

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD EUGENE HINKLE,

Defendant-Appellant.

UNPUBLISHED

November 27, 2007

No. 271166

Oakland Circuit Court

LC No. 2005-205313-FH

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), assault and battery (domestic), MCL 750.81(2), and assault and battery, MCL 750.81(1). He was sentenced, as a third habitual offender, MCL 769.11, to 60 to 480 months in prison for the first-degree home invasion conviction, and 93 days for the domestic assault and assault and battery convictions. We affirm.

Defendant's first argument on appeal is that he was denied his right to a properly instructed jury when the trial court instructed the jury that it could consider evidence that defendant had left the scene as evidence of his guilt. We disagree.

Because defendant failed to preserve his claim of instructional error, we review for plain error affecting substantial rights. *People v Rodriguez*, 251 Mich App 10, 24; 650 NW2d 96 (2002). Under the plain error rule, we reverse "only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*

The trial court included a flight instruction, CJI2d 4.4, in its instructions to the jury:

There has been some evidence that the defendant ran away from the alleged crime. This evidence does not prove guilt. A person may run or hide for innocent reasons such as panic, mistake, or fear. However, a person may also run or hide because of consciousness of guilt. You must decide whether the evidence is true, and if it is true, whether it shows the defendant had a guilty state of mind.

Defendant essentially argues that there was not a proper basis in the evidence for this instruction. He claims that the testimony only established that defendant left the scene after the incident and was later arrested. "Jury instructions must include all elements of the charged offense and must

not exclude material issues, defenses, and theories if the evidence supports them.” *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). In this case, there was sufficient evidence to support this instruction.

A police officer who responded to the 911 dispatch testified, “We were informed that he had fled on a bike, the responsible had fled on a bike.” The complainant and her friend, Ernesto Flores, testified that they each tried to dial 911 but defendant kept interfering. Based on this testimony and the police officer’s testimony that the suspect fled the scene on a bicycle, the jury could reasonably have inferred that defendant left the complainant’s apartment because he knew the police were likely to arrive. The flight instruction was supported by sufficient evidence and also provided innocent explanations for flight such as panic, mistake, or fear. Thus, the instruction given did not constitute error because it sufficiently protected defendant’s rights. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

Defendant also argues that his trial attorney’s failure to object to the flight instruction constituted ineffective assistance of counsel. We disagree. As noted above, the instruction was properly given and counsel is not required to make a meritless objection. *People v McGhee*, 268 Mich App 600, 626-627; 709 NW2d 595 (2005).

Defendant’s third argument on appeal is that the prosecutor improperly questioned defendant about the credibility of prosecution witnesses. While we agree that the prosecutor’s conduct was improper, we find that the error does not require reversal because defendant has not shown that it affected his substantial rights.

“Where issues of prosecutorial misconduct are preserved, we review them de novo to determine if the defendant was denied a fair and impartial trial.” *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). However, because defendant failed to object to the alleged misconduct, we review this issue for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). “Thus, to avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings.” *Id.* “We will reverse only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of his innocence.” *Thomas, supra* at 454.

It is improper for a prosecutor to ask a defense witness to comment on the credibility of another witness because it is for the trier of fact to assess the credibility of the witnesses. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). In this case, the prosecutor did so repeatedly. Indeed, “the prosecutor’s strategy was to discredit defendant by inviting him to label prosecution witnesses ‘liars.’ ” *Buckey, supra* at 17. Although defendant at times resisted the prosecutor’s invitations to call the prosecution witnesses “liars,” he did, over the course of his testimony, agree with the prosecutor that the complainant, her landlord, Flores, and a police officer had lied during the trial.

Nevertheless, defendant has failed to demonstrate that this error affected the outcome of the proceedings. *Aldrich, supra* at 110. Through the testimony of the complainant, Flores, the landlord, and others, the prosecution presented significant evidence against defendant. That defendant’s testimony contradicted this evidence would have been readily apparent even if the prosecution had not drawn attention to it in an improper manner. In particular, the complainant

and Flores testified that defendant came in through the window by pushing a window air conditioning unit into the kitchen, but defendant denied entering through the window. The police officer who responded to the 911 dispatch testified that he saw an air conditioner on the kitchen floor. Also, the complainant testified that defendant punched her and choked her, and the prosecution presented photographs, taken the following day, that the complainant claimed represented the injuries inflicted by defendant, but defendant claimed he did not strike the complainant. More importantly, given the overwhelming evidence of defendant's guilt, defendant has not shown that the prosecution's error was prejudicial to defendant. This was not a close case in which any damage to defendant's credibility might have meant the difference between a guilty verdict and an acquittal.

Defendant's fourth argument on appeal is that his Sixth and Fourteenth Amendment rights were violated when the trial court sentenced him based on facts not found by a jury beyond a reasonable doubt. We disagree.

Defendant argues that the application of Michigan's sentencing scheme to his case is unconstitutional under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because several offense variables were scored based on conduct not found by the jury. However, Michigan's sentencing scheme is unaffected by *Blakely*. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). For this reason, defendant's argument that his trial counsel's failure to object to the claimed sentencing error constituted ineffective assistance of counsel is also without merit.

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer