STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 16, 2010
v	No. 288242 Macomb Circuit Court
THOMAS LEE GEBORKOFF, Defendant-Appellant.	LC No. 2008-001579-FC

Before: Sawyer, P.J., and Saad and Shapiro, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 40 to 240 months for the home invasion conviction, 40 to 120 months for the assault conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. BASIC FACTS

In January 2008, the complainant ended a four-year relationship with defendant against his wishes. After the breakup, in February 2008, defendant drove from his home to the complainant's hometown, hoping to see her.[1] Both the complainant and defendant testified that he called her from a local bar, and the two ultimately spent time together. The complainant testified that defendant eventually started sending text messages accusing her of being with other men and indicating that the relationship was not finished, that he did not want her to date anyone else, and that he would kill her and anyone else she dated. He also left voicemail messages that he was "going to get her." The complainant called defendant a few days before March 14, 2008, and told him that she would no longer communicate with him.

Defendant admitted that on March 14, 2008, he used his shoulder to forcibly open the complainant's garage service door, entered the detached garage, and took the extra house key

[1] Defendant's residence is about a ten-hour drive from the complainant's residence.

that was inside the garage. Defendant used the key to open the complainant's back door, and entered her home. The complainant explained that although she was not at home at the time, defendant knew her schedule and knew that she would enter her house using the back door. The complainant testified that as she opened her back door at the usual time, defendant grabbed her wrist, pulled her inside, and said, "I'm here to kill you." Defendant repeated the statement three times. The complainant explained that defendant demanded her cell phone and when he reached for it, she broke free, ran out of the house, and called 911 as she ran to a neighbor's house. The complainant did not see a weapon, but reported that defendant was known to carry a gun. The 911 call was played for the jury. The complainant's neighbor and police officers described the complainant as frantic, trembling, and scared.

Police officers testified that when they opened the complainant's back door, they saw defendant sitting at the kitchen table, "slumped over," "passed out," and very intoxicated. A "fully loaded" revolver was on the chair next to defendant and was "within arm's reach." An officer explained that the firearm "was completely loaded with all the [six] rounds, and was ready to be fired." The firearm was not visible; it was in a chair that was pushed under the table. A large bottle of whiskey that was more than half-empty and open cans of beer were on the table. The spare house key was inside defendant's coat pocket. The police located defendant's vehicle parked in a strip mall parking lot about 1.34 miles from the complainant's home.

At trial, defendant denied any intent to harm the complainant, and claimed that he did not remember what happened. On the day of the incident, he was en route to Alabama to visit relatives and stopped in the complainant's area, hoping to see her. He did not call her because she was no longer accepting his calls. He had several drinks at a local restaurant, realized that he was intoxicated when he started driving, parked his vehicle, and hitched a ride to the complainant's house. When defendant left his vehicle, he carried a gallon of whiskey and a loaded gun in a bag; he claimed that he planned to leave the gun at the complainant's house while he traveled to Alabama. Defendant claimed that he went inside the home because he was cold. He then drank beer and whiskey, eventually passed out, and next recalled waking up in a hospital.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence was insufficient to sustain his convictions. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004); MCL 750.110a(2).

There was undisputed evidence that defendant broke and entered the complainant's locked garage and home without permission. Defendant admitted that he forcibly opened the garage service door, took the complainant's spare house key, and used it to enter her home without permission; the spare key was found in defendant's pocket. The complainant testified that defendant did not have permission to enter her home, and that she did not want him in her house. In addition, contrary to what defendant argues, there was evidence from which a jury could infer that he intended to commit and actually committed an assault while in the complainant's house. Defendant knew what time the complainant usually arrived home and knew that she would use the back door. When the complainant opened her back door, defendant immediately grabbed her wrist, pulled her inside, and declared three times that he was there to kill her. Also, defendant admitted bringing a loaded weapon inside the complainant's home. Viewed most favorably to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant broke into the complainant's garage and house without permission with the intent to commit an assault, while armed with a dangerous weapon.

"Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). An intent to cause great bodily harm less than murder may be inferred from facts in evidence; because an actor's state of mind is difficult to prove, only minimal circumstantial evidence is required. *Id.*; *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). The question of a defendant's intent is a matter for the trier of fact to resolve. See *Hardiman*, 466 Mich at 417.

Viewed in a light most favorable to the prosecution, the testimony was sufficient to establish that defendant assaulted the complainant with the intent to do great bodily harm less than murder. Again, there was evidence that defendant assaulted the complainant by grabbing her wrist and pulling her into the house. Although defendant argues that there was no evidence that he intended to harm the complainant, there was evidence that as defendant grabbed her, he said in a "serious" tone, "I'm going to kill you." He declared this reason for being in her house unannounced three times. The complainant explained that she "didn't doubt for a moment" that defendant was "very serious" and intended to kill her because of "the serious look in his face," the "look in his eyes," and the fact that he was in her house without warning. Because the complainant had dated defendant for more than four years, a jury could reasonably infer that she could discern whether he was serious or joking. Further, defendant admitted that he did not attempt to contact the complainant as he had always done in the past, and did not park his truck in her driveway as usual. The complainant explained that had defendant's vehicle been parked

outside, she would not have entered her home, given his previous threats. Defendant also had a "fully loaded" weapon in close proximity that was "ready to be fired."

This evidence was sufficient to enable the jury to infer that defendant assaulted the complainant with the intent to do great bodily harm less than murder. Defendant's claim that he was too "heavily intoxicated" to form the requisite intent is without merit. MCL 768.37 abolished voluntary intoxication as a defense to specific intent crimes in this state (subject to a very limited exception not applicable in this case). The evidence was sufficient to sustain defendant's conviction of assault with intent to do great bodily harm less than murder.

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Defendant argues that the evidence was insufficient to sustain this conviction because he was not guilty of either potential underlying felony. As explained previously, sufficient evidence was presented to sustain defendant's convictions of first-degree home invasion and assault with intent to do great bodily harm less than murder. Accordingly, the evidence was sufficient to sustain defendant's conviction for felony-firearm.

III. ADMISSION OF EVIDENCE

Defendant argues that the trial court abused its discretion in allowing the testimony of a "jail snitch," Edward Koralewski. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

While in jail with defendant, Koralewski gave a corrections officer a note (a "KITE") indicating that based on defendant's statements, he was concerned about what defendant might do to himself and to the complainant if he is released. Koralewski supposedly reported to a correctional officer that defendant admitted that on the night he was arrested, he was trying to kill his girlfriend, but was caught in the act. Koralewski testified at defendant's bond hearing, but did not testify as to all of defendant's statements and suggested that defendant may have been joking at times. Before trial, defendant moved to exclude Koralewski's testimony, arguing that it was not relevant and that the prosecutor wanted to elicit a denial from the witness in order to "backdoor" defendant's statements through the correctional officer. In allowing Koralewski's testimony, the court noted that it would further address the admissibility of the correctional officer's testimony when pertinent. At trial, Koralewski testified that defendant stated that he should have killed the complainant since he was being charged with the crimes. Koralewski admitted that he reported that defendant stated that "the night he was arrested, he was trying to kill his girlfriend," but denied reporting that defendant said he was "caught in the act." In subsequent argument at trial, defense counsel stipulated to the admission of the KITE, but again argued against the correctional officer being able to state what Koralewski told him defendant had said. The trial court allowed the correctional officer to testify only about the procedure and process of a KITE.

On this record, the trial court did not abuse its discretion. Because defendant's theory was that he did not assault the complainant and had no intent to harm her, evidence that he had

stated that he was trying to kill her or that he should have killed her was relevant to his credibility and because it tended to corroborate the complainant's claims of an assault. See MRE 401 (relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Furthermore, the evidence was not inadmissible simply because the nature of the evidence was prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403. Under the circumstances, the crux of defendant's challenge to Koralewski's testimony involves a matter of witness credibility, which was for the jury to decide. See *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), and *Wolfe*, 440 Mich at 514. Moreover, issues pertaining to Koralewski's credibility were plainly presented to the jury. The record discloses that defense counsel vigorously attacked Koralewski's credibility, and thoroughly explored his motivation to lie. In addition, the trial court gave the jury a specific cautionary instruction during trial regarding Koralewski's and the correctional officer's testimony. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that the prosecutor improperly called Koralewski only to elicit a denial in order to introduce improper impeachment evidence of his prior inconsistent statement through the correctional officer. "The general rule is that evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends directly to inculpate the defendant." *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). However, a prosecutor may not introduce evidence of a statement that directly inculpates the defendant under the guise of impeachment if (1) the substance of the statement is relevant to the central issue of the case and (2) there is no other testimony from the witness for which his credibility was relevant to the case. *Id.* at 682-683. This is a "very narrow" exception. *Kilbourn*, 454 Mich at 683.

The substance of defendant's statement to Koralewski was relevant to the central issue of the case. However, a review of Koralewski's testimony shows that he did not deny reporting that defendant said he was trying to kill his girlfriend on the night he was arrested. He only denied that defendant told him that he was "caught in the process." In addition, Koralewski testified regarding defendant's statements that he should have killed the complainant. Given Koralewski's testimony, it was not necessary for the prosecutor to impeach Koralewski through the correctional officer. Further, the trial court limited the correctional officer's testimony and precluded him from testifying about what Koralewski told him.

For these reasons, we reject this claim of error.

IV. PROSECUTOR'S CONDUCT

Defendant argues that the prosecutor's conduct of "parading witness after witness" through court denied him a fair trial. We disagree. Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Because defendant did not raise this claim below, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999).

Defendant asserts that the testimony of all witnesses other than the complainant was "inadmissible" because they had "no personal knowledge of the facts of the case." Defendant has not provided any support for his premise that only eyewitnesses may testify in a case, see *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984), and further, his premise is legally incorrect. See MRE 401 and MRE 402. Moreover, a finding of prosecutorial misconduct cannot be based on a prosecutor's good-faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Here, defendant has made no showing that the prosecutor acted in bad faith.

For example, three police officers testified regarding their response to the 911 call, their observations of the complainant and defendant immediately after the incident, and other aspects of the police investigation, which included the confiscation of a loaded firearm, the location of defendant's vehicle, and defendant's high level of intoxication. The police testimony was relevant to the charges against defendant, to the complainant's credibility, and to rebut defendant's defense. The complainant's neighbor testified that she was outside when she saw the complainant "frantically" run from her house, while on the phone with 911, and remarked that defendant had grabbed her and was trying to kill her. The neighbor's testimony was relevant to the complainant's credibility, and the complainant's statements to her neighbor were admissible under the excited utterance exception. See MRE 803(2). The 911 dispatcher testified regarding the logistics of the 911 call, which was played for the jury. Indeed, defense counsel used the 911 call to cross-examine the complainant. The complainant's sister and daughter testified that the complainant called them right after calling 911 and that she was crying and "scared to death." MRE 803(2). They also testified that shortly before the date of the incident, the complainant expressed fear of defendant because of threatening text and voicemail messages she had received. Given that defendant denied any hostility toward the complainant, her statements in that regard were relevant to demonstrate relationship discord, which is probative of motive and intent, see *People v Rotar*, 137 Mich App 540, 548-549; 357 NW2d 885 (1984), and were admissible under MRE 803(3) as evidence of her then-existing state of mind.[2]

In sum, defendant has not demonstrated that the witnesses' testimony was not relevant or otherwise inadmissible. Consequently, defendant has not established a claim of prosecutorial misconduct. *Noble*, *supra*.

V. MOTION TO QUASH THE INFORMATION

Defendant argues that the district court abused its discretion in binding him over for trial. We again disagree. Generally, a circuit court's decision to deny a motion to quash a felony information is reviewed de novo to determine whether the district court abused its discretion in ordering the bindover. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). But "[i]f a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich

[2] The only other witnesses were Koralewski and the correctional officer whose testimony was previously discussed.

1018; 677 NW2d 29 (2004). Here, defendant's argument fails because sufficient evidence at trial supported his convictions, and there is no indication that he was otherwise prejudiced by the claimed error. *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990). Consequently, defendant has failed to state a cognizable claim on appeal regarding the sufficiency of the evidence at the preliminary examination.

VI. SENTENCE

Defendant argues that he is entitled to resentencing because his sentence for assault with intent to do great bodily harm less than murder exceeds the applicable sentencing guidelines range, and the trial court failed to state a substantial and compelling reason to depart from the guidelines range, contrary to MCL 769.34(3). We disagree.

Defendant's presentence investigation report provided:

> It is respectfully recommended on Count 1 [assault with intent to do great bodily harm less than murder]: That the defendant be remanded to the custody of the Michigan Department of Corrections for 40 months to 120 months . . . . *The sentencing guideline range is 24 to 40 months.*
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> With respect to Count 3 [first-degree home invasion], it is recommended that the defendant be remanded to the Michigan Department of Corrections for 40 months to 240 months . . . . *The sentencing guideline range is 24 to 40 months.* [Emphasis added.]

Defendant did not challenge the accuracy of this information at sentencing. Indeed, defense counsel stated, "The guidelines are from 24 to 40 months, and the home invasion is 40 to 240, and the assault charge is 24 to 40." Subsequently, when imposing sentence, the trial court stated, "I will stay within the guidelines," and imposed sentence without objection by defendant.

Defendant now argues that his 40-month minimum sentence for his assault conviction is an upward departure from the properly scored guidelines range, which defendant maintains is 0 to 11 months. Because defendant specifically agreed at sentencing that the applicable guidelines range for the assault conviction was 24 to 40 months, he has waived appellate review of this issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000), reh den 463 Mich 1210 (2000). Defendant's waiver extinguished any error. *Id.* at 216.

Although this issue is waived, we note that the trial court imposed concurrent sentences for defendant's first-degree home invasion conviction, a class B felony, MCL 777.16f, and assault with intent to do great bodily harm less than murder conviction, a class D felony, MCL 777.16d. Therefore, the court was only required to score the guidelines for the highest crime class conviction, first-degree home invasion. *People v Mack*, 265 Mich App 122, 126-128; 695 NW2d 342 (2005). Defendant does not dispute that the appropriate guidelines range for his home invasion conviction was 24 to 40 months and that he was sentenced within this range. Moreover, whether defendant's class D felony sentence is proportional is not at issue because

that sentence does not exceed the concurrent sentence imposed for defendant's class B felony conviction for home invasion. *Id.* at 128-129. Defendant is not entitled to resentencing.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Douglas B. Shapiro