STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2007
v	No. 271416 Wayne Circuit Court
KEVIN FORBES, Defendant-Appellant.	LC No. 06-003958-01

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Defendant was charged with first-degree home invasion, MCL 750.110a(2), and aggravated domestic assault, MCL 750.81a(2). Following a jury trial, defendant was convicted of home invasion and acquitted of the assault charge. He was sentenced to a prison term of 3 to 20 years. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Rekeya Taylor and Danielle Green were residents of a duplex. Green testified that defendant came over looking for Taylor, with whom he had a dating relationship. He yelled for her to open the door, threatened to kick the door down, and threatened to beat Taylor. When Taylor, who had another male visitor, did not respond immediately, defendant kicked the door open and ran up to Taylor's unit. He met Taylor, who had come to the top of the stairs with her guest, and struck her in the head. She fell down the stairs and was rendered unconscious. Defendant pulled Taylor by the feet to lay her out flat, causing another blow to her head. Then he left. Taylor, who suffered a brain injury, had no memory of the event. She was in the hospital for over a month.

Defendant testified that Taylor had asked him to come over because she had run into a man who had once raped her and he had threatened her. Defendant went there, left, and returned twice because Taylor did not answer the door. On his third visit, defendant saw Taylor at the top of the stairs. She was trying to come down but was being restrained by another man. Believing that the man might be the rapist, defendant broke in to rescue Taylor. As he ran up the stairs, Taylor got loose and ran down. The next thing defendant knew, she was lying unconscious at the foot of the stairs. Defendant further testified that when he got to the top of the stairs, he recognized the other man as one of Taylor's former boyfriends. He was on his cell phone telling someone "to come around the back with the heater." Fearing that someone was coming to shoot him, defendant left. Defendant denied making the statements Green ascribed to him and stated

that Green was inside her unit with the door closed and could not have seen anything until after Taylor fell.

Defendant first contends that the evidence was insufficient to support his conviction for home invasion.

In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It is for the trier of fact to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The elements of first-degree home invasion, as charged, are (1) that the defendant broke and entered a dwelling, (2) that when the defendant broke and entered the dwelling, he intended to commit an assault therein, and (3) when the defendant entered, was present in, or was leaving the dwelling, another person was lawfully present therein. MCL 750.110a(2)(b). The defendant's intent may be proved from circumstantial evidence, including the defendant's words and the manner in which the offense was committed. *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001).

Defendant admits that the first and third elements were proved, but contends that the evidence was insufficient to prove that he entered with the intent to assault Taylor. According to Green, immediately before defendant broke and entered, he threatened to break down the door and beat Taylor. Such evidence, if believed, was sufficient to prove that defendant broke and entered with the intent to commit an assault. While defendant denied making such a statement and testified that he broke in to rescue Taylor, all conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Further, while the jury acquitted defendant of the domestic assault charge, that does not negate a finding of specific intent because it is not necessary that the intended offense be successful, only that the defendant intended to commit the offense when he broke and entered the dwelling. *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993).

Defendant next contends that he is entitled to a new trial due to ineffective assistance of counsel. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

> To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of

> reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003) (citations omitted).]

Defendant contends that counsel was ineffective for failing to request an instruction on the lesser offense of breaking and entering without permission, MCL 750.115.

A court is only required to instruct on a necessarily included lesser offense if requested, and the lesser offense is supported by a rational view of the evidence. The court may not instruct on cognate lesser offenses. *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002); *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002). The misdemeanor offense of breaking and entering without permission is a necessarily included lesser offense of first-degree home invasion. *Silver, supra* at 392.

The decision whether to request an instruction on a lesser included offense is a matter of trial strategy. *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). A decision to forgo a charge on a lesser included offense and instead "force the jury into an 'all or nothing' decision" does not constitute ineffective assistance. *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981). Further, it was reasonable for counsel not to request such an instruction because it was inconsistent with defendant's theory of the case, which was that the otherwise unlawful entry was justified by the need to protect Taylor and that her fall down the stairs was an accident. Therefore, defendant has failed to overcome the presumption that counsel's strategy was reasonable. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood