited him in to view Bey's paint job. Bey opened the side door for defendant and defendant had the impression that Bey was in lawful possession of the house. When the police arrived at the back of the house, defendant followed Bey toward the front of the house. Defendant emerged with his hands in the air; Bey hid in the bushes.

In closing argument, the prosecutor argued:

(…continued)

examination.

> Mr. Tumpkin comes out with his hands up. Didn't hear him say any explanation then. Several months later he's here telling you this story. Lots of time to think about it.

Defendant asserts that reversal is required on the basis that the argument infringed impermissibly on his right to remain silent. We disagree.

Defendant did not preserve this issue by objection below. Review of an unpreserved issue regarding prosecutorial remarks is limited to whether plain error affecting substantial rights occurred. *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003). Reversal is warranted only if it resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 274-275.

The import of the prosecutor's argument was that defendant did not tell his version of events during his initial encounter with the police and that the jury should consider this factor as undermining the credibility of defendant's testimony at trial. However, defendant would not have received *Miranda*[3] warnings or invoked his right to remain silent at that point. Such impeachment is permissible. *People v Solmonson*, 261 Mich App 657; ___ NW2d ___ (2004); *People v Sutton (After Remand)*, 436 Mich 575, 579-580; 464 NW2d 276, amended on other grounds 437 Mich 1208; 466 NW2d 281 (1990); *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992). Thus, defendant has not established any error, plain or otherwise, based on his claim that the prosecutor's argument violated his constitutional protections against self-incrimination.

III

Defendant raised several additional issues in a supplemental brief filed in propria persona.

A

Defendant first asserts that he was improperly bound over to the circuit court for trial. However, "[i]f a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1011; 677 NW2d 29 (2004). Thus, any possible insufficiency in the evidence presented at the preliminary examination does not provide a basis for relief.

B

Defendant next argues that he was denied the right to a fair trial and effective assistance of counsel because the trial court appointed different counsel to represent him in the circuit court proceedings than the counsel who represented him in the district court at the preliminary examination. However, an indigent defendant receiving counsel at public expense is not entitled to choose an attorney. *People v Ackerman*, 257 Mich App 434, 456; 669 NW2d 818 (2003).

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Therefore, absent a showing that counsel's actual representation of defendant was defective, appellate relief is not warranted.

C

Defendant further argues that trial counsel's performance deprived him of the effective assistance of counsel. Because defendant did not raise his claims of ineffective assistance of counsel below, review of those claims is limited to errors apparent on the record. *People v Wilson*, 257 Mich App 337, 363; 668 NW2d 371 (2003), vacated in part on other grounds 469 Mich 1011 (2004). To establish ineffective assistance of counsel, a defendant must show (1) that counsel did not function as the counsel guaranteed by the Sixth Amendment, and (2) a reasonable probability that the deficient performance affected the outcome of the trial. *Id.* at 362.

In this regard, defendant claims that trial counsel was deficient in failing to cross-examine prosecution witnesses to elicit facts that would have been beneficial to the defense, failing to subpoena alibi witnesses and the co-defendant, failing to object to the admission of evidence concerning prior bad acts, and failing to make certain Fourth Amendment challenges. We disagree. Defendant has failed to develop a record to establish that further cross-examination or the presentation of alibi witnesses would have benefited the defense, or that he had valid Fourth Amendment claims. Defendant also faults trial counsel for failing to object to prosecutorial comments and jury instructions without indicating what prosecutorial remarks or jury instructions allegedly were improper. Upon our review of the record, we find no ineffective assistance of counsel in this respect. Defendant further claims that counsel was ineffective in failing to procure the testimony of co-defendant, who had already pleaded guilty and who had executed an affidavit supporting defendant's version of the events, and in failing to object to the introduction of defendant's prior convictions. Assuming that counsel was deficient in these respects, the comments of the trial court in response to defendant's statements at sentencing in which he raised these issues, to the effect that defendant's story was unbelievable, indicate that the trial court would not find that defendant was prejudiced by counsel's failures. Thus, these claims must fail.

D

Defendant's third issue consists of a presentation of assorted claims. First, defendant argues that counsel provided ineffective assistance by failing to reasonably investigate this case before trial. But, again, defendant has not established a factual predicate for this claim. *Wilson, supra*, 257 Mich App at 362. Defendant also argues that the prosecutor "made several remarks concerning the defendant's status on parole and other prejudicial remarks during the Jury trial proceeding of record," without specifying the allegedly improper remarks. We are aware of no clear reference to defendant's parole status by the prosecution in the jury's presence.

E

Defendant further argues that he was prejudiced by the "atmosphere" of the trial proceedings, particularly because he was seated with his back facing his counsel rather than sitting by counsel's side and because he was allegedly threatened by the trial court during the proceedings "because he was trying to get his counsel to question and or [sic] object to matters

of trial." However, there is no factual basis in the record to support defendant's claims about the seating arrangements or that he was threatened by the trial court. Thus, defendant has not overcome the heavy presumption of judicial impartiality. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

F

Defendant also asserts that he was given a harsher sentence because he chose to exercise his right to trial and was not given credit to which he was entitled for time spent in jail awaiting trial. We disagree. The trial court indicated that defendant might have received a lower sentence if he had accepted a "reduced offer," but that "now I'm in the guidelines and that's where I'm at." The trial court further stated that defendant was "not being penalized for exercising your due process right," but would not be given the same leniency "as one who stands up and admits responsibility and accepts responsibility." These remarks do not reflect that the trial court imposed a harsher sentence because defendant exercised his right to a trial, but merely that defendant was not entitled to the benefit of a concession pursuant to an earlier plea offer that he did not accept. See *People v Godbold*, 230 Mich App 508, 517-521; 585 NW2d 13 (1998). Accordingly, defendant is not entitled to relief based on his claim of receiving a harsher sentence for exercising his right to trial.

With regard to defendant's argument that he was entitled to sentencing credit for time spent in jail awaiting trial, the trial court indicated that defendant was not receiving credit for this time because he would effectively be credited with that time in connection with a parole violation in a separate case. The trial court was correct in declining to award credit for time served in jail against the present sentence because this time should be credited toward the unexpired portion of the earlier sentence from which defendant was on parole. *People v Johnson*, 205 Mich App 144, 146-147; 517 NW2d 273 (1994).

G

Finally, defendant argues that the trial court's jury instructions were defective because "the burden of proof was relaxed by the instructions given the jury concerning the defendant's knowledge of entry, and intent of entry, where the state's case hinged upon a second and or subsequent entry(s)." This argument is unpreserved. Upon a review of the instructions, we find no error.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White