STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2004
v	No. 250226 Wayne Circuit Court
JAMES PHILLIP WILLIAMS, Defendant-Appellant.	LC No. 02-015036-01

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree home invasion, MCL 750.110a(2), and assaulting, resisting, or obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant to imprisonment for nine to twenty years for the first-degree home invasion conviction and one to two years for the assaulting, resisting, or obstructing a police officer conviction. We affirm.

Defendant first argues that the trial court erred in refusing to instruct the jury regarding the lesser included offense of third-degree home invasion, MCL 750.110a(4). We disagree. We review claims of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). To warrant reversal of a conviction based on the failure to instruct the jury on a lesser included offense, a defendant must show that it is more probable than not that the failure to give the requested lesser included offense instruction undermined the reliability of the verdict. *People v Cornell*, 466 Mich 335, 365; 646 NW2d 127 (2002); *People v Lowery*, 258 Mich App 167, 172-173; 673 NW2d 107 (2003).

Defendant was convicted of first-degree home invasion. MCL 750.110a(2). MCL 750.110a(2) 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 exist:

(a) The person is armed with a dangerous weapon.

(b) Another person is lawfully present in the dwelling.

According to defendant, the trial court erred in refusing to instruct the jury on third-degree home invasion. MCL 750.110a(4). MCL 750.110a(4) provides, in relevant part:

> (4) A person is guilty of home invasion in the third degree if the person does either of the following:
>
> (a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or 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 misdemeanor.

MCL 768.32 governs inferior-offense instructions.[1] In *Cornell*, the Supreme Court interpreted MCL 768.32 as prohibiting a trial court from giving instructions on cognate lesser offenses. *Cornell*, *supra*, 354-355. However, instructions on necessarily included lesser offenses are "proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id.*, 357.

Neither plaintiff nor defendant explicitly addresses the issue whether MCL 750.110a(4)(a) is a cognate or a necessarily included lesser offense of MCL 750.110a(2) in their briefs on appeal. Both parties' arguments on appeal presume that MCL 750.110a(4)(a) is a necessarily included offense of MCL 750.110a(2). Assuming, without deciding, that MCL 750.110a(4)(a) is a necessarily lesser included offense of MCL 750.110a(2) under the facts of this case, we conclude that the trial court did not err in refusing to give the third-degree home invasion instruction because there was no dispute regarding a factual element that differentiates first-degree home invasion from third-degree home invasion.

First-degree home invasion requires either (1) the person to be armed with a dangerous weapon, or (2) another person to be lawfully present in the dwelling. MCL 750.110a(2). Neither of these alternative elements of first-degree home invasion is an element of third-degree home

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[1] MCL 768.32(1) provides:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense.

invasion. In this case, the prosecutor introduced evidence that Katherine Bevele, Terricika Watts, Keisha Harris, and Lolita Harris were lawfully present inside the dwelling, and defendant introduced no evidence to indicate otherwise and did not dispute that the four women were lawfully present in the dwelling. Because there was not a factual dispute regarding the element of first-degree home invasion involving whether another person was lawfully present in the dwelling, the trial court was not required to instruct the jury on the lesser offense of third-degree home invasion. *Cornell, supra,* 357. A rational view of the evidence did not support a third-degree home invasion instruction where the prosecutor established that the victims were lawfully present in the dwelling and defendant introduced no evidence to indicate otherwise. Therefore, because there was no dispute regarding a factual element of the greater offense that was not part of the lesser offense, the trial court was not required to instruct the jury on third-degree home invasion.

Defendant next argues that defense counsel was ineffective in failing to request an instruction regarding the necessarily included lesser offense of entering without permission. MCL 750.115(1). Because defendant did not move for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Contrary to defendant's claim on appeal, the record reveals that defense counsel did request an entering without permission instruction and that the trial court denied the request. We therefore find no merit to defendant's argument that defense counsel was ineffective in this regard.

Defendant next argues that prosecutorial misconduct deprived him of a fair trial. We disagree. Issues of prosecutorial misconduct are decided on a case-by-case basis. *Noble, supra,* 660. The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.* The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *Id.*

Defendant did not object to the alleged prosecutorial misconduct at trial. Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *Id.* To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, and (3) the plain error affected substantial rights. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999). Under the third requirement, a showing of prejudice is necessary; a defendant has been prejudiced if "the error affected the outcome of the lower court proceedings." *Id.* Once a defendant satisfies the three requirements, an appellate court must exercise its discretion in deciding whether to reverse. *Id.* Reversal is warranted only when the plain, forfeited error resulted in the conviction of an innocent defendant "or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*, 774.

During opening argument, the prosecutor told the jury that Katherine Bevele had "certain learning disabilities and might appear somewhat slow." The prosecutor asserted that it offered the jury this information about Bevele so that the jury would "know what to expect." According to defendant, this comment amounted to an improper attempt to seek sympathy for the victim and constituted a statement that was not supported by the evidence. Defendant is correct that a prosecutor may not argue facts not in evidence or appeal to the jury to sympathize with the victim. *People v Watson,* 245 Mich App 572, 588, 591; 629 NW2d 411 (2001). However, in our

view, the prosecutor's comment, which was not a blatant appeal to the jury's sympathy, did not constitute an improper appeal to the jury to sympathize with the victim or an improper attempt to inject information that would not be supported by evidence at trial. Moreover, a jury is presumed to follow the trial court's instructions, and the trial court instructed the jury that the statements and arguments of the lawyers were not evidence and that it must not let sympathy influence its decision. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). We find that the prosecutor's statement during opening argument did not result in plain error and that the trial court's instructions cured any prejudice that may have resulted from the prosecutor's comment. We are not convinced that the prosecutor's comment resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings. *Carines, supra*, 774.

Defendant finally argues that the trial court erred by initially reading the jury the wrong first-degree home invasion instruction and then by failing to make a written copy of the corrected version of the first-degree home invasion instruction part of the record as required by MCR 2.516(B)(5) and MCR 6.414(G). We disagree.

As we stated above, this Court reviews claims of instructional error de novo. *Hubbard, supra*, 487. When reviewing claims of error in jury instructions, we examine the instructions in their entirety. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). Even 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. *Id.* To preserve an instructional error for review, a defendant must object to the instruction before the jury deliberates. MCR 2.516(C); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). In the absence of an objection, this Court reviews the issue for plain error affecting the defendant's substantial rights. *Gonzalez, supra*, 225.

Defendant is correct that the trial court initially gave the jury the wrong first-degree home invasion instruction.[2] The trial court read CJI2d 25.2a to the jury, when it should have instructed the jury according to CJI2d 25.2c. However, the difference between the instructions is slight. CJI2d 25.2a applies when first-degree home invasion is committed by means of breaking and entering, and CJI2d 25.2c applies when first-degree home invasion is committed by means of entering without permission. The trial court recognized its erroneous instruction after the jury sent a note asking for a definition of first-degree home invasion. The trial court then told the jury that it may have initially given the wrong first-degree home invasion instruction, gave it a written copy of CJI2d 25.2c, and instructed it to follow CJI2d 25.2c. It is true that this Court presumes that the jury followed the incorrect instruction if the trial court gives both a correct and incorrect instruction. *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995). However, this rule does not apply to cases like the instant case in which "the trial court expressly repudiates the incorrect instruction." *People v Hardesty*, 139 Mich App 124, 132; 362 NW2d 787 (1984). Our review of the record reveals that the trial court expressly repudiated the first incorrect first-degree home invasion instruction. While the trial court initially gave the wrong instruction, it corrected the mistake and instructed the jury to follow CJI2d 25.2c. Therefore,

[2] Defendant did not object to the incorrect instruction.

defendant was not prejudiced by the erroneous instruction. There is "no prejudice to a defendant where instructional mistakes are timely corrected." *Id.*

We also reject defendant's argument that the trial court failed to make a written copy of the corrected version of the first-degree home invasion instruction part of the record as required by MCR 2.516(B)(5) and MCR 6.414(G). Both MCR 2.516(B)(5) and MCR 6.414(G) require the trial court to ensure that a written copy of the correct instruction, CJI2d 25.2c, was "made a part of the record." In fact, the lower court record contains a written copy of CJI2d 25.2c. Defendant's contention that the written copy of CJI2d 25.2c does not comply with MCR 2.516(B)(5) and MCR 6.414(G) because the instruction includes both alternatives "a" and "b" under the second element of the offense is unpersuasive. We find no merit to defendant's argument that the trial court failed to comply with MCR 2.516(B)(5) and MCR 6.414(G).

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff