STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 6, 2012
v	No. 301505 Isabella Circuit Court
MAWUT MAYEN, Defendant-Appellant.	LC No. 2009-000794-FH

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Defendant Mawut Mayen appeals by right his bench convictions of first-degree home invasion, see MCL 750.110a(2), and two counts of stealing or retaining a financial transaction device without consent, see MCL 750.157n(1). The trial court sentenced Mayen to time-served for his stealing or retaining a financial transaction device convictions, and sentenced him to serve 40 months to 20 years in prison for his home invasion conviction, with credit for 203 days served. On appeal, the primary question is whether the prosecutor presented sufficient evidence to establish that Mayen was the person who entered the victims' home and stole the credit card at issue along with other items. We conclude that there was sufficient evidence to establish Mayen's identity as the perpetrator of the home invasion. Because there was sufficient evidence to support the home invasion conviction and there were no other errors that warrant relief, we affirm.

I. BASIC FACTS

Nancy Parshall testified that she, her husband, and their daughter went to bed sometime between 9:30 and 10:30 p.m. on the evening of September 17, 2008. Apparently, they had left the door leading to their deck unlocked. The next morning, September 18, they discovered that several items were missing from the home; her husband's money clip was missing from the top of the microwave, her purse was missing from the kitchen, and her daughter's back pack was missing from the den. Parshall stated that her Chase Visa was in her purse along with several other valuables.

Paul Lauria testified that he was a detective with the Mount Pleasant police department and that he began to investigate the home invasion at Parshall's residence on September 22, 2008. He discovered that Parshall's credit card was used to make two on-line purchases after it was stolen. One purchase was made at 5:47 a.m. and another at 6:23 a.m. on the morning of

September 18, 2008. He learned that the purchases were made using a computer account assigned to Mayen by Central Michigan University and that the person who made the purchases gave the sellers an address in East Lansing. Lauria also secured a warrant to obtain the records of Mayen's computer use on the University's system.

Troy Bongard testified that he was an associate network manager for the University. He stated that every computer has a unique IP address assigned to it when on-line and that the on-line purchases made with Parshall's credit card were associated with Mayen's account with the University. He also stated that the University keeps track of the Media Access Control (MAC) addresses for the University's ports and that he traced the MAC address used during the on-line purchases to the port in Mayen's apartment. He explained that this means that someone using Mayen's account logged into the University system from Mayen's apartment and made those on-line purchases. Finally, Bongard testified that Mayen's account with the University was active from September 10 through September 23, 2008.

Karen Godwin testified that she assigns apartments for the University and that Mayen was the only student assigned to the apartment at issue; he had no roommates.

Lauria learned that Mayen leased an apartment from the University and placed it under surveillance every day after he learned that Mayen's account was used to access the internet for the on-line purchases. There was no sign of any activity at Mayen's apartment, despite keeping it under surveillance for about a month. He also tried attending the classes for which Mayen had registered, but was unable to locate Mayen. Lauria learned that Mayen had a home address in East Lansing and asked the East Lansing police to make contact, but they too were unable to locate him.

Lauria stated that Parshall's home was two to three miles from Mayen's apartment. He also admitted that the police department never recovered any of the items stolen from Parshall's home.

Mayen testified that he returned to the University's campus at the end of August 2008. He had been working at a meat plant in Nebraska. On the night in question, he walked to a nearby bar. He walked because his car was not working and he had a suspended license; he also remembered that it was "a pretty good day in the fall." While at the bar, he met a woman and her two friends—another guy and girl. He said that they drove back to his apartment and drank until about 3:45 a.m. on the morning of September 18, 2008. Thereafter, they all fell asleep. In the morning, after the woman he met left, he noticed that his scan disk drive was missing from his computer. Mayen also stated that he leaves his "door open" and that he "always [has] people in [his] apartment" because he parties "a lot." Indeed, there is even "some other kid" that comes in and out" all the time.

Mayen stated that the University's information technology department informed him on September 23, 2008, that a police officer had served a warrant on the University for the records of his internet activity. Because he was concerned, he contacted the police department and the prosecutor's office—among others—to find out why the police department was interested in his internet activity. He stated that he was told that he was not under investigation. Mayen said he

decided to drop out of school and return to Nebraska. He left for East Lansing on September 29, 2008 and went to Nebraska on November 15, 2008.

Mayen testified that he did not enter Parshall's home and steal the items at issue and did not make the on-line purchases that were made with his University account from his apartment. His theory was that one of his guests—or indeed any of a number of people—could have entered his apartment and made the purchases using his computer.

The trial court rejected Mayen's theory of the case and found him guilty on all three counts. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Mayen first argues that the trial court clearly erred when it found that he was the person who committed the home invasion at issue. Specifically, Mayen notes that Michigan courts have long held that mere possession of stolen property cannot serve—by itself—to establish that the possessor committed an offense other than larceny. Here, Mayen contends, there was no evidence that he ever even possessed the credit card at issue; as such, the use of Parshall's credit card number to make on-line purchases was insufficient to establish that he was the person who stole the items from the Parshall's home. When read as a whole, it is apparent that Mayen has actually challenged the sufficiency of the evidence that he was the person who broke into Parshall's home and, among other things, stole Parshall's credit card. When reviewing a challenge to the sufficiency of the evidence, "this Court reviews the record evidence de novo in the light most favorable to the prosecution 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 Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009).

B. MERE POSSESSION

To prove first-degree home invasion, in relevant part, the prosecutor had to present evidence that Mayen broke into Parshall's home, committed a larceny, and that another person was lawfully present in the home. See MCL 750.110a(2)(b); *People v Wilder*, 485 Mich 35, 42-43; 780 NW2d 265 (2010). Here, there was undisputed evidence that someone entered Parshall's home after Parshall, her husband, and her daughter went to sleep and that the person stole Parshall's purse, her daughter's backpack, and her husband's money clip. This evidence was sufficient to establish every element of the offense except Mayen's identity as the perpetrator. Identity is an element of every offense. See *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). As such, the prosecutor had to present evidence sufficient to support a finding that Mayen was the person who entered Parshall's home and stole the items at issue. On appeal, Mayen argues that the trial court could not find that he was that person on the sole basis of the evidence that someone made an on-line purchase using Parshall's credit card number from his apartment and using his internet account with the University.

Generally, the mere possession of stolen property is insufficient to establish the elements of home invasion: "unexplained possession of property recently stolen, unaccompanied by other facts or circumstances indicating guilt, will not sustain a conviction for Breaking and entering, even though it is some evidence that the possessor is guilty of Theft." *People v McDonald*, 13 Mich App 226, 236; 163 NW2d 796 (1968), citing *People v McDonald*, 163 Mich 552, 555, 128 NW 737 (1910); see also *People v Benevides*, 71 Mich App 168, 174-175; 247 NW2d 341 (1976). Nevertheless, as Michigan Courts have repeatedly explained, the possession of stolen property, along with other facts giving rise to an inference that the defendant was responsible for stealing the property, is sufficient to support a conviction for breaking and entering or burglary; this is so even though there is no direct evidence that the defendant was at the scene of the crime.

In *People v Stoneman*, 7 Mich App 65, 67; 151 NW2d 206 (1967), police officers discovered the defendant sitting in a station wagon next to a trailer, which had a stolen 760 pound safe resting on it, but which was not attached to the station wagon. At trial, it was the defendant's theory that he found the safe and did not take it from the bar in question. *Id.* at 69. On appeal, he argued that his mere possession was insufficient to support his conviction of breaking and entering in the nighttime. *Id.* at 70. The Court, however, rejected the notion that the evidence was insufficient:

> This case presents remarkable circumstances accompanying the possession. Not only was there possession of a stolen safe, but there was possession of a stolen safe which defendant would have the jury believe was apparently abandoned without its contents being taken. Defendant's 'co-incidental' discovery of the safe in a fairly secluded area, early in the morning, less than one hour after the Las Vegas bar had been closed, takes this case out of the 'mere' possession category of *People v McDonald*, [163 Mich at 555-556.] Perhaps the most telltale proofs which help establish a Prima facie case are defendant's own falsifications regarding the property found in his possession. See *People v Trine*, 164 Mich 1; 129 NW 3 (1910). [*Id.*]

Similarly, in *People v Hutton*, 50 Mich App 351, 355; 213 NW2d 320 (1973), police officers initiated an early morning traffic stop on Hutton and his passenger, Townsend. During the stop, the officers noticed electronic equipment—including two televisions—protruding from the trunk and in the backseat. *Id.* Townsend claimed that the electronic equipment was his and that he did part time electronics work as a hobby. *Id.* After it was determined that the equipment was stolen from a repair shop, police officers arrested Hutton and Townsend. *Id.* at 355-356.

On appeal, the defendants argued that the trial court erred when it refused to dismiss the charges against them on the ground that there was insufficient evidence that they committed a breaking and entering. *Id.* at 357. They premised their contention on "the rule, well settled in this state, that the mere possession of stolen property is insufficient, as a matter of law, to support a conviction for burglary." *Id.*, citing *McDonald*, 163 Mich at 555-556. In examining the issue, the Court in *Hutton* agreed with the prosecutor that this was not a case of mere possession. *Id.* at 358-360. Rather, the Court determined that inconsistencies between Townsend's original explanation for how he came to possess the stolen items and his trial testimony, the defendants' possession of the property within just five hours of the point at which the shop closed for the night, and the defendants' attempts to evade arrest were facts that, when considered along with

their possession of the stolen items, were sufficient to sustain their convictions of breaking and entering. *Id.*

Accordingly, when considering a challenge to the sufficiency of the evidence premised on mere possession, this Court will examine the totality of the evidence to determine whether, when considered along with the defendant's possession of the stolen property, there is other evidence that tends to permit an inference that the defendant was the person responsible for stealing the property. *Stoneman*, 7 Mich App at 67; *Hutton*, 50 Mich App at 360. The other evidence may include evidence that the defendant lied about the circumstances giving rise to his or her possession or tried to evade arrest. *Hutton*, 50 Mich App at 358-359. In addition, the defendant's possession of the stolen property within a short time of the breaking and entering may be sufficient to take the case out of the "mere possession" category. See *People v Williams*, 368 Mich 494, 501; 118 NW2d 391 (1962) (holding that there was sufficient evidence to convict the defendants of larceny from a building because the defendants were found in possession of the stolen tires shortly after the offense must have been committed and no one else had access to the car where the stolen tires were found); *People v Tutha*, 276 Mich 387, 395; 267 NW 867 (1936) ("Possession of stolen property within a short time after it is alleged to have been stolen raises a presumption [that] the party in possession stole it, and this presumption is either weak or strong, depending upon the facts."); *People v Gordon*, 60 Mich App 412, 418; 231 NW2d 409 (1975) (explaining that the fact that the defendant had "the goods in his possession at a time and place close to the crime would be . . . sufficient" to support an inference that the defendant committed the robbery, but ultimately holding that there was insufficient evidence because the prosecutor's case depended on "impermissibly building one inference upon another.");[1] *People v Brown*, 42 Mich App 608, 613; 202 NW2d 493 (1972) (stating that there was circumstantial evidence that showed that the defendant had had possession of the stereo one day after it was stolen, which in turn supported an inference that the defendant was the one who stole the stereo); compare *People v Rankin*, 52 Mich App 130, 134; 216 NW2d 620 (1974) (holding that the case was one of mere possession because, given the evidence concerning the timing of the robbery and the distance at which the defendant was discovered with the stolen property, "it cannot be said to be so near in either place or time as to link the defendant to the scene."). Thus, contrary to Mayen's argument on appeal, the prosecutor could establish that Mayen committed the home invasion by presenting evidence that, when considered in light of Mayen's apparent possession of the stolen credit card, gave rise to an inference that he must have been the person who entered Parshall's home and stole the missing property.

[1] The Court in *Gordon* relied on *People v Atley*, 392 Mich 298; 220 NW2d 465 (1974), for the proposition that it is impermissible to build one inference upon another. See *Gordon*, 60 Mich App at 418. However, since the decision in *Gordon*, our Supreme Court has overruled the rule stated in *Atley* that inferences cannot be founded upon inferences. See *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

C. THE EVIDENCE

The prosecutor in this case presented evidence that Parshall and the other members of her family went to bed around 9:30 or 10:30 p.m. the night before they discovered that their property had been stolen. This was evidence that the theft of their items occurred sometime after 9:30 or 10:30 p.m. on the night of September 17 to September 18. Further, there was evidence that Parshall reported her credit card stolen the next morning and learned that someone had made purchases using her credit card information at 5:47 and 6:23 a.m. that same morning. This evidence, although not conclusive, clearly permitted an inference that the person who used Parshall's credit card information to make the on-line purchases at 5:47 and 6:23 a.m. acquired the information from the actual card. Given the short lapse of time between the theft and the purchases, this in turn permitted an inference that that person who made the purchases was the same person who entered Parshall's home and stole her purse. There was also evidence that the on-line purchases were made using Mayen's account with the University and that the purchaser did so from Mayen's apartment. This evidence was sufficient to permit an inference that Mayen himself was the person who made the purchases and, hence, that he was the person who broke into Parshall's home and stole her purse along with her husband's money clip and her daughter's backpack. The proximity of the on-line purchases to the timing of the home invasion—at most eight hours and likely significantly less than eight hours—was sufficient to remove this case from those involving mere possession of stolen property. See *Tutha*, 276 Mich at 395; *Gordon*, 60 Mich App at 418; *Brown*, 42 Mich App at 613.

Notwithstanding this, Mayen claims on appeal that the person who made the on-line purchases could have obtained the credit card information over the internet or physically from a third party. Accordingly, he further maintains, the evidence that the on-line purchases were made using Parshall's credit card information is not evidence that the same person who made the purchases committed the home invasion. Although it is theoretically possible that the person who made the on-line purchases obtained the credit card information through a third party, the fact that the purchase was made just hours after the likely time of the home invasion strongly suggests that the person obtained the credit card information directly from the card and that he or she was able to do so because he or she was the one who stole it. See, e.g., *Brown*, 42 Mich App at 613-615 (stating that, although the stolen stereo was not found at the defendant's home until two months after the theft, a witness testified that he heard the stereo over the phone the day after the theft and this established that the defendant had possession of the stereo shortly after the theft). Indeed, it is highly unlikely that the person who stole Parshall's credit card would have been able to transfer the credit card information to a third party in such a short time after the home invasion.

In any event, the prosecutor was not required to disprove every theory that was consistent with Mayen's innocence; rather, the prosecutor had only to present evidence that, if believed, was sufficient to establish the elements of home invasion. See *People v Hardiman*, 466 Mich 417, 424; 646 NW2d 158 (2002). And when considering Mayen's challenge to the sufficiency of the evidence premised on mere possession, this Court's review is limited to determining whether there was evidence that, when viewed in the light most favorable to the prosecution, permitted the trier of fact to conclude that Mayen committed the home invasion. *Id.* at 428. Although mere possession of the stolen credit card would have been insufficient to support Mayen's conviction for home invasion, *McDonald*, 163 Mich at 555-556, when the possession is

considered in light of the timing of the on-line purchases, there was sufficient evidence to support the trial court's findings. See *Gordon*, 60 Mich App at 418 ("[H]aving the goods in his possession at a time and place close to the crime would be a sufficient circumstance" to remove the case from one of mere possession).

Even if the timing were insufficient to remove this case from one involving mere possession, there was other evidence that, when considered along with the timing of the on-line purchases, tended to show that Mayen was the person who entered Parshall's home and stole her credit card. There was testimony that Parshall's home was within easy walking distance of Mayen's apartment, just two to three miles away, and that the weather was conducive to walking. Indeed, Mayen testified that it was nice out that evening—a "good day" for fall—and that he walked to the bar. Accordingly, he clearly was physically able to walk to Parshall's home and had ample opportunity to commit the home invasion and return in time to make the purchases. See *Rankin*, 52 Mich App at 134 (acknowledging that possession of stolen goods within close proximity—in time and space—to the theft can remove a case from one of mere possession). He also testified that he learned that police officers were inquiring into his on-line purchases on September 23 and Bongard testified that Mayen stopped using his internet account with the University on the same day. Moreover, although Mayen testified that he did not have a car and could not drive as a result of a suspended license, he testified that he rented a car from an acquaintance, which was later reported stolen, in order to leave Mount Pleasant and ultimately return to Nebraska. The fact that he ceased using his computer after discovering that he was being investigated and then procured a car in order to leave the state, despite the fact that he could not legally drive, was strong evidence that he was trying to evade arrest. And this evasion was inconsistent with his claim that he not only did not commit the home invasion, he did not even make the illegal on-line purchases. When considered with the evidence that he made the on-line purchases using credit card information from a credit card that was recently stolen from a house that was within walking distance of his apartment, the evidence supported an inference that he was the person who committed the home invasion. See *Hutton*, 50 Mich App at 358-360 (concluding that the defendants' discovery with the stolen merchandise in close proximity to the time of the breaking and entering, when coupled with the false explanation for the possession and the efforts to evade arrest, which efforts were inconsistent with the defendants' theory that they innocently possessed the stolen merchandise, was sufficient to remove the case from one premised on mere possession).

Similarly, Mayen's explanation for how someone might have been able to use his University account to access the internet from his apartment and make on-line purchases with Parshall's stolen credit card information within hours of the home invasion, was so implausible that it permitted an inference that he was lying in order to cover-up his involvement. Mayen testified that his apartment was frequented by numerous persons, including some "kid" who entered the apartment at will. But this testimony was directly contradicted by evidence that he had only recently moved into the apartment[2] and by testimony that there was no activity at the

[2] Mayen testified that he returned to school at the end of August and Bongard testified that Mayen's internet account began to be used on September 10—just eight days before the break-in at Parshall's home. As such, Mayen would have the trier of fact believe that his new apartment

apartment after it was put under surveillance. Likewise, his theory that one of the people that he met at the bar on the night in question might have made the on-line purchases was equally implausible. In order for one of these drunken strangers to have made the on-line purchases, that person would have had to have committed the home invasion or otherwise acquired Parshall's credit card information after 9:30 or 10:30 p.m., but before Mayen met them at the bar around midnight, or after Mayen purportedly went to bed sometime after 3:45 a.m., but before the first purchase at 5:45 a.m. Mayen's implausible effort to craft a story that might explain how someone came to use his computer to make an on-line purchase with Parshall's stolen credit card information, when considered along with the evidence that he was the one who actually made the on-line purchases, is itself evidence that he broke into Parshall's home and stole the credit card. *Stoneman*, 7 Mich App at 70 (stating that the defendant's own falsifications regarding the stolen property was the most telling proof of his involvement).

Finally, Mayen maintains that the trial court erred because the multiple inferences necessary in order to find him guilty were simply too tenuous to support the verdict. Specifically, Mayen argues that the trial court had to infer that he was the one who used his computer to make the on-line purchases. The trial court then had to infer that the person making the on-line purchase actually possessed the credit card and then infer that the credit card came into that person's possession by physically taking it from Parshall's home. These inferences, Mayen argues, were "not sufficiently strong to warrant a [finding], beyond a reasonable doubt," that he was guilty of home invasion. However, our Supreme Court has disavowed the notion that the elements of a crime may not be established through a series of inferences. See *Hardiman*, 466 Mich at 428 ("[I]f evidence is relevant and admissible, it does not matter that the evidence gives rise to multiple inferences or that an inference gives rise to further inferences."). Rather, "[i]t 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." *Id.* Here, the evidence that the on-line purchases were made using Mayen's account with the University and that they were made from his apartment was sufficient to permit an inference that Mayen made the purchases. Further, the evidence that the purchases were made using credit card information from a credit card that was stolen just hours earlier permitted an inference that Mayen acquired the credit card information from the actual credit card. Finally, given the close proximity in time and distance, this in turn permitted an inference that Mayen was the one who entered Parshall's home and stole the credit card, among other things. Accordingly, when considered in the light most favorable to the prosecution, there was sufficient evidence to support Mayen's conviction of home invasion. *Roper*, 286 Mich App at 83.

There was sufficient evidence to support the trial court's findings; and, on this record, we are not left with the definite and firm conviction that the trial court was mistaken when it found that Mayen was the person who entered Parshall's home and stole the items at issue while Parshall and her family slept. Therefore, the trial court did not clearly err in so finding. *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001).

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became a veritable campus hangout, complete with open access to his internet account, within a matter of days after returning from summer break.

III. MOTION TO DISQUALIFY PROSECUTOR AND FOR SUBSITUTE COUNSEL

A. STANDARD OF REVIEW

Mayen also argues that the trial court erred when it refused to disqualify the prosecutor and to grant his request for substitute counsel. This Court reviews a trial court's decision regarding a defendant's motion to disqualify a prosecutor for an abuse of discretion. *People v Petri*, 279 Mich App 407, 423-424; 760 NW2d 882 (2008). Likewise, this Court reviews a trial court's decision on a motion for substitute counsel for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). A trial court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 353.

B. MOTION TO DISQUALIFY THE PROSECTORS

Prior to trial, Mayen moved to disqualify all the Isabella County prosecutors from prosecuting his case. He noted that Parshall's husband, Gorden Bloem, operated the Isabella County Public Defenders Office and that Parshall was "the Isabella County Friend of the Court Referee and Magistrate." He argued that it was "reasonable to believe the county Prosecutor may have a conflict of interest with these proceedings" "due to the victims' close ties to the Isabella County Trial Courts." The trial court denied the motion.

A prosecutor may be disqualified because of a conflict of interest where the prosecutor has a personal, financial, or emotional interest in the litigation or a personal relationship with the accused. *People v Mayhew*, 236 Mich App 112, 127; 600 NW2d 370 (1999). Neither basis is applicable here. Mayen has presented no facts showing that the prosecutor had a personal, financial, or emotional interest in the litigation. There is also no evidence that the prosecutor had been involved with Mayen outside this prosecution. The victims' close ties to the court system are not a sufficient basis to mandate disqualification of the prosecutor's office. Indeed, as the trial court noted, the fact that the prosecutor knew the victims and was advocating for them does not establish a conflict. The trial court did not abuse its discretion in denying Mayen's motion to disqualify all the Isabella County prosecutors.

C. MOTION FOR SUBSTITUTE COUNSEL

Mayen also moved for a substitute lawyer on the ground that his lawyer worked for Bloem at the Public Defenders Office. He argued that the relationship between his lawyer and Bloem necessarily created a conflict of interest. The trial court denied the motion because it concluded that the lawyer's interaction with Bloem was not sufficient to create a conflict of interest:

> The Court does not believe that the relationship here is going to prevent [defense counsel] from doing what he is required to do as an Officer of the Court, and as an admitted member of the Michigan State Bar, which is to represent to the fullest extent possible, his client.

> The fact that somebody to whom he has an affiliation may be a victim in this case, I do not believe rises to a level to require removal of—as counsel, nor warranted to bring anybody in from another county to represent the Defendant in this matter.
>
> The Court is of the opinion that the economics for [defense counsel] will not be affected. He does not receive cases based upon the discretion of Mr. Bloem, but in fact receives a percentage of the cases that come in. And the Court does not see anything in that situation that would cause [defense counsel] to have dual priorities or allegiances for purposes of any representation of the Defendant in this matter.

A criminal defendant's right to counsel includes "a correlative right to effective representation that is free from actual conflicts of interest." *In re Osborne*, 237 Mich App 597, 606; 603 NW2d 824. "[I]n order to demonstrate that a conflict of interest has violated his Sixth Amendment rights, a defendant 'must establish that an actual conflict of interest adversely affected his lawyer's performance.'" *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998), quoting *Cuyler v Sullivan*, 446 US 335, 350; 100 S Ct 1708; 64 L Ed 2d 333 (1980). Moreover, courts will only presume prejudice where "the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984), quoting *Cuyler*, 446 US at 350, 348. Thus, in order to show that he was deprived of his right to counsel as a result of a conflict of interest, Mayen had to show that his trial counsel had an actual conflict of interest and that the conflict adversely affected his counsel's performance.

Assuming that the trial court erred when it determined that there was no actual conflict of interest occasioned by defendant's lawyer's representation, on appeal, Mayen has failed to cite any evidence tending to suggest that his counsel actively lessened his defense as a result of the purported conflict or that the conflict otherwise adversely affected his lawyer's performance. Because Mayen failed to establish that any actual conflict of interest affected his trial lawyer's performance, he has not established error warranting relief. *Id.*

IV. CONCLUSION

There was sufficient evidence to support Mayen's conviction of first-degree home invasion and the trial court's findings in that regard were no clearly erroneous. Further, the trial court did not abuse its discretion when it denied Mayen's motion to disqualify the prosecutors and any error in the denial of Mayen's motion for substitute counsel did not warrant relief.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly