STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 11, 2005
v	No. 247351 Otsego Circuit Court
ROY DUANE SHATTUCK, JR., Defendant-Appellant.	LC No. 02-002748-FH

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree home invasion, MCL 750.110a(2), domestic violence, MCL 750.81(2), and fourth-degree child abuse, MCL 750.136b(6). Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of 120 to 360 months' imprisonment for the home invasion conviction, twelve months' imprisonment for the fourth-degree child abuse conviction, and ninety-three days' imprisonment for the domestic violence conviction. We affirm.

Defendant first argues that the trial court should have read certain instructions to the jury. However, defendant did not request the instructions cited and expressed approval of the instructions as they were actually read. Because defendant did not request the instructions he now claims should have been given and he expressed approval of the instructions given, he has waived the issue. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Therefore, "there is no 'error' to review." *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000).

In any event, we find no error in the failure to give the cited instructions. Specifically, defendant argues that the trial court should have sua sponte instructed the jury on third-degree home invasion and a claim of right defense. However, third-degree home invasion is not a necessarily included lesser offense of first-degree home invasion. *People v Cornell*, 466 Mich 335, 357, 361; 646 NW2d 127 (2002). Further, pursuant to a personal protection order (PPO), defendant had lost the right to enter the home in issue, *People v Szpara*, 196 Mich App 270, 272-274; 492 NW2d 804 (1992), and thus, could not argue a claim of right to be in the home.

Defendant next argues that the trial court gave an improper explanation of the significance of a PPO to the jury, thereby compromising his ability to use a claim of right defense. However, defendant waived this issue by approving the explanation given to the jury. *People v Hall*, 256 Mich App 674, 678 n 1; 671 NW2d 545 (2003). See also *People v Barclay*,

208 Mich App 670, 673; 528 NW2d 842 (1995). ("Defendant may not assign error on appeal to something that his own counsel deemed proper at trial"). An affirmative agreement, as opposed to a failure to object, constitutes a waiver. See *Carter, supra.* Furthemore, even if this issue had been preserved, as we have already noted, a claim of right defense does not apply under the circumstances.

Because the claim of right defense does not apply, defendant's next argument is also without merit. Defendant argues that the prosecutor engaged in misconduct by misstating the law by arguing that the PPO precluded defendant from having a legal right to be at the residence. Defendant did not object to the prosecutor's allegedly improper remarks so the issue is not preserved. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, as discussed, the PPO issued in this case did result in defendant losing any right to enter the home. *Szpara, supra* at 273-274. Therefore, the prosecutor did not misstate the law.

Defendant next argues that the prosecutor committed misconduct by improperly vouching for the credibility of witnesses. We disagree. We review this unpreserved issue for plain error affecting substantial rights. *Ackerman, supra* at 448.

A prosecutor "cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Moreover, a prosecutor may not argue for conviction on the basis of the prestige of his office or an opinion of the police that the defendant is guilty. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). However, a prosecutor may argue the evidence and all reasonable inferences from the evidence. *Bahoda, supra* at 282. During closing argument, the prosecutor summarized the testimony of the complainant concerning whether she had been frightened by defendant, as well as the testimony of a police officer who stated that the victim appeared to him to have been genuinely frightened after the assault. The prosecutor did not argue that he had special knowledge of the truthfulness of these witnesses. Rather, the prosecutor was arguing that the truthfulness of the complainant's testimony was supported by the officer's testimony. This is proper argument from the evidence, not vouching. See *United States v Walker*, 155 F3d 180, 187 (CA 3, 1998). Thus, there was no plain error affecting defendant's substantial rights.

Defendant further argues that the cumulative effect of the alleged instances of prosecutorial misconduct requires reversal. Because there were no errors, there can be no cumulative error. *Bahoda, supra* at 292 n 64.

Defendant finally argues that his trial counsel was ineffective for failing to request a jury instruction stating that he could not have broken and entered the residence if he believed he had a right or permission to be there. Because defendant did not raise this issue in the trial court, our review is limited to facts on the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

A "breaking" can be effected by the use of any amount of force, however slight, to open a door. *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998). The testimony showed that defendant had to open the door to enter the residence. However, "there is no breaking if the defendant had the right to enter the building." As discussed, the existence of the PPO removed any right defendant had to enter the home. *Szpara, supra* at 272-274. Defendant argues that a

claim of *permission* is different from a claim of *right*. However, Michigan courts use the terms interchangeably because permission is merely one form of a right. See, e.g., *People v Brownfield* (*After Remand*), 216 Mich App 429, 432-434; 548 NW2d 248 (1996) (holding that a minor had a right to enter a home because he had permission to enter the home). Permission to enter a home and ownership of a home both fall under the umbra of a "right." Here, defendant lost that right, so the trial court should have denied a claim of right instruction had trial counsel requested it. Trial counsel is not ineffective for failing to advocate a meritless position. *Riley*, *supra* at 142.

Affirmed.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio