STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2010
v	No. 290003 Allegan Circuit Court
KEVIN LEE NEW, Defendant-Appellant.	LC No. 08-015700-FH

Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of first-degree home invasion, MCL 750.110a(2).[1] We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Complainant, defendant's next-door neighbor, testified that she and her children were home in their apartment on April 13, 2008, when defendant knocked on her door at approximately 12:30 a.m. She looked out of the peephole, decided to ignore defendant, and went back to bed. Approximately one-half hour later, defendant again knocked on the door. Complainant testified that defendant "pounded" on her door for approximately 15 minutes before she opened it. She asked defendant to stop knocking because he was "creeping her out." Defendant told complainant that her children were pounding on the wall. Defendant appeared to be a bit intoxicated. Complainant replied that the children were sleeping, and told defendant to stop knocking. She shut and locked the door, returned to bed, and fell asleep. Her children remained asleep in the living room. Complainant awoke to find defendant standing over her bed saying her name. She asked him how he got into her bedroom and told him to leave. He would not do so, and complainant had to physically push him out while threatening to stab him with a pen. As complainant was telling defendant to leave, defendant crudely asked if he could perform oral sex on her. Complainant testified that she felt terrified. Defendant would not leave when repeatedly ordered to do so. Complainant finally managed to get defendant out of the apartment

[1] Defendant was acquitted of a concurrent charge of assault with intent to commit sexual penetration, MCL 750.520g(1).

by a combination of threats and by physical force. She later discovered that defendant had entered through her locked balcony door after climbing up from below.

Defendant first argues that the prosecution presented insufficient evidence to support defendant's conviction for home invasion.

We review a defendant's allegations regarding insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id*. However, we will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and the reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences fairly can be drawn from the evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

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 felony, larceny, or assault, or actually committing a felony, 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). A simple assault may be committed either by an attempt to commit a battery or by an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). "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 Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998).

Defendant bases his argument on the fact that the jury acquitted him of the concurrent charge of assault with intent to commit sexual penetration. He argues that the jury's finding of guilt as to the home invasion charge was inconsistent with this acquittal. We disagree.

The verdicts were not necessarily inconsistent. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to establish the element of intent. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Based on complainant's testimony, including defendant's previous harassing behavior, the fact that complainant awoke to find defendant standing at her bedside, and his resistance as she attempted to get him to leave the home, the jury could reasonably have found that defendant intended to commit at least a simple assault on her while he was present in her home, even if it did not find that defendant specifically intended to sexually penetrate her.

Moreover, even assuming we were to find an inconsistency, the general rule is that juries may render inconsistent verdicts. *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980).

> Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jurors reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. These considerations change when a case is tried by a judge sitting without a jury. But we feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility. [*Id*. (footnotes omitted).]

"A jury in a criminal case may reach *different* conclusions concerning an *identical* element of two different offenses." *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994) (emphasis in original). This Court has stated that inconsistent verdicts "might" require reversal when there is evidence, beyond the inconsistent verdict itself, "that the jury was confused, did not understand the instructions, or did not know what it was doing." *People v McKinley*, 168 Mich App 496, 510; 425 NW2d 460 (1988). However, here, defendant has offered nothing on appeal other than the verdict itself to demonstrate that the jury was confused or did not understand the instructions or what it was doing. Therefore, even were we to find that the jury's verdict was inconsistent, this does not validate defendant's argument that the prosecution failed to provide sufficient evidence to support his conviction.

Next, defendant argues that defense counsel provided ineffective assistance when he failed to challenge for cause a juror who admitted during voir dire that his girlfriend had been the victim of a sexual assault. Defendant did not bring a motion for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*[2] hearing before the trial court; therefore, his ineffective assistance of counsel claim is not preserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Our review of an unpreserved ineffective assistance of counsel claim is limited to mistakes apparent on the record. *Davis*, 250 Mich App at 368. A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id*.

'"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise."' *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005), quoting *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "In order to overcome this presumption, 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." *Id*. "Second, defendant must show that the

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

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." *Id*., quoting *Solmonson*, 261 Mich App at 663-664.

A trial attorney's decisions with respect to prospective jurors are considered matters of trial strategy, and we generally decline to evaluate a claim of ineffective assistance of counsel with the benefit of hindsight. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000). In *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986), this Court held that failure to challenge a juror does not provide a basis for a claim of ineffective assistance of counsel. This Court explained, "A reviewing court cannot see the jurors or listen to their answers to voir dire questions. A juror's race, facial expression, or manner of answering a question may be important to a lawyer selecting a jury." *Id*. at 94-95. This Court continued, "Our research has found no case in Michigan where defense counsel's failure to challenge a juror or jurors has been held to be ineffective assistance of counsel. We cannot imagine a case where a court would so hold, and we do not so hold in this case." *Id*. at 95.

In the instant case, the prospective juror stated that his girlfriend had been sexually assaulted during a home invasion about 20 years ago. When the court asked whether it would affect the juror's "being fair" he replied that he did not think so. The court also asked whether the juror could put aside his girlfriend's prior assault and judge the case by what he saw and heard in the courtroom, and the juror replied that he could. When questioned whether he had anything to add that the parties would find important to know, the juror stated that his business had been the victim of break-ins twice in the prior year. The prosecutor asked the juror whether it would affect his ability to sit as a juror and to impartially listen to the evidence presented and base his decision only on the evidence. The juror answered no, and yes, respectively. He also answered in the negative when asked by defense counsel whether anything about his previous involvement with the break-ins would affect his ability to assess this case. Nothing in the juror's answers clearly supports a challenge for cause, or a claim that trial counsel was not acting as counsel in making the determination not to challenge. We find that defendant's ineffective assistance of counsel claim is without merit.

Affirmed.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood