STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2007
v	No. 271037 Kent Circuit Court
JESSE JAMES MOORE, JR., Defendant-Appellant.	LC No. 05-007856-FH

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of first-degree home invasion, MCL 750.110a(2). The trial court sentenced him, as a fourth-offense habitual offender, MCL 769.12, to seven to 25 years' imprisonment. We affirm.

In the early morning hours of July 4, 2005, defendant forcibly entered an apartment where his two-year-old son, his son's grandmother, and his son's mother resided, after the women refused to let defendant see the child. As defendant kicked in the apartment door, the door struck the grandmother, injuring her wrist.

Defendant first argues that the trial court erred in sentencing him as a fourth-offense habitual offender, MCL 769.12. We disagree.

Because defendant did not object to his classification as a fourth-offense habitual offender at sentencing, this issue is unpreserved. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). We review defendant's unpreserved claim of error for plain error affecting defendant's substantial rights. *Id*.; *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred, (2) the error was clear or obvious, and (3) the error affected the outcome of the lower court proceedings. *Id*. at 763.

Defendant is correct that multiple convictions arising from a single criminal transaction are to be counted only as a single conviction for purposes of determining habitual offender status. *People v Stoudemire*, 429 Mich 262, 278; 414 NW2d 693 (1987), modified *People v Preuss*, 436 Mich 714, 717, 737-738; 461 NW2d 703 (1990). However, defendant presents no evidence that his prior convictions arose from a single criminal transaction. He merely notes that the offenses were committed on the same day and that he was convicted of the offenses in a

single proceeding. The mere fact that multiple offenses are committed on the same day and within a short time of each other does not establish that the offenses were part of a single criminal transaction. See *People v Hampton* (*On Remand*), 188 Mich App 675, 678; 470 NW2d 499 (1991) (*Hampton I*), rev'd 439 Mich 860 (1991), and *People v Hampton*, 439 Mich 860; 475 NW2d 822 (1991) (*Hampton II*). In *Hampton I*, this Court held that the defendant's two prior offenses, which were committed "on the same date, within the same hour, and in adjacent buildings," and which were "related, occurred in spatial proximately, and were, essentially, part of a crime spree," could not be counted as two prior convictions for purposes of the habitual offender statute. *Hampton I*, *supra* at 678. The Supreme Court reversed, stating that "[t]he two prior felonies which formed the basis for the charge of third-felony offender were two separate criminal transactions. Consequently, there was no error in employing them to convict the defendant of being a third-felony offender." *Hampton II*, *supra* at 860. Because defendant has failed to show that his prior felony offenses arose from the same criminal transaction, he has not established that the trial court plainly erred in sentencing him as a fourth-offense habitual offender.

Defendant also argues that he was deprived of the effective assistance of counsel by his trial counsel's failure to object to the trial court's sentencing of defendant as a fourth-offense habitual offender. We disagree.

To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms; that, but for his counsel's errors, there is a reasonable probability that the results of the proceedings would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To establish that his counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma*, *supra* at 302. "This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired." *Rodgers*, *supra* at 715.

As discussed above, defendant has not established that his prior felony convictions arose from a single criminal transaction. Therefore, he has not shown that, but for his counsel's failure to object to defendant's sentence on this ground, the outcome of the sentencing proceeding would have been different. Thus, defendant's claim that he received ineffective assistance of counsel at sentencing lacks merit, *Toma*, *supra* at 302-303; *Rodgers*, *supra* at 714, and, contrary to defendant's assertion in his appellate brief, he has established no basis for a remand for an evidentiary hearing.

Defendant also argues that he was deprived of the effective assistance of counsel during the course of his trial, when his counsel failed to object to a comment by witness Carlos Stout that defendant was on parole at the time of the instant offense. During his testimony, Stout volunteered that defendant was on parole at the time of the incident underlying the instant offense.[1] Defense counsel did not object, explaining out of the presence of the jury that he did

[1] After introducing himself, describing his relationship with defendant, and identifying (continued…)

not wish to draw attention to Stout's brief comment. This decision not to draw attention to Stout's comment was a strategic decision that we will not second-guess. *Rodgers, supra* at 715. Counsel's decision did not fall below an objective standard of reasonableness under prevailing professional norms. *Toma, supra* at 302. Further, Stout's comment was very brief and isolated. No further reference to defendant's parole status was made in front of the jury. Even if counsel's failure to object to the remark could be considered deficient performance, given the unequivocal testimony of various witnesses that defendant forcibly broke into the apartment, injuring the grandmother's wrist, defendant cannot establish that there is a reasonable probability that the outcome of his trial would have been different had his counsel objected. Therefore, defendant has not established that he received ineffective assistance of counsel at trial, *id*. at 302-303; *Rodgers, supra* at 714, and he again has not demonstrated any basis for a remand for an evidentiary hearing.

Finally, defendant asserts that the prosecutor impermissibly shifted the burden of proof, depriving him of a fair trial, when she commented during closing arguments that certain inculpatory evidence was uncontroverted. We disagree.

Generally, a prosecutor may not attempt to shift the burden of proof to the defendant and may not comment on a defendant's failure to testify or otherwise present evidence. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, a prosecutor may observe that certain evidence is uncontroverted. *Fields, supra* at 115. "A prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment." *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003).

Contrary to defendant's assertions, the prosecutor's comment during closing arguments did not shift the burden of proof. Rather, the prosecutor simply observed that inculpatory evidence was uncontroverted. This was permissible and did not deprive defendant of a fair trial. *Id*.; *Fields, supra* at 115. Reversal is unwarranted.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter

(…continued)

defendant, Stout testified as follows:

> *Q*. On that night, what were you doing together?
>
> *A*. We were just hanging out. *He was on parole.* I hadn't seen him for a while, so we just decided to go hang out. [Emphasis added.]