

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE ROBERT LEE MAPP,

Defendant-Appellant.

UNPUBLISHED

November 23, 2004

No. 250182

Wayne Circuit Court

LC No. 03-004725-01

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant earlier pleaded guilty to being a felon in possession of a firearm, MCL 750.224f, which, according to defendant, was contingent on a jury verdict of guilt on the felony-firearm charge. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent terms of ten to twenty years for the home invasion conviction, two to five years for the felon in possession of a firearm conviction, one to four years for the felonious assault conviction, and a consecutive term of two years for the felony-firearm conviction. We affirm.

I

This case stems from defendant's unauthorized entry into the Highland Park home of a girl with whom he had had a prior relationship, sixteen-year-old Erika Goldman, in the early morning hours of March 4, 2003. The prosecution alleged that defendant broke into the home and assaulted Goldman's boyfriend by firing a gun near his head.

According to witnesses' testimony, sometime around 5:00 a.m., Goldman and others staying in the home heard someone break into the home through the front door. Goldman and her boyfriend, Ardele Gist, were sleeping in an upstairs bedroom. When defendant entered the bedroom, Goldman saw that he had a gun, and she ran from the home. Gist attempted to follow her out of the house, but was confronted by defendant. According to Gist, defendant was threatening to kill people; he threw Gist against the wall and hit him in the head with the gun; he then cocked the gun and fired at Gist's head.

Although defendant at one time had been given a key to the Goldman home, Goldman and her mother testified that defendant did not have permission to enter their home on March 4, 2003. Goldman's uncle testified that he heard banging on the front door, and then he saw defendant on the stair landing. He saw a gun in defendant's hand when defendant had Gist pinned against the wall, but he did not hear any shots fired. He stated that he locked the front door that night from the inside and that it could not be unlocked from the outside. According to the testimony, the door was damaged during the break-in, and there was a bullet hole in the wall of Goldman's bedroom, which Goldman testified was not there before the break-in.

II

Defendant first argues that there was insufficient evidence to sustain his conviction of first-degree home invasion. We disagree.

When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 478, amended 441 Mich 1201 (1992).

Defendant contends that it was "heavily disputed" at trial whether he had permission to enter the Goldman home, and therefore the element of entering without permission, was not satisfied beyond a reasonable doubt. Plaintiff responds that there was sufficient evidence to find that defendant did not have permission to enter the home. We find the evidence sufficient to sustain defendant's conviction.

Witnesses testified that defendant did not have permission to enter the home on March 4, 2003. Goldman testified that although defendant was previously invited into the home, he was not allowed entry into the home on March 4, 2003. Goldman's mother testified that at one time defendant had been given a key and had permission to enter the home, but that he had not had permission to enter the home for months. Defendant did not testify. In light of the uncontroverted testimony that defendant did not have permission to enter the home on March 4, 2003, defendant's insufficient evidence claim is without merit.

III

Defendant argues that the trial court erred in refusing to instruct the jury on the necessarily lesser included offense of breaking and entering without permission, MCL 750.115(1). We disagree.

We review claims of instructional error de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). "[A] requested instruction on a necessarily included lesser offense is 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." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002);

The trial court denied defendant's request for an instruction on the lesser-included misdemeanor of breaking and entering without permission, which is a necessarily lesser-included offense of first-degree home invasion.¹ *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002). The court indicated that the instruction would confuse the jury and was inappropriate given the factual circumstances.

Defendant argues that not only was it disputed whether defendant had permission to enter the home, an essential element of first-degree home invasion, but also that the other elements of the offense were disputed. Defendant asserts that the element of intent to commit a felony when entering the home was "debatable," given that no testimony established that defendant knew that Gist would be in the home when he went there to talk to Goldman. Accordingly, the jury could have concluded that defendant entered the home, either lawfully or without permission, and assaulted Gist without any "preconceived desire" when defendant found Gist in bed naked with Goldman.

Plaintiff argues that no factual dispute existed regarding whether defendant broke into the Goldman home. The evidence indicated that defendant did not enter through an open door or use a key on a locked door. Instead, he tore the door open so that it was no longer operable. There was no evidence that defendant had permission to enter the home by causing substantial property damage. Thus, an instruction on entering without permission is not supported by a rational view of the evidence.

"Breaking and entering without permission requires (1) breaking and entering or (2) entering the building (3) without the owner's permission. It is impossible to commit first-degree home invasion without first committing a breaking and entering without permission. The two crimes are distinguished by the intent to commit 'a felony, larceny, or assault,' once in the dwelling." *Id.*

In this case, we agree that a rational view of the evidence does not support defendant's claim that the jury could have concluded that defendant had no intent to commit a felony or assault. The uncontroverted evidence established that defendant essentially "broke the door down" to enter the Goldman home. Witnesses testified that they heard loud banging on the door at 5:00 am, and defendant entered carrying a gun.

Further, there was no evidence that defendant merely entered the home with an intent other than to commit a felony or assault, as in *Silver, id.* at 389-390, 392, where the defendant testified that he entered the home of someone he was acquainted with to use her bathroom, and the Court found error because "defendant's unvarying position, unblemished by inconsistent statements," was that there was an entry without permission, but no intent to steal. It is also

¹ We agree with defendant's contention that at one point during the discussion of the jury instructions, the trial court mistakenly stated that breaking and entering without permission is not a necessarily lesser-included offense of first-degree home invasion. However, the misstatement does not appear to have affected the court's decision to deny defendant's request for the instruction.

noteworthy that in this case defendant was convicted of the underlying felonious assault. Unlike in *Silver*, there was not substantial evidence supporting the lesser offense of breaking and entering without permission. *Id.* at 393.

IV

Defendant argues he was denied the effective assistance of counsel by counsel's failure to remove a juror, Michael Robertson. Defendant asserts that Robertson should have been challenged because he had been a victim of breaking and entering, he was robbed at gunpoint, his brother was murdered a few years before trial, and he had been a victim of a police beating, all of which could have made a difference in the outcome of defendant's trial. Defendant asserts that he was prejudiced by counsel's failure to challenge Robertson because he did not have twelve impartial jurors.

To establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant must overcome a strong presumption that counsel's action constituted sound trial strategy. *Id.* at 302. Because defendant did not move for a *Ginther*² hearing, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

We find no error requiring reversal. As plaintiff notes, some of the circumstances cited by defendant as a basis for challenging Robertson, could be viewed as favorable to the prosecution, while some could be viewed as favorable to defendant. Moreover, in response to the court's inquiry, Robertson indicated that he could set aside his personal experiences so that they did not affect how he judged this case.

Defense counsel's failure to challenge a juror generally does not provide a basis for a claim of ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). An attorney's decision regarding the selection of jurors is generally a matter of trial strategy, which this Court declines to evaluate with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The fact that some of Robertson's personal experiences could be favorable to the defense supports a conclusion that counsel's decision was a matter of trial strategy.

Moreover, Robertson's assurances to the court that he could set aside his personal experiences in judging this case supports a conclusion that counsel's failure to seek his removal was not outcome determinative. *Johnson, supra* at 256, 259-260. Defendant has failed to show that he was prejudiced by counsel's decision. *Toma, supra* at 302-303.

² *People v Ginther*, 390 Mich 436, 443, 212 NW2d 922 (1973).

V

Defendant argues that he was denied his right to a fair trial by the admission of improper other acts evidence. Defendant asserts that Gist improperly testified concerning defendant's involvement in an uncharged murder. The challenged testimony occurred during direct examination:

Q. After he hit you in the head with the gun, what happened next?

A. He was yelling out. He was screaming [Goldman's] name. [Goldman's mother's and her uncle's] name out. He was screaming: ya'll got five seconds to get in here, I'll kill them like I did my boy. Pooh-Pooh, deceased; he got killed so I'm going to kill you, like I did the n***** Pooh-Pooh was his name.

Because defendant failed to timely object to the challenged testimony, our review is limited to plain error that affected defendant's substantial rights, i.e., an error that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999).

Substantial evidence existed to convict defendant. This evidence consisted of the eyewitness accounts of defendant's actions, which were essentially uncontroverted. Given this evidence, it is unlikely that the above challenged testimony affected the outcome of the trial. *Carines*, *supra* at 763.

VI

Defendant argues that the cumulative effect of the alleged errors concerning ineffective assistance and improper other acts evidence warrants reversal of his convictions, *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). We disagree. "In order to reverse on the grounds of cumulative error, the errors at issue must be of consequence." *Id.* In light of our above conclusions with regard to the individual claims of error, we find no basis for reversal of defendant's convictions on his claim of the cumulative effect of individual errors.

Affirmed.

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