

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY LYNN HOUSE,

Defendant-Appellant.

UNPUBLISHED

March 20, 2007

No. 266034

Oakland Circuit Court

LC No. 2003-193806-FH

Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for first-degree home invasion, MCL 750.110a(2). He was sentenced to 57 months to 20 years' imprisonment. Defendant argues that there was insufficient evidence to sustain his conviction and that several instances of prosecutorial misconduct deprived him of a fair trial. We affirm.

The prosecutor presented sufficient evidence to support defendant's conviction. We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

With respect to first-degree home invasion, and given the particular allegations in this case, the prosecutor was required to prove that (1) defendant broke into and entered a dwelling or entered a dwelling without permission, (2) defendant either intended to commit an assault at the time of entry or defendant actually committed an assault while entering, present inside, or leaving the dwelling, and that (3) defendant did so while another person was lawfully present in the dwelling. MCL 750.110a(2); CJI2d 25.2a; CJI2d 25.2c. Defendant's sufficiency argument relates only to the first two elements.

Viewed in a light most favorable to the prosecutor, there was sufficient evidence presented for a rational juror to find that on November 2, 2003, defendant committed first-degree home invasion, either as a principal, or by aiding and abetting Adam Collins. The prosecutor presented evidence that defendant, along with Collins, broke into the victim's house. On the night of the incident, Dawn Chaney awoke to "screaming and pounding" at her front door, followed by the sound of someone scraping the gate behind her house on the ground. She subsequently discovered that the gate had been torn off its hinges and was left lying on the ground. Chaney also discovered that the back door of her house had been damaged and would no longer completely close. Leslie Keaton, a guest at Chaney's house, testified that defendant entered the house through the closed back door, after entering through a closed rear gate. While Keaton did not directly observe the back door open from a closed position, she heard the back door strike a washing machine as it opened, inferentially from a closed position. Opening a closed door is sufficient to satisfy the breaking element, even if the door is unlocked. *People v Wise*, 134 Mich App 82, 88-89; 351 NW2d 255 (1984); see also CJI2d 25.2a(2) (opening a door is sufficient force to count as a breaking). The circumstantial evidence and reasonable inferences arising from that evidence support a conclusion that defendant broke into the house.

In addition, there was evidence that defendant, along with Collins, did not have permission to enter the Chaney home. Keaton testified that she spoke to Collins on the telephone before he arrived at Chaney's house, and she told him not to come to the house. Keaton also stated that she told Collins to leave while they were in front of Chaney's house, during a conversation that defendant testified he overheard. Chaney testified that she did not give defendant or Collins permission to enter her home. Viewed in a light most favorable to the prosecutor, there was sufficient evidence that defendant either broke into the house, or entered the house without permission. There is no dispute that defendant was indeed present in the house at some point in time.

Furthermore, the prosecutor presented evidence that defendant either committed, assisted in the commission of, or intended to commit an assault inside the home. Criminal assault can either be an attempt to commit a battery or an unlawful act that places a person in reasonable apprehension of receiving a battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). MCL 750.110a(2) does not limit the term "assault" to felonious assault; therefore, both misdemeanor and felony assaults may be properly considered as offenses underlying first-degree home invasion. *People v Sands*, 261 Mich App 158, 163; 680 NW2d 500 (2004). Jacob Gasperoni testified that as he slept in a bedroom in Chaney's house on November 2, 2003, he was awoken by two men pulling his legs. The men proceeded to strike Jacob in the face. Pictures of Jacob's bruised face were admitted into evidence. Keaton testified that she observed defendant enter the bedroom where Jacob was assaulted and stay there for roughly ten seconds. Keaton further testified that she observed Dawn Chaney pull defendant out of the bedroom roughly ten seconds after defendant entered it and eventually escort defendant out of the house. Viewed in a light most favorable to the prosecutor, there was sufficient evidence from which a reasonable jury could find that defendant was one of the men who assaulted Jacob.

Defendant argues that Keaton's testimony is unpersuasive, and that several purported contradictions in her testimony require this Court to disregard the testimony. However, as noted above, this Court does not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Wolfe, supra* at 514-515.

Defendant next argues that the prosecutor violated defendant's due process right to a fair trial by: (1) impermissibly introducing evidence of defendant's prior bad acts, including defendant's previous home invasion conviction; (2) inaccurately and erroneously summarizing testimony and arguing facts that were not in evidence; and (3) impermissibly shifting the burden of proof to defendant. Defendant failed to preserve these claims of prosecutorial misconduct for appellate review. Accordingly, we review defendant's challenges to the prosecutor's actions for plain error affecting defendant's substantial rights. *Carines, supra* at 763.¹ Reversal is warranted only when plain error caused the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* This Court will not find error requiring reversal where a curative instruction could have prevented any prejudicial effect. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003); *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

With respect to the misconduct claim relative to prior bad acts, a prosecutor's good-faith effort to admit evidence does not constitute prosecutorial misconduct. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Defendant correctly observes that prosecutorial references to a defendant's prior convictions or imprisonment to show the defendant's bad character are not permitted. *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). Here, however, the prosecutor was not responsible for the introduction of defendant's previous conviction or defendant's probation status. Rather, as indicated in footnote 1 of this opinion, defendant's previous conviction and probation status were introduced by defendant, during direct examination of defendant by his attorney. Furthermore, to the extent that the prosecutor went beyond defendant's testimony on direct examination, the trial court gave a limiting instruction to the jury, which informed the jury that the evidence of defendant's previous conviction could only be considered to determine defendant's credibility. Jurors are presumed to follow a court's instructions; therefore, even if the prosecutor erred in revisiting the issue of defendant's criminal past, any prejudicial effect of the prosecutor's action would have been cured by the trial court's limiting instruction. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004); *People v*

¹ With regard to the prosecutor eliciting testimony about defendant's prior conviction and his probation status, defendant testified to these matters on direct examination by his counsel. Before trial, the court ruled that it would not allow testimony about defendant's prior conviction unless he took the stand and portrayed himself as having never been in trouble with the law. Defendant apparently decided to first introduce the evidence on the belief that the prosecutor would be permitted to make inquiry on cross-examination and in order to deflate any negative effect. A defendant cannot be allowed to assign error on appeal to something his own counsel deemed proper at trial because to do so would allow the defendant to harbor error as an appellate parachute. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998); see also *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000) (discussing the principle of waiver and distinguishing it from forfeiture). To the extent that defendant claims misconduct on the basis that the prosecutor elicited testimony that defendant had been previously convicted of a crime and was on probation when the crime charged here was committed, the issue was waived. However, because the prosecutor went further than the testimony given by defendant on direct examination by delving into the specifics of the prior crime and into probation violation proceedings, we shall assume that there was not a complete waiver of the issue and treat it as a claim of forfeited error.

Green, 228 Mich App 684, 693; 580 NW2d 444 (1998). Defendant has not established plain error affecting his substantial rights. Moreover, given the circumstances, we find no bad faith on the part of the prosecutor.

Next, we reject defendant's claim that the prosecutor argued facts that were not in evidence. Defendant contends that the prosecutor argued facts not in evidence when he stated:

The witnesses that you heard from yesterday, Leslie Keaton, Dawn Chaney, Jacob Gasberoni (phonetic), all say that three men barged into their house, punched Jake Gasberoni (phonetic) in the eye. Two of those men are identified, Adam Collins, and Gary House.

Although a prosecutor may not argue facts not supported by the evidence, the prosecutor here merely summarized the evidence before the jury and drew reasonable inferences therefrom, and prosecutors are permitted to argue the facts and the reasonable inferences that arise from those facts. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Nevertheless, even if the prosecutor's statement was impermissible, any error was cured by the trial court's instructions to the jury that the lawyers' arguments were not evidence and that the jury could only consider the evidence when determining whether defendant was guilty of the charged crime. Defendant has not established plain error affecting his substantial rights.

Finally, we reject defendant's argument that the statement by the prosecutor that "[t]he defendant has the burden of proving the things that he says happens" was an impermissible attempt to shift the burden of proof that warrants reversal. A prosecutor's clear misstatement of the law, which remains uncorrected, may deprive a defendant of a fair trial. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). However, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can be cured. *Id.* We first note that the prosecutor's statement, when read in context, did not indicate an effort to shift the burden of proof *with respect to the elements of the crime*. Regardless, the trial court instructed the jury that "it's the burden of the prosecution to prove each element of the offense beyond a reasonable doubt. The defendant is not required to prove his innocence or do anything at all." This instruction cured any assumed misconduct by the prosecutor. Defendant has not demonstrated the existence of a plain error that seriously affected the fairness, integrity, or public perception of judicial proceedings, or that he was actually innocent.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Kirsten Frank Kelly