

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD WAYNE HARRIS,

Defendant-Appellant.

UNPUBLISHED

June 3, 2008

No. 270621

Huron Circuit Court

LC No. 04-004395-FH

Before: Kelly, P.J., and Meter and Gleicher, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his jury trial conviction for second-degree home invasion, MCL 750.110a(3). Defendant was sentenced as a third habitual offender, MCL 769.11, to five to 30 years in prison. We affirm.

I. Basic Facts

On August 18, 2004, the victim returned home from work and discovered that the door to her house had been forced open and four long guns, a hunting knife, an afghan, and some coins were missing. A neighbor had observed a white van or SUV driving slowly in the homeowner's driveway earlier that day. The following day, Sergeant Brian Wisenbaugh, who was off-duty at the time, noticed defendant and his girlfriend, Lisa Taylor, in a white van at a gas station. Because Sergeant Wisenbaugh knew that there was a no-contact order between defendant and Taylor, he contacted his dispatcher, who sent Sergeant Michael Anderson to the area. Sergeant Anderson arrested defendant for violating the no-contact order, and during a search of the vehicle, he found an open container of alcohol, drugs and drug paraphernalia, coins, and a hunting knife. The homeowner identified four of the coins and the hunting knife as hers. Taylor was also arrested, and she testified at defendant's trial.

II. Sufficiency of the Evidence

Defendant argues that there was insufficient credible evidence to support his second-degree home invasion conviction. We disagree. When the sufficiency of the evidence is challenged, we review the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). The standard of review is deferential, and this Court is required to draw all reasonable inferences and make

credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of second-degree home invasion are that the defendant (1) either broke into or entered a home without permission, (2) with the intent to commit a felony or larceny in the building. *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004). The evidence showed that the homeowner locked the doors and windows of her home before leaving for work in the morning and, when she returned home that afternoon, the door had been forced open. A neighbor reported seeing a white van or SUV drive into the homeowner's driveway. Taylor recalled that, when she was with defendant in a white van, they pulled into a residential driveway. While Taylor waited in the van, defendant went to the back of the residence and returned with three or four long guns, which were covered with a blanket or afghan. The next day, defendant was arrested after he was observed inside a white van. From items found in the van with defendant, the homeowner identified four coins and the hunting knife as hers.

Although defendant claims that Taylor was not credible, it was the jury's role to determine the credibility of the witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). On review, this Court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *Nowack, supra* at 400. Taylor's testimony, along with the evidence that items stolen from the homeowner's house were recovered from the van that defendant was in when he was arrested, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant committed the charged crime.

III. Defendant's Motion for A Mistrial

Defendant contends that the trial court erred in denying his request for a mistrial. We disagree. We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

Defendant argues that a mistrial was required because of two incidents involving the jury, which defendant contends denied him due process. The two incidents involved (1) the possibility that some jurors observed defendant in handcuffs, and (2) three jurors' exposure to a newspaper article about the case. "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted).

During trial, defense counsel advised the trial court that at the end of the previous day of testimony, defendant was escorted out of the rear door of the courthouse and that some jurors who were also present would have been able to see defendant handcuffed and led out the door. Counsel was concerned that this might affect defendant's presumption of innocence. A similar situation arose in *People v Moore*, 164 Mich App 378, 384-385; 417 NW2d 508 (1987), in which the jurors had a "brief, inadvertent view of defendant in handcuffs" when "the deputies having custody of defendant were returning him to court following a recess." *Id.* This Court rejected the defendant's claim that the brief, inadvertent viewing required a mistrial, reasoning:

In general, freedom from shackling of a defendant during trial has long been recognized as an important component of a fair and impartial trial.

However, this rule does not extend to circumstances in which a defendant may be shackled outside a courtroom to prevent escape. In addition, where a jury inadvertently sees a shackled defendant, there must be some showing that prejudice resulted. It was incumbent upon defendant here to establish prejudice. He failed to do so, and there is no error requiring reversal. [*Id.* (citations omitted).]

In this case, it is unclear whether any jurors actually observed defendant in handcuffs, and any viewing that did occur was inadvertent and occurred outside the courtroom. Further, although defense counsel was concerned about the possible implication any viewing might have on defendant's presumption of innocence, the trial court instructed the jury on the presumption of innocence both before any viewing occurred and again before the jury began its deliberations. Under these circumstances, defendant has not shown any prejudice.

Defendant also maintains that a mistrial should have been granted because, during trial, some jurors were exposed to a newspaper article about the trial, which included references to facts that were not presented at trial. As a general rule, "[w]hether or not prejudice warranting a new trial results from the reading by the jurors of news articles or seeing or hearing broadcasts must turn on the special facts of each case, and the question is left largely to the determination and discretion of the trial court." *People v Grove*, 455 Mich 439, 472; 566 NW2d 547 (1997) (citation omitted). Here, the trial court questioned the jury, and three jurors indicated that they had seen the news article. Upon further questioning, at least two of the jurors stated that they had just "glanced" at the article and did not read the entire article. The trial court advised all the jurors that they were to decide this case only on the basis of the evidence presented at trial. In response to the trial court's question regarding whether they could set aside the article and not let it affect their decision, all three jurors responded affirmatively. In light of this record, there is no indication that any of the jurors were actually influenced by the article. See *People v Budzyn*, 456 Mich 77, 100; 566 NW2d 229 (1997).

Because the record discloses that the two incidents involving the jury did not prejudice defendant's right to a fair trial, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

IV. Informer-Addict Jury Instruction

Defendant contends that the trial court abused its discretion by denying his request for an addict-informer instruction with respect to Taylor's testimony. See CJI2d 5.7. We review claims of instructional error de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). Even if the instructions are imperfect, there is no error if they fairly represented the issues to be tried and sufficiently protected the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007).

"An instruction concerning special scrutiny of the testimony of addict-informants should be given upon request, where the testimony of the informant is the only evidence linking the defendant to the offense." *People v Griffin*, 235 Mich App 27, 40; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007) (citation omitted). In *Griffin*, this Court concluded that even though a witness had been arrested twice for selling drugs, "had a crack cocaine habit for five years," and once used drugs

four or five times a week, an addict-informer instruction was not warranted because the evidence fell “short of clearly indicating that [the witness] was an addict at the time in question.” *Id.*

In this case, there was even less evidence of Taylor’s status as an addict. Although Taylor admitted that she sometimes used cocaine when she was with defendant, she denied being an addict or having a problem with the drug. Further, there was no evidence that she had ever been treated for drug addiction or that she had ever been arrested for drug activity. Moreover, contrary to defendant’s claim that Taylor’s testimony was the only evidence against him, the evidence indicated that defendant was arrested in a white van that contained items stolen from the subject home. Additionally, the court instructed the jury to consider whether Taylor was an accomplice and, if so, to use caution when considering her testimony. Viewed as a whole, these instructions served the purpose of advising the jury that it should view Taylor’s testimony cautiously and were sufficient to protect defendant’s rights. Under these circumstances, the trial court did not abuse its discretion in refusing to give the requested instruction.

V. Prosecutorial Misconduct

Defendant claims that the prosecutor’s conduct denied him a fair trial. “Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo.” *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We review claims of prosecutorial misconduct case by case, examining the remarks or conduct in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

Defendant asserts that the prosecutor failed to fully disclose the consideration Taylor received for her testimony at defendant’s trial. As defendant argues, the prosecutor is required to disclose whether an accomplice has been granted immunity, and if “reasonable expectations, as opposed to promises, of leniency or other rewards for testifying resulted from contact with the prosecutor.” *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976). “However, it is one thing to require disclosure of facts (immunity or leniency) which the jury should weigh in assessing a witness’ credibility. It is quite another to require ‘disclosure’ of future possibilities for the jury’s speculation.” *Id.* at 174. Here, the record does not support defendant’s claim that undisclosed promises were made to Taylor in exchange for her testimony. Taylor acknowledged that she faced prosecution for several criminal charges and, although she denied being promised anything in exchange for her testimony, the jury was fully aware, both through the prosecutor’s comments and through defense counsel’s cross-examination, that there was a possibility that she would not be prosecuted. Defendant has not presented any evidence showing that any promises were actually made that were not disclosed at trial. We therefore reject this claim of misconduct.

Because defendant did not object to the remaining comments and arguments by the prosecutor that he now challenges on appeal, we review these remarks for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Defendant argues that the prosecutor improperly stated his opinion that Taylor had led a law-abiding life before she met defendant and would again do so after she was through with him, which denigrated defendant. However, the challenged reference did not involve a question or comment made by the prosecutor at trial, but rather a statement made by the prosecutor during a

pretrial conversation with Taylor, and was relevant to the issue whether the prosecutor's pretrial conversation may have created any possible expectations of leniency for her testimony. The statement was offered to show the effect it may have had on Taylor's decision to testify, not for the purpose of blaming defendant for all of Taylor's problems. Further, it did not involve an improper appeal for sympathy, an improper injection of the prosecutor's personal beliefs, or denigration of defendant or defense counsel. Thus, viewed in its proper context, it was not plain error.

Additionally, it was not improper for the prosecutor to comment on Taylor's lengthy career as a registered nurse and remarking that she had done a lot of good things before meeting defendant. There was evidentiary support for the prosecutor's arguments, and they were also responsive to defense counsel's closing argument, in which he repeatedly attacked Taylor's credibility and accused her of lying or being unable to remember things. Viewed in this context, there was no plain error. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Defendant also claims that the prosecutor improperly attempted to elicit irrelevant information by asking Taylor whether defendant needed money. Taylor had previously testified that defendant went to the homeowner's house to get his "tools and equipment" so that he could sell them and buy cocaine. When asked if defendant needed money, Taylor answered that she did not know. This brief follow-up question, which was not further pursued by the prosecutor, did not amount to plain error and, in light of Taylor's answer, certainly did not affect defendant's substantial rights.

Defendant also asserts that the prosecutor improperly attempted to shift the burden of proof by remarking, in rebuttal, that defendant could have called witnesses if he had chosen. The prosecutor's remark was made in response to defense counsel's questioning of Taylor about other people who might have broken into the homeowner's house. Once a defendant "advances evidence or a theory, argument on the inferences created does not shift the burden of proof[.]" and a prosecutor does not shift the burden of proof by commenting on the improbability of the defendant's theory. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Thus, there was no plain error.

VI. Ineffective Assistance of Counsel

Defendant argues that defense counsel was ineffective to the extent that he failed to object to any of the matters previously addressed in this opinion. Only the challenged comments and remarks by the prosecutor were not preserved with an appropriate objection at trial. Because we have concluded that the prosecutor's conduct was not improper, we likewise conclude that defense counsel was not ineffective for failing to object. Defense counsel is not required to make futile objections. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Finally, because we find no errors with regard to any of defendant's challenges, there is no merit to defendant's argument that the cumulative effect of several errors deprived him of a fair trial. *People v LeBlanc*, 465 Mich 575, 591-592; 640 NW2d 246 (2002).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter