STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 11, 2008
v	No. 277830 Calhoun Circuit Court
WILLIAM BRIAN STORY, Defendant-Appellant.	LC No. 2006-004475-FH

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree home invasion, MCL 750.110a(2), and assault with intent to rob and steal unarmed, MCL 750.88. The trial court sentenced defendant to concurrent sentences of 6 to 20 years' imprisonment for the first-degree home invasion conviction and 4 to 15 years' imprisonment for the assault with intent to rob and steal unarmed conviction, with credit for 82 days. Because defendant has not established substantive error relative to his convictions, we affirm his convictions but vacate his sentence and remand for both resentencing and correction of defendant's presentence investigation report (PSIR).

This case arises from an incident that occurred in the early morning on March 6, 2006. Jennifer Haynes was asleep in her bed in her apartment when she awoke due to a crashing noise. A man immediately opened her bedroom door and asked her for money as he threw rocks at her. The man asked Haynes for money and searched her body, including touching her breasts and genital area, looking for money. Haynes testified that the man was drunk and smelled of alcohol. At one point, he fell off her bed. When he fell on the floor, Haynes got out of her bed and ran out of her apartment to get help. The man followed Haynes out of her apartment and fell. When Haynes screamed for help, the intruder ran away. As the intruder was leaving the building, he walked past the maintenance man, whose fiancé immediately called 911. Police searched the area, found defendant rustling in the woods about three blocks away from Haynes' apartment building, and took him into custody. He was later charged, and convicted by a jury. This appeal followed.

Defendant first argues that his trial counsel was ineffective for failing to request an instruction for misdemeanor breaking and entering without permission and instead requesting a jury instruction for third-degree home invasion, for which he was not entitled. To establish

ineffective assistance of counsel during trial, defendant must show that his trial counsel'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 his trial 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 trial 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. Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

The decision to request or refrain from requesting a lesser offense instruction is generally a matter of trial strategy. See *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996); *People v Robinson*, 154 Mich App 92, 93; 397 NW2d 229 (1986). "The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel." *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). Therefore, even though defense counsel requested a jury instruction for third-degree home invasion and the request was denied by the trial court, we cannot conclude that counsel was ineffective for requesting such an instruction.

We further conclude that trial counsel was not ineffective for failing to request a jury instruction for breaking and entering without permission. In *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002), the Court ruled that breaking and entering without permission is a necessarily included lesser offense of first-degree home invasion. "It is impossible to commit the first-degree home invasion without first committing a breaking and entering without permission. The two crimes are distinguished by the intent to commit 'a felony, larceny, or assault,' once in the dwelling." *Id.*

> [A] trial court, upon request, should instruct the jury regarding any necessarily included lesser offense, or an attempt, irrespective of whether the offense is a felony or misdemeanor, if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and a rational view of the evidence would support it. [*Id*. at 388.]

At trial, defendant's intent upon breaking and entering was not an issue. Rather, defense counsel argued that the evidence did not demonstrate beyond a reasonable doubt that defendant was the person who committed the crime. Intent was not presented as a disputed factual element. This choice was sound trial strategy. *Toma*, *supra* at 302. Moreover, a rational view of the evidence did not support such an instruction. Defendant, in essence, argues that a rational view of the evidence supported the lesser offense instruction because a jury could have found that defendant did not intend to commit a larceny. Defendant relies on the lack of evidence that defendant rummaged through any of the victim's belongings, the fact that defendant did not take money that was on the living room floor, and his claim that a reasonable fact-finder may have found the victim's assertion that defendant kept demanding money unbelievable because of inconsistencies in the victim's story. Defendant's argument ignores the victim's testimony that the perpetrator repeatedly asked her for money and searched her for money. The evidence supports only the conclusion that defendant had the intent to commit a larceny and a rational

view of the evidence does not support a contrary conclusion. Therefore, defendant was not entitled to the instruction, and counsel was not ineffective for failing to request it.

Defendant next argues that his trial counsel was ineffective for failing to move for a *Walker*[1] hearing to suppress his statements to police. He claims that he was still drunk and did not effectively waive his *Miranda*[2] rights. Statements by a defendant made during custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his right against self-incrimination. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Garwood*, 205 Mich App 553, 555-556; 517 NW2d 843 (1994). To be valid, a waiver "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986). Advanced intoxication from alcohol consumption may preclude the effective waiver of *Miranda* rights. *People v Davis*, 102 Mich App 403, 410; 301 NW2d 871 (1980). However, the fact that a person was intoxicated is not dispositive on the issue of voluntariness. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987). Rather, voluntariness is determined by examining the totality of the circumstances surrounding a statement to establish if it was the product of an essentially free and unconstrained decision by its maker. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). Volunteered statements of any kind are not barred by the Fifth Amendment of the United States Constitution, US Const, Am V, and are admissible. *Miranda*, *supra* at 478; *Rhode Island v Innis*, 446 US 291, 300; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

In this case, the record indicates that defendant was likely intoxicated when he committed the offenses. The victim testified that the intruder was drunk and smelled of alcohol. At one point, he even fell off her bed. Further, when Officer Ryan Strunk discovered defendant, defendant started stumbling and fell backwards. Officer Strunk testified that he did not know whether defendant was confused, lacked balance, or is something was wrong with him. Officer Strunk further testified that defendant appeared intoxicated and that he fell when walking to the patrol car. However, Officer Strunk also testified that defendant did not resist being taken into custody and seemed to walk right out of the woods and do everything that was asked of him. Thus, his mind was not so impaired that he could not follow directions.

Detective Brad Wise's interview of defendant occurred approximately ten hours after defendant was taken into custody. Detective Wise testified that defendant waived his rights and decided to speak with police. Defendant did not display any kind of confusion or lack of understanding of his rights at this time. Defendant appeared to voluntarily, knowingly, and intelligently waive his right against self-incrimination. Although Detective Wise indicated that defendant appeared tired and "not normal," defendant had the forethought to indicate that he would only answer questions to a certain point. Thus, defendant appeared to have full awareness of both the nature of any right being abandoned and the consequences of his decision to abandon

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[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

it. Defendant told Detective Wise that he did not remember being in the victim's apartment at all. Although defendant may have been intoxicated when the crimes were committed and may not have remembered committing the crimes, the record evidence does not support the conclusion that defendant was not able to effectively waive his *Miranda* rights because of intoxication.

Because there was no *Miranda* violation, defense counsel was not ineffective for failing to move for a *Walker* hearing to suppress the statements made by defendant. Defense counsel is not ineffective for failing to make a motion or objection that would be futile. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant further argues that he was denied a fair trial because the prosecutor committed prosecutorial misconduct during closing arguments, specifically when the prosecutor referred to defendant as the man "sitting there with that smirk on his face." Defense counsel failed to object to the prosecutor's statement, and we review defendant's claim for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Defendant's conviction will be reversed only if a plain error affecting defendant's rights exists, and it is determined that defendant is actually innocent, or that the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings," regardless of his innocence. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). This Court will not find error requiring reversal if a curative instruction could have alleviated any prejudicial effect. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (internal citations omitted). Issues of prosecutorial misconduct are reviewed "on a case-by-case basis by examining the record and evaluating the remarks in context." *Thomas*, *supra* at 454.

"[P]rosecutors should not . . . express their personal opinion of a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). However, prosecutors are accorded great latitude regarding their arguments and conduct during trial. *Id.* A prosecutor is "free to argue the evidence and all reasonable inferences from the evidence." *Id.* A prosecutor may also argue from the facts that a witness is credible. *Unger*, *supra* at 240.

In this case, defendant assigns error to the prosecutor's comment describing defendant as he sat at the defense table. The prosecutor provided this description in the midst of her argument that the victim was sure defendant was the perpetrator. The prosecutor's comment was not proper because it denigrated defendant to some degree and suggested that he did not take the proceeding seriously. Nevertheless, it was an isolated comment. "[A] well-tried, vigorously argued case should not be overturned on the basis of a few isolated improper remarks that could have been corrected had an objection been lodged[,]" *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998), unless the misconduct is sufficiently egregious that a curative instruction could not counteract the prejudice or unless manifest injustice would result from failure to review the alleged misconduct. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

The challenged comment does not rise to the level of error requiring reversal because the error did not affect defendant's rights nor otherwise rise to the level of error requiring reversal. *Toma*, *supra* at 453-454. There was overwhelming evidence indicating defendant's guilt. Two people identified defendant in a lineup, defendant was found near the scene, and defendant's shoe print matched the shoe prints leaving the scene. Further, a right-hand orange glove was found in the victim's apartment, and defendant was found with a left-hand orange glove. The error also did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Ackerman*, *supra* at 448-449. The comment was not sufficiently egregious that a curative instruction could not have corrected the error. And, the trial court instructed the jurors that they "may only consider the evidence that has been properly admitted in this case" and that the "lawyers' statements and arguments are not evidence." The trial court further instructed that "[y]ou should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge." The instructions were sufficient to preclude any prejudice that might have resulted from the prosecutor's remark. *Bahoda*, *supra* at 281 (Trial court's instruction that arguments of attorneys are not evidence eliminated any prejudice).

Defendant argues that the trial court erroneously scored 25 points for offense variable (OV) 13, MCL 777.43(1)(b), which provides that OV 13 must be assessed 25 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." Defendant contends that he has only two crimes that can be counted because the third crime was dismissed and should not have been included because there was no actual evidence, much less a preponderance of the evidence, that defendant committed the third crime. Defendant cites *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). Defendant avers that the error in scoring this variable resulted in the recommended minimum sentencing range under the legislative guidelines being higher than it should have been. Therefore, defendant asserts that his sentence constituted an unlawful and unintended departure from the guidelines.

Defendant had another first-degree home invasion charge pending and set for trial for an offense that occurred 27 or 28 hours before the instant offenses occurred. The prosecutor dismissed the case, apparently because there was an expectation that that case would not result in a greater sentence than the case at hand. That charge was the third crime against a person that the trial court included in scoring OV 13 at 25 points.

A trial court's calculation of the recommended minimum sentence range under the legislative guidelines is reviewed to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Issues of statutory interpretation are reviewed de novo. *McLaughlin*, *supra* at 671.

> In considering a question of statutory construction, this Court begins by examining the language of the statute. We read the statutory language in context to determine whether ambiguity exists. If the language is unambiguous, judicial construction is precluded. We enforce an unambiguous statute as written. Where ambiguity exists, however, this Court seeks to effectuate the Legislature's intent

> through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished. [*Macomb Co Prosecuting Atty v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001) (internal citations omitted).]

MCL 777.43(2)(a) provides that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." Thus, all crimes committed within a five-year period that encompass the sentencing offense can be considered. *People v Francisco*, 474 Mich 82, 86; 711 NW2d 44 (2006). Further, the specific language of the statute provides that all offenses "shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Thus, the plain language supports that charges that have been dismissed can be counted as well. However, factors used in sentencing a defendant must have support in the record, *Hornsby, supra*, and where effectively challenged, must be proved by a preponderance of the evidence. *Drohan, supra* at 142-143.

In this case, no evidence of record supported that defendant committed the third first-degree home invasion charge. The prosecutor verbally asserted at sentencing that the offense occurred 27 or 28 hours before the instant offense and the matter was set for trial, but dismissed. However, no evidence supported the scoring decision, no findings were made on the record, and the trial court did not indicate that it found defendant committed the crime by a preponderance of the evidence. We vacate defendant's sentence and remand for resentencing. On remand, the trial court may again consider the dismissed charge but only if it first determines by a preponderance of the evidence that defendant in fact committed the offense.[3]

Defendant next argues that the trial court's order of attorney fees should be vacated or the matter remanded so he has the opportunity to present evidence or argument concerning his current and future inability to pay the ordered fees. We review a challenge to the imposition of attorney fees for an abuse of discretion. *In re Condemnation of Private Prop for Hwy Purposes*, 221 Mich App 136, 139-140; 561 NW2d 459 (1997). This matter was remanded by this Court to enable the trial court to address defendant's current and future financial circumstances and foreseeable ability to reimburse the county for attorney fees. *People v Story*, unpublished order of the Court of Appeals, entered February 4, 2008 (Docket No. 277830). This Court's order specifically stated "[a]t the trial court's discretion, the decision may be made based on the record without the need for a formal evidentiary hearing." *Id*.

After remand, the trial court issued an order finding that, after review of defendant's PSIR, health history and employment record, defendant has the ability to pay his court-appointed attorney fees. Therefore, the trial court appropriately complied with this Court's February 4, 2008 order. An evidentiary hearing was not required. See *People v DeJesus*, 477 Mich 996, 997; 725 NW2d 669 (2007), and *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004). Thus, this issue that a remand is necessary to allow defendant to present evidence or argument has no merit.

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[3] On the sentencing grid for Class B offenses, MCL 777.63, without the scoring of 25 points for OV 13, defendant's OV level becomes I, thus his minimum sentencing range would be 36-60 months rather than 57-95 months.

Defendant's final argument is that a criminal sexual conduct (CSC) charge arising from the incident at hand should be stricken from the PSIR because it is not supported by a preponderance of the evidence and therefore is inaccurate. Alternatively, defendant argues that the CSC charge should be stricken from the PSIR because the trial court did not rely on it when sentencing defendant. We review a sentencing court's response to claims of inaccuracies in a defendant's PSIR for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003). "[T]he court has wide latitude in responding to these challenges. The court may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information." *Id*. at 648-649 (citations omitted).

The PSIR indicated that defendant's charges at the time of arrest included first-degree CSC during a felony and first-degree home invasion. Defendant did not object at sentencing nor does he appear to object on appeal to a description of the conduct that resulted in the CSC charge appearing in the PSIR. Rather, defendant only objects to the CSC charge being listed on the PSIR, because the charge was ultimately dismissed and the testimony at trial did not support such a charge. Haynes testified, in essence, that defendant's groping of her during the incident was not sexual touching, but rather he was just trying to see if she had any money under her clothes. She further testified that the touching happened very quickly and did not last for a long period of time. At sentencing, when defense counsel objected to the inclusion of the information about the CSC charge in the PSIR, he referred only to the portion of the PSIR that listed the charges to include the CSC charge. Clearly, defendant's initial charges at arrest included first-degree CSC charge. But, the testimony at trial did not support a criminal sexual conduct charge and the charge was subsequently dismissed. Thus, while the trial court accurately determined that defendant's initial charges at arrest included first-degree CSC, the charge was unfounded and not supported by the record as evidenced by its dismissal. The trial court abused its discretion when it determined that the CSC charge should be listed on defendant's PSIR and we remand for correction of defendant's PSIR.

Affirmed, but remanded for resentencing and correction of the PSIR. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald