STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 20, 2009
v	No. 280781 Monroe Circuit Court
SCOTT EDWARD HENSLEY, Defendant-Appellant.	LC No. 07-035886-FH

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of malicious destruction of a building over $1,000 to $20,000, MCL 750.380(3)(a), and first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent sentences of 48 to 120 months' imprisonment for the malicious destruction of property conviction and 278 to 480 months' imprisonment for the first-degree home invasion conviction. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant, accompanied by his friend Michael Grice, drove to Terry Pierce's home to retrieve his wife, Reida Hensley, and take her back to Florida. Hensley was living with Pierce, although she was not home at the time of these events. Defendant pounded on Pierce's front door with such force that the steel door began to bend. When Pierce informed defendant that Hensley was not at home and that he had a gun, defendant replied, "I don't give an F, that no gun—when no .25 is gonna stop me." Fearing for his life, Pierce shot at defendant through the door.

Defendant then got into his van and rammed Pierce's house with the vehicle. The force of the impact buckled the aluminum siding, bowed the living room window inward, and damaged the studs and drywall on the interior of Pierce's home. After hitting the front of the structure, defendant then caused his vehicle to strike the back of the house, which resulted in the denting of a section of aluminum siding and breaking off part of the deck railing.

Defendant first asserts that interference by the interpreter deprived him of his right to cross-examine the witness, Grice, during trial. Because defendant failed to object to the interpreter's actions at any time during the contested testimony, we review this issue for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004). Reversal

is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines, supra* at 763-764.

Although hearing impaired, Grice was not completely deaf and had the ability to read lips. While testifying, Grice demonstrated some difficulty hearing and understanding the questions posed to him. In addition, persons in the courtroom experienced problems with understanding some of his responses. Because of this breakdown in communication, the trial court instructed its clerk, Kelly Gabriel, who was fluent in the sign language alphabet, but not certified as a signer in American Sign Language, to translate Grice's answers through the use of the signed alphabet when needed. Both the prosecutor and the defense attorney stated they had no objections to Gabriel assisting when necessary.

Defendant cites several examples where he asserts Gabriel, acting as an interpreter, took liberties by trying to explain to Grice what was being asked, gave summaries of what was being said, and in asking questions, all of which are contrary to the proper role of an interpreter as delineated by this Court in *People v Cunningham*, 215 Mich App 652; 546 NW2d 130 (1999). The *Cunningham* Court held that, "[a]s a general rule, the proceedings or testimony at a criminal trial are to be interpreted in a simultaneous, continuous, and literal manner, without delay, interruption, omission from, addition to, or alteration of the matter spoken, so that the participants receive a timely, accurate, and complete translation of what has been said." *Id.* at 654.

This case is distinguishable from *Cunningham* for several reasons. First, this case involved the interpretation of sign language from an English speaking witness who was hearing impaired. Unlike the witness in *Cunningham*, the courtroom was privy to much of Grice's testimony without the aid of an interpreter. Grice spoke and understood English and individuals in the courtroom understood the majority of Grice's testimony without the aid of an interpreter. Unlike *Cunningham,* the interpreter's purpose in this case was to clarify questions to the witness and answers by the witness *when necessary*. The record does not reflect any attempt by the interpreter to give summaries of the witness' testimony, as alleged by defendant.

Second, the record does not support defendant's assertion that a portion of the testimony subject to the use of sign language was not translated for the trier-of-fact. Defendant also alleges that the interpreter interfered by trying to explain questions to defendant. However, the record fails to support this allegation. There were only occasional and minor lapses in the simultaneous and literal translation of Grice's testimony, which was likely due to the interpreter's use of the sign language alphabet. These minor lapses in the translation did not deprive defendant of his right to confrontation. There is also no indication that the interpreter altered Grice's testimony or interfered with the ability of those in the courtroom to understand Grice's testimony. Even though the cross-examination of Grice was often tedious, counsel was able to convey the meaning of his questions and obtain responsive answers. *Cunningham, supra* at 654-655.

Finally, unlike *Cunningham*, trial counsel never objected to the testimony interpreted by Gabriel. There was no indication by the judge, counsel, or jurors to suggest that Gabriel was taking liberties in translating the questions posed to Grice or his responses.

Defendant next asserts that his conviction for first-degree home invasion must be reversed because he was denied the right to a unanimous verdict. Defendant contends the trial court erred when it failed to give an instruction advising the jury that it had to unanimously agree on the specific act that formed the basis for its finding of first-degree home invasion. We review this unpreserved constitutional issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 764.

At trial, the prosecution presented evidence that either of the following would prove the single count of first-degree home invasion: 1) driving the van into Pierce's home; or 2) walking through the attached porch and violently banging on the door and threatening Pierce, who was inside. The jury was not instructed that it had to unanimously agree on the particular act that formed the basis for its finding of first-degree home invasion. Rather, the trial court instructed the jury that, "[a] verdict in a criminal case must be unanimous. In order to return a verdict it is necessary that each of you agrees on that verdict."

After instructing the jury, the trial court asked defense counsel if he would like to address the court regarding the instructions. Counsel voiced no dissatisfaction with the instructions and expressly requested the trial court to *not* give a specific unanimity instruction, stating that it might confuse the jury if they were presented with two theories for the home invasion charge. Counsel's express approval of the trial court's jury instructions constituted a waiver of this issue, which has extinguished any error on appeal. *People v Carter*, 462 Mich 206, 215-220; 612 NW2d 144 (2000). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights for his waiver has extinguished any error." *People v Dobek*, 274 Mich App 58, 65; 732 NW2d 546 (2007), quoting *Carter*, *supra* at 215.

Next, defendant argues in his Standard 4 supplemental brief that there was insufficient evidence presented at trial to support his first-degree home invasion conviction. We review sufficiency of the evidence challenges in a criminal trial de novo. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005). In reviewing the sufficiency of the evidence, we determine whether the evidence, when viewed in the light most favorable to the prosecution, would warrant a trier of fact in finding that all the elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). In determining whether sufficient evidence had been presented to support a conviction, this Court "will not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses." *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

To support a conviction of first-degree home invasion, the prosecution must prove that defendant did the following: (1) entered the dwelling without permission; (2) while intending to commit a larceny or assault, or actually committing a larceny or assault while entering, exiting or while in the dwelling; and (3) that either another person was lawfully present in the dwelling at the time or defendant was armed with a dangerous weapon. *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004); MCL 750.110a(2). The home invasion charge in the instant case was based on defendant committing an assault. An assault is defined as "'either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995), quoting *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). A battery is

defined as '"the willful touching of the person of another by the aggressor or by some substance put in motion by him; or, as it is sometimes expressed, a battery is the consummation of the assault.'" *People v Bryant*, 80 Mich App 428, 433; 264 NW2d 13 (1978), quoting *Tinkler v Richter*, 295 Mich 396, 401; 295 NW 201 (1940).

The prosecution offered two theories in support of the first-degree home invasion charge. First, it contended that defendant entered Pierce's porch and assaulted Pierce by banging on the door with such force that it bent the door inward, while threatening to kill Pierce. The prosecution's second theory was that defendant assaulted Pierce when he drove his van into Pierce's home.

Defendant argues there was insufficient evidence to convict him of first-degree home invasion because he did not intentionally drive his vehicle into Pierce's home and that at no time did the vehicle actually penetrate the structure. However, it is clear from the testimony at trial that defendant's act of driving his vehicle into Pierce's home was intentional. Pierce and his children testified that while defendant was on the porch of his home, he violently banged on the door and threatened Pierce. Seconds later, defendant drove his vehicle into the home, penetrating the drywall of the living room. Admissions by Grice and defendant to the police placed defendant behind the wheel of the vehicle at the time of impact. This evidence satisified the elements of first-degree home invasion because it demonstrated that defendant (1) entered Pierce's house without permission by setting his vehicle in motion, (2) when entering the dwelling with his vehicle, defendant willfully committed an unlawful act that placed Pierce in reasonable apprehension of receiving an immediate harmful or offensive touching, and (3) defendant and his children were lawfully present in the dwelling at the time of the incident. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant's conviction of first-degree home invasion. *Robinson, supra* at 5.

Defendant also argues the evidence was insufficient to convict him of first-degree home invasion because he never entered the dwelling, but only entered the enclosed porch, which led to the door that allows direct access to the house. For purposes of the home invasion statute, "a dwelling" is specifically defined as "a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." MCL 750.110a(1)(a). It was established at trial that to get to the front door of Pierce's home, one first has to walk though a screened-in porch. Under the first-degree home invasion statute, the enclosed porch attached to the home clearly qualified as an appurtenant structure to the dwelling.

Defendant also asserts that he was denied the effective assistance of counsel because his trial counsel failed to request the trial court to instruct the jury on the lesser-included offense of breaking and entering. Defendant failed to move for a new trial or an evidentiary hearing on his claims of ineffective assistance of counsel. Therefore, our "review is limited to mistakes apparent on the record." *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 95 (2002).

Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689-690; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 326-327; 521 NW2d 797 (1994). To overcome this presumption, defendant must meet a two-pronged test. Defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness

under the circumstances and according to prevailing professional norms. *Strickland, supra* at 687-688; *Pickens, supra* at 312-313. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. *Strickland, supra* at 693; *Pickens, supra* at 309.

The decision to request or refrain from requesting a lesser offense instruction is generally considered to be a matter of trial strategy. See *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). "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, one cannot conclude that counsel was ineffective solely because it refrained from requesting the lesser offense instruction of breaking and entering.

"[B]reaking and entering without permission is a necessarily included lesser offense of first-degree home invasion." *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002). "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. However, this does not mean that the jury should always be instructed on a lesser-included offense where the only difference between the greater and lesser offenses is the intent element. Further, the evidence supporting the lesser offense must be "substantial." *Id.* at 388 n 2.

In the instant case, defendant's intent upon breaking and entering was at issue. Defendant contends that his actions at Pierce's home were merely intended to retrieve his wife and not to commit an assault. In addition, defendant asserts that he did not intend to drive his vehicle into Pierce's home, but that the icy condition of the driveway was to blame for losing control of his vehicle and hitting Pierce's home. Even though defendant's intent comprised a disputed factual element, a rational view of the evidence did not support an instruction for the lesser-included offense. Defendant conveniently ignores testimony by Pierce and his children that defendant was forcefully trying to beat down the door while verbally threatening Pierce. In addition, defendant ignores testimony by the police that the tracks and force of the impact were not consistent with sliding on an icy driveway. A rational view of the evidence supports only the conclusion that defendant had the intent to commit an assault. Therefore, defendant was not entitled to the instruction, and counsel was not ineffective for failing to request it.

Affirmed.

/s/ Michael J. Talbot
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher