# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 17, 2009 |
| v | No. 285172<br>Wayne Circuit Court |
| ARTHUR JOHNSON, JR.,<br><br>Defendant-Appellant. | LC No. 07-021136-FH |

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 6 to 15 years' imprisonment. We affirm.

Defendant first argues that there is insufficient evidence to support his conviction of first-degree home invasion because there was not evidence that he had the intent to commit a larceny within the victim's home. We disagree.

A challenge to the sufficiency of evidence is reviewed by this Court de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We must "'view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.'" *Id*., quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The elements of first-degree home invasion are: (1) the defendant broke into and entered a dwelling without permission, (2) while intending to commit or actually committing a felony, larceny, or assault while entering, exiting, or present within the dwelling, and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. MCL 750.110a(2); *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004). Defendant was tried under the theory that he intended to commit a larceny within the dwelling and defendant only challenges whether there was sufficient evidence to show that he had the intent to commit larceny.

A defendant's intent can be proven by circumstantial evidence, including "the act, means, or the manner employed to commit the offense." *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). When reviewing a sufficiency of evidence claim, all conflicts in the

evidence must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Further, "it is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

In this case, the evidence showed that defendant opened the back door of the victim's house and entered the sunroom. The victim made eye contact with defendant through a mirror, while she was in the den. Defendant then quickly left through the same door without saying anything after the victim's dog started barking. The evidence also showed that when defendant was arrested he was found in possession of an envelope and coupons that the victim had attached to her front door the previous night for a member of a club she was in. Based on this evidence, it was reasonable for the jury to infer that defendant had taken the coupons from the front of the house and then went around the back of the house, to enter with the intent to steal items from within the house. When defendant entered, he was startled to find the victim at home, and left immediately. Therefore, based on this evidence and the reasonable inferences from it, a rational trier of fact could have concluded that defendant had the intent to commit larceny when he entered the house.

Defendant raises additional issues in his Standard 4 brief. First, defendant argues that the trial court erred by instructing the jury on simple larceny because first-degree home invasion does not contain an element of larceny. We disagree.

To preserve a challenge to jury instructions on appeal, a party must object to or request a jury instruction before the jury deliberates. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). And an affirmative statement by defense counsel that there are no objections to the jury instructions constitutes express approval of the instructions, waiving appellate review. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Here, after the jury instructions were given, defense counsel stated that he had no objections to the instructions. This constituted an affirmative statement of approval; thus, this issue was waived. See *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Further, to the extent that defendant is contending that the trial court erred by informing the jury that he had been previously charged with larceny in addition to first-degree home invasion, this claim is without merit. Defendant failed to support such claim with proper citation to the record, MCR 7.212(C)(7), and we are unable to locate such a reference.

Next, defendant raises several claims of prosecutorial misconduct, including that the prosecutor committed misconduct by misrepresenting facts, encouraging the jury to convict him of larceny even though this crime was not charged, intentionally using perjured testimony, and obstructing his access to videotape evidence of when he was brought to the police station after his arrest. We disagree.

This Court generally reviews claims of prosecutorial misconduct de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, because these claims were not preserved, our review is for plain error affecting substantial rights. *Id*. The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the relevant portion of the record, evaluating a prosecutor's remarks in context. *Id*.

Defendant's first challenge is to the prosecution's opening statement and closing argument. The prosecutor stated that defendant was seen running from the victim's house and was seen running before he was apprehended. Although the victim testified that she did not actually see defendant running, she also testified that she believed he must have been running because he was out of sight by the time she got to the door. The testimony also showed that defendant was not running when he was apprehended. However, opening statements and closing arguments are not evidence. *People v Bailey*, 451 Mich 657, 681; 549 NW2d 325, amended 453 Mich 1204 (1996), and the jury was so instructed. Jurors are generally presumed to follow instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, this instruction cured any potential prejudice from these minor misstatements.

Defendant's second claim of prosecutorial misconduct—that the prosecutor encouraged the jury to convict him of larceny even though this crime was not charged—is also meritless. A prosecutor may not make a factual statement to the jury that is not supported by the evidence, but she is free to argue the evidence and all reasonable inferences arising from it as they relate to her theory of the case, and need not confine her argument to the blandest possible terms. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

In this case, the prosecutor simply argued that the jury should infer that defendant had the intent to steal from his possession of the coupons that had been taped to the victim's door, which required the jury to infer that defendant had taken the coupons in the first place. As noted above, these inferences surrounding the coupons and defendant's intent when he entered the house were reasonable for the jury to make. Further, defendant's suggestion that the prosecutor was relying on the stolen coupons when there was not probable cause to charge defendant with stealing them is misguided. Defendant was initially charged with larceny from within a building. However, this charge was dropped at the preliminary examination after it was determined that the coupons were taped outside the door, and thus, there was no evidence defendant took anything from inside the home. Although the prosecution decided not to pursue a charge for the theft of the coupons, it is well settled that "the decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998).

Defendant also claims that the prosecutor intentionally used "perjured" testimony. A prosecutor may not knowingly use false testimony, and must report and correct perjury committed by a government witness. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001); *People v Lester*, 232 Mich App 262, 276-278; 591 NW2d 267 (1998). But a finding of "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The mere fact that certain testimony may be contradicted does not compel the prosecutor to disbelieve his own witnesses and correct their testimony. *Lester*, *supra* at 278-279.

Defendant's first challenge concerns the fact that the victim testified at the preliminary examination that her doorbell was working but at trial she testified that it was not working on the day of the incident. Regardless, the prosecutor did not question the witness regarding the status of the doorbell at trial. Rather, this evidence was solicited on cross-examination. Trial testimony to this effect aided defendant because it made it plausible that he tried to ring the doorbell; therefore, this inconsistency does not constitute plain error.

Defendant also challenges the fact that the victim testified at trial that she had taken medication before the incident, yet she testified at the preliminary examination that she had not taken her medication prior to the incident. And defendant refers to the victim's testimony regarding the coupons, where she stated they were present that morning and then gone when she was taken by police to identify defendant. This testimony contradicted her trial testimony in which she stated that she did not check on the coupons from the previous night until she left with police. However, apparent inconsistencies in the victim's testimony does not establish that the witness committed perjury or that the prosecutor was aware of any perjury. See *Herndon*, *supra* at 417.

Defendant also asserts other instances of "perjured" testimony from the officers at trial, but fails to note where in the record this testimony occurred or provide any basis for why this evidence is perjury or how it constitutes prosecutorial misconduct. A defendant "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . .." See *Matuszak*, *supra* at 59 (citation and quotations omitted). The treatment of this issue constitutes abandonment. *Id*.

Defendant next contends that the prosecutor committed misconduct by asking, "nothing else was missing in your home, right?" However, the actual question was "Now other than the coupons that were gone from the front door, was there anything else missing from your house?" This question does not assume that anything was stolen from within the house, and thus, defendant's claim is without merit.

Finally, defendant also failed to establish plain error with regard to his claim that the prosecutor committed misconduct when the videotape recording of outside the police station's garage after defendant's arrest was not provided to him. Defendant wished to use the tape to impeach the police officers on the circumstances under which he was removed from the scout car. However, there is no evidence in the record that the prosecutor intentionally obstructed defendant's access to this tape or whether such a tape even exists.

Next, defendant raises several claims of ineffective assistance of counsel, none of which warrant appellate relief.

Under the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, the guaranteed right to counsel encompasses the right to the effective assistance of counsel. *Cline*, *supra* at 637. "To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the factual findings for clear error and the constitutional question de novo. *Id*. However, because

there was no hearing pursuant to *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent on the record. *Rodriguez, supra* at 38.

First, defendant claims that his counsel was ineffective for failing to object to the jury instruction which improperly included an instruction on larceny. We disagree. The instruction on larceny was relevant to the first-degree home invasion instruction because defendant was tried under the theory that he had the intent to commit larceny when he entered the house. Therefore, any objection by defense counsel on this point would have been meritless, and counsel is not ineffective for failing to advocate a meritless position or to make a futile objection. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Second, defendant contends that his counsel was ineffective for failing to object to the prosecution's argument that defendant stole coupons in order to create an inference to show defendant's intent. We disagree. As analyzed above, the prosecution properly presented this as an argument to the jury, which was a reasonable inference for the jury to make. Again, counsel is not ineffective for failing to make a futile objection. See *Fike, supra*.

Third, defendant argues that he was denied the effective assistance of counsel by his counsel's decision not to state in his opening statement that defendant knocked on the back door because he was looking for yard work to do or to call witnesses who could testify that defendant does yard work in the area. We disagree. "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). However, "[d]efendant must overcome the strong presumption that counsel's performance was sound trial strategy." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

Here, defense counsel's trial strategy was to acknowledge that defendant entered the victim's house without permission, but argue that there was no evidence of his intent to commit larceny. In pursuit of that strategy, defense counsel successfully requested that the court instruct on the lesser-included charge of entering without permission. Because defendant did not testify at trial, it would not have been feasible for defense counsel to present a basis for defendant's presence without being able to have defendant testify to support this theory. Clearly defense counsel viewed arguing the prosecution's lack of evidence, rather than providing alternative explanations, as the best defense in this case. Furthermore, this Court has recognized that admitting guilt on lesser offenses and contesting guilt on greater offenses can constitute sound trial strategy. *Matuszak, supra* at 60. Based on this, defendant has failed to show he was denied the effective assistance of counsel.

Further, defendant provides no details on the other witnesses he claims he wanted his counsel to call. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Without a basis for concluding that these witnesses would support a substantial defense, defendant has failed to show his counsel was ineffective.

Fourth, defendant argues that he was denied the effective assistance of counsel because his counsel failed to impeach the victim when she allegedly perjured herself. We disagree. Defendant fails to specify what statements should have been used and how such statements

would have established that the victim was not credible. Also, contrary to defendant's argument, the record reflects that defense counsel cross-examined the victim extensively and even recalled her later in the trial. On multiple occasions defense counsel raised inconsistencies with her testimony from the preliminary examination and her trial testimony. Defense counsel went as far as to recall the victim after the prosecution's proofs to further question her. The record therefore establishes that defendant's trial counsel's performance in this regard did not fall below an objective standard of reasonableness.

Finally, defendant raises in his Standard 4 brief an identical claim challenging the sufficiency of the evidence. Based on the above analysis, there is sufficient evidence to support defendant's conviction. Defendant also raises additional claims of error in this issue regarding his preliminary examination violating his initial right to due process, the lack of notification on the charge of larceny, and the prosecution obtaining a conviction on an illegal factual basis of the stolen coupons. However, defendant has abandoned appellate review of these issues because he failed to raise them in his statement of questions presented, as required by MCR 7.212(C)(5). See *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra