STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 14, 2009
v	No. 283058 Oakland Circuit Court
JOHN PAUL KICI, Defendant-Appellant.	LC No. 2007-216997-FH

Before: Wilder, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for third-degree home invasion, MCL 750.110a(4), and domestic violence, second offense, MCL 750.81(3). He was sentenced, as a second habitual offender, MCL 769.10, to three to seven and a half years in prison for the third-degree home invasion conviction, and 183 days in jail for the domestic violence, second offense, conviction. We affirm.

Defendant first argues on appeal that the testimony established that he had both express and implied permission to enter the townhouse of Danielle Adams, his ex-girlfriend and the mother of his son, Landon, and therefore, the verdict of guilty on the third-degree home invasion count was against the great weight of the evidence. We disagree.

This Court reviews "for an abuse of discretion a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.*, at 217. "A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* at 232, citing *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). "Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. Absent exceptional circumstances, issues of witness credibility are for the trier of fact." *Id*. "To determine whether a verdict is against the great weight of the evidence . . . a judge necessarily reviews the whole body of proofs." *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds *Lemmon, supra.*

A person is guilty of third-degree home invasion, pursuant to MCL 750.110a(4)(b), if he "[b]reaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or exiting the dwelling, violates any of the following ordered to protect a named person or persons: (i) a probation term or condition, (ii) a parole term or condition, (iii) a personal protection order term or condition, (iv) a bond or bail condition or any condition of pretrial release." MCL 750.110a(1)(c) defines "without permission" as "without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully or in control of the dwelling."

Defendant does not dispute that the conditions of his parole and the terms of the personal protection order prohibited him from having contact with Adams and being at her residence, but rather, his sole argument is that he had permission to enter the townhouse. This argument is without merit. First, although Rachel Cluckey, age 16, opened the door and stepped aside, she did not ask defendant to come in. In fact, at the preliminary examination, she specifically testified that she moved out of the way before defendant could push her out of the way because "he seemed pretty angry." At trial, although Cluckey at first testified that defendant seemed more upset than angry, she later admitted that defendant looked angry and intoxicated. Furthermore, in her statement to police after the incident, Cluckey indicated that defendant "had busted in." Moreover, Cluckey herself testified that she did not think she had authority to either grant or deny entry to defendant. Additionally, Cluckey was not the owner or lessee of the premises as required by MCL 750.110a(1)(c), and she was not in control of the dwelling because Adams was home at the time. Finally, Cluckey testified that while in court for the preliminary examination, defendant had engaged her in conversation, essentially asking her to say that she had let him in, from which the jury could infer that she did not, in fact, do so.

Second, Adams, the owner of the premises, admitted that she was not expecting defendant to come over. At any rate, she was asleep when he arrived, and therefore, could not have given her permission for him to enter. Moreover, when she was asked at the preliminary examination whether defendant had permission to be in her home she answered, "no." In fact, she asked Cluckey to call the police because she did not want defendant in her home. Officer Guda, the responding officer, testified that Adams appeared visibly upset, and she told the officers that defendant had just gone upstairs, despite the fact that he was in the bedroom lying under a blanket, trying to look as though he had been asleep.

There is evidence that Adams had rekindled her relationship with defendant and claimed to have slept with him the night before the incident.[1] She further testified on cross-examination that she had written defendant a letter wherein she stated that he was not at fault and had not entered the townhouse without permission. However, Adams also admitted that she and defendant had broken up a month before the incident and was dating another man, which was the source of defendant's anger. Furthermore, she had requested and obtained a personal protection order against defendant, and had not sought to remove it. Although it was clear that, at trial, both

[1] Adams had testified otherwise at the preliminary examination, and furthermore, Derek Joyce, defendant's roommate, testified that Adams and defendant did *not* spend the night together on the evening before the incident.

Adams and Cluckey tried to change their stories to help defendant, they were repeatedly confronted with their prior sworn testimony, and the trier of fact determined which testimony was credible. *Unger, supra* at 232.

Regarding the defense witnesses, the purpose of both the roommate's and stepmother's testimony was to show that there was an established pattern between Adams and defendant, in which both freely knocked and then entered the other's residence without specifically being told to enter. This, however, is not relevant to whether defendant entered without permission on September 10, 2007, after showing up, uninvited, and in violation of his parole and the personal protection order, after midnight. Therefore, in light of the entire body of proofs, the trial court did not abuse its discretion when it denied defendant's motion for new trial on the grounds that the verdict was against the great weight of the evidence because testimony established that defendant did not have permission to enter the townhouse.

Defendant next argues on appeal that his conviction was based on insufficient evidence because, for all of the same reasons offered in support of his argument that the verdict was against the great weight of the evidence, defendant had permission to enter the townhouse. Defendant also argues that because he spoke softly and did not appear angry when Cluckey opened the door, there was no reason for her to deny him entry. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "[A] court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Nevertheless, "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime." *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007) (internal citations omitted).

Defendant's only substantive argument is that he had permission to enter the townhouse. Regardless of his demeanor when he presented himself at the front door at 1:30 a.m., defendant did not have permission to enter for all of the reasons mentioned above in the discussion of whether the verdict was against the great weight of the evidence. It should be noted, of course, that there was also testimony that he appeared at the townhouse angry, upset, and intoxicated. Therefore, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational jury to find defendant guilty beyond a reasonable doubt of third-degree home invasion.

Defendant next argues on appeal that the trial judge erred in denying his motion for a directed verdict on the first-degree home invasion count, and as a result, the jury reached a compromise verdict by finding defendant guilty of third-degree home invasion. We disagree.

"In reviewing the denial of a motion for a directed verdict of acquittal, this Court reviews the evidence in a light most favorable to the prosecution in order 'to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.'" *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (citation omitted). In the trial court, "[i]f the evidence presented by the prosecution in the light most

favorable to the prosecution, up to the time the motion is made, is insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt, a directed verdict or judgment of acquittal must be entered." *Lemmon, supra* at 634. "[I]t is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for directed verdict of acquittal, no matter how inconsistent or vague that testimony might be." *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001) (internal citations omitted).

Pursuant to MCL 750.110a(2), "a person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault, is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists: (a) The person is armed with a dangerous weapon. (b) Another person is lawfully present in the dwelling." See also *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004).

"Although the term 'assault' is not defined within the statute . . . Michigan has defined the term 'assault' 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 Musser*, 259 Mich App 215, 223; 673 NW2d 800 (2003), citing *People v Reeves*, 458 Mich 236, 239; 580 NW2d 433 (1998). A "'battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.'" *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004) quoting *Reeves, supra* at 240 n 4.

Defendant argues that the testimony from Cluckey and Adams made clear that defendant did not have the intent to commit first-degree home invasion, and furthermore, he did have permission to enter the townhouse. These arguments are without merit. First, as discussed above, defendant did not have permission to enter the townhouse. Second, it is not necessary for the prosecution to prove intent if there is evidence that defendant did in fact assault Adams: the statute provides that a person is guilty of first-degree home invasion if he enters the dwelling without permission with the "intent to commit . . . [an] assault" or, if while present in the dwelling, actually "commits . . . [an] assault" while armed or while another person is lawfully present. *Sands, supra* at 161, quoting MCL 750.110a(2). In this case, defendant does not dispute that other individuals were lawfully present in the home, and furthermore, defendant admits in his brief on appeal that he is not challenging his conviction for domestic violence[2] (a misdemeanor assault and battery). "[U]nder MCL 750.110a(2), both misdemeanor and felony assaults may properly be charged as crimes underlying first-degree home invasion." *Id.* at 163.

[2] Pursuant to MCL 750.81(3), "An individual who commits an assault or an assault and battery in violation of subsection (2), and who has previously been convicted of assaulting or assaulting and battering his or her spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household . . . may be punished by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both . . . ."

Therefore, the trial court did not err in denying defendant's motion for a directed verdict on the first-degree home invasion count because there was sufficient evidence to show that defendant entered the townhouse without permission and committed an assault while present therein.

Defendant next argues on appeal that the prosecutor engaged in misconduct when she used evidence properly admitted under MRE 404(b) in her cross-examination of Carrie Lynn Richardson, defendant's stepmother. We disagree.

Defendant did not preserve this issue for appeal, and therefore, "appellate review is for outcome-determinative, plain error." *Unger, supra* at 235. Under the plain error rule, "reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*, quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

"[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor injects issues broader than the defendant's guilt or innocence." *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007) (internal citation omitted).

It should be noted that while defendant's statement of questions presented seemed to indicate that he was challenging the admissibility of other acts evidence under MRE 404(b), defendant merely argues that the prosecutor improperly used the MRE 404(b) evidence in her cross-examination of Richardson. Regardless, the trial court found the evidence admissible under both MRE 404(b) (to show a common scheme) and MCL 768.27b.[3] However, even in a case where the evidence is only "arguably admissible," "a prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Dobek, supra* at 70. Therefore, the prosecutor's questioning of the witness regarding admissible evidence is not misconduct. Nevertheless, defendant asserts that using this information upon cross-examination of Richardson amounted to intentional badgering and belittling of her testimony, and therefore, this conduct rose to the level of denying defendant a fair trial. We disagree.

On direct examination, Richardson testified that she had witnessed "countless" interactions between defendant and Adams, and Adams would come to defendant's home "all the time." Regarding the manner in which Adams would be let into defendant's house when she arrived, Richardson agreed that there was no verbal communication, and explained that either Adams would "just walk in or someone opened the door, just come on in." In addition, Richardson had gone with defendant to Adams's townhouse approximately four to five times in

[3] Pursuant to MCL 768.27b(1), "'in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.' This statute stands in stark contrast to MRE 404(b)(1), which requires a proponent to offer more than the transparency of a person's character as justification for admitting evidence of other crimes or wrongs." *People v Schultz*, 278 Mich App 776, 778; 754 NW2d 925 (2008).

the past year.[4] When asked how they would be let into the townhouse, Richardson replied, "opened the door, just, you know, knocked, opened the door, and we walked in." Richardson agreed that there were occasions when Adams would just open the door and let them in and nothing was said. Finally, she stated that Adams never exhibited fear of defendant on any of these visits.

On cross-examination, the prosecutor asked Richardson the following questions, to which she responded in the negative:

> Have you ever come over to her townhouse with your stepson when your stepson has been drinking at 1:30 in the morning?
>
> Were you there on September 10, 2006, when he came in and broke his way in and assaulted her and assaulted the guy she was with?
>
> Were you there on August 19, 2006, when again he tried to get in and shattered the window?
>
> You weren't there on July 24, 2006, when he assaulted her?
>
> Or on April 2006 when he broke down her mom's door?
>
> Or on August 2005 when he threatened her?
>
> And her unborn child?

As noted by the prosecutor, the defense called Richardson to show that Adams had a habit of allowing defendant to enter her townhouse by simply opening the door and his interactions with her were peaceful. The prosecutor, on the other hand, sought to demonstrate that Richardson's personal knowledge was lacking, and thus, she was not a credible witness in regard to the issue at trial, that is, what occurred on September 10, 2007. Under MRE 611(b), "a witness may be cross-examined on any matter relevant to any issue in the case, including credibility . . . The scope and duration of cross-examination is in the trial court's sound discretion; [this Court] will not reverse absent a clear showing of abuse." *Wischmeyer v Schanz*, 449 Mich 469, 474-475; 536 NW2d 760 (1995). Therefore, the prosecutor's questioning was not improper.

Even if it had been error for the prosecutor to use evidence properly admitted under MRE 404(b) and MCL 768.27b(1) to cross-examine Richardson, defendant cannot show outcome-determinative error. First, Adams testified about all of the incidents, in detail, and therefore, the jury had already heard the information. Second, the trial court instructed the jury that 1) the lawyers' questions to the witnesses are not evidence, and 2) the other-acts evidence should be considered only for certain purposes, that is, whether defendant had a reason to commit the

[4] As the prosecution correctly points out, defendant was paroled on April 24, 2007, and had been incarcerated before that time.

crime, acted purposefully and not by accident or mistake, or used a plan or scheme that he used before. "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Unger, supra* at 235. Therefore, defendant has failed to show plain error.

Defendant next argues on appeal that trial counsel provided ineffective assistance by failing to object to the prosecutor's line of questioning. Defendant did not include this issue in his statement of issues presented, however, and therefore, the issue of ineffective assistance of counsel is not properly presented on appeal. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Suffice it to say that because the prosecutor's cross-examination of Richardson was not improper, any objection by counsel would have been futile. "Counsel is not ineffective for failing to make a futile objection." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Finally, defendant argues that his sentence is invalid because it was based on inaccurate information. He does not cite any inaccurate information, but rather, he merely argues that his assaults on Adams posed no risk to the public, and in addition, the assaults were not severe acts of domestic violence. Defendant concludes that his transgressions could have been addressed by a short county jail sentence, probation, and domestic violence counseling. We disagree and find that defendant is simply arguing that the trial court should have reached a different conclusion based on accurate information. Moreover, "if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence *and* the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004) (emphasis added). Defendant did not raise the issue of inaccurate information at sentencing, in a motion for resentencing, or in a motion to remand, and his sentence is within the guidelines range. Therefore, even had defendant articulated some reason why the information relied on at sentencing was inaccurate, the issue is not reviewable on appeal.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood