STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2012
v	No. 302784 Cass Circuit Court
TODD JAY BAKER, Defendant-Appellant.	LC No. 10-010160-FH

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant Todd Jay Baker was convicted of second-degree home invasion, MCL 750.110a(3); conspiracy to commit second-degree home invasion, MCL 750.157a; larceny in a building, MCL 750.360; and conspiracy to commit larceny in a building, MCL 750.157a. The trial court sentenced him as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 7 to 15 years each for the home-invasion conviction and corresponding conspiracy conviction and to 3 to 15 years' each for the larceny conviction and corresponding conspiracy conviction. Defendant appeals as of right, and we affirm.

Defendant first challenges the sufficiency of the evidence used to convict him at trial. This is an issue that this Court reviews de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *Id*. at 196.

Pursuant to MCL 750.110a(3), the elements of second-degree home invasion are: (1) the defendant entered a dwelling, either by committing a breaking or by entering without permission; and (2) the defendant intended to commit a felony, assault, or larceny in the dwelling at the time of his entry or actually committed one while he entered, exited, or was present in the dwelling. When viewed in the light most favorable to the prosecution, the evidence was sufficient to establish the elements of second-degree home invasion beyond a reasonable doubt. With regard to the first element, defendant's accomplices, Jamie Goodwin and Richard Coughenour, Jr., testified that defendant broke into the victims' home by removing the screen from a ground-floor window. Removing the screen was sufficient evidence of a breaking. See *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998) (any amount of force to enter a dwelling constitutes

a breaking). Regarding the second element, Coughenour testified that defendant placed some of the victims' property in bags and lined the bags up next to the front door. Because "[l]arceny in a building is complete as soon as there is the slightest taking of property with the intent to steal it," *People v Mumford*, 171 Mich App 514, 518; 430 NW2d 770 (1988), defendant's actions satisfied the second element of the offense, i.e., defendant committed a larceny while he was inside the building. Thus, the evidence was sufficient to support defendant's conviction of second-degree home invasion.

Likewise, the evidence was sufficient to support defendant's conviction of larceny in a building. Again, "[l]arceny in a building is complete as soon as there is the slightest taking of property with the intent to steal it." *Id*. Defendant committed a taking as soon as he moved the victims' property into bags. Additionally, a rational jury could have inferred defendant's intent to steal based on his actions. See, generally, *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). Indeed, a rational jury could have inferred defendant's intent to steal because he placed the victims' property next to the door in a manner that would have allowed him to escape quickly with the property. Because the prosecution presented evidence of a taking with the intent to steal, there was sufficient evidence to support defendant's conviction of larceny in a building. *Mumford*, 171 Mich App at 517-518.

The prosecution also presented sufficient evidence to support defendant's conspiracy convictions. The elements of a conspiracy under MCL 750.157a are: (1) the specific intent to combine with another individual and (2) the specific intent to jointly pursue a criminal objective. See *People v Justice (After Remand)*, 454 Mich 334, 345-347; 562 NW2d 652 (1997). The prosecution is not required to present direct evidence of the conspiracy. *Id*. at 347. Instead, it may prove the conspiracy through circumstantial evidence, such as the parties' actions. *Id*.

Although there was no evidence of an express agreement between defendant and his accomplices, the parties' actions were sufficient to establish the conspiracy charges. First, with regard to conspiracy to commit second-degree home invasion, Coughenour testified that after defendant broke into the home, he waived to Coughenour, who was still outside, to come inside and join him. Coughenour did so. From this evidence, a rational jury could have found that Coughenour and defendant specifically intended to combine to commit second-degree home invasion.[1] See *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002) ("[w]hat the conspirators actually did in furtherance of the conspiracy is evidence of what they had agreed to do"). Second, the evidence adduced at trial was sufficient for a rational jury to conclude that defendant and Coughenour conspired to commit larceny in a building. Coughenour testified that after he joined defendant inside the home, defendant handed him a bag that contained some of the victims' property. Coughenour accepted the bag and decided to help defendant in taking things from the house. These actions demonstrated a specific intent to steal property as well as an implied agreement by Coughenour and defendant to act together in order to accomplish the

[1] Coughenour also testified that, when approaching the house, both he and defendant understood that Coughenour was going to help defendant break into the house.

crime. See *id*. When viewed in the light most favorable to the prosecution, the evidence produced at trial was sufficient to support defendant's conspiracy convictions.

Defendant maintains that the evidence was insufficient to support his convictions because, he alleges, the testimony of his accomplices was not credible. He notes that Coughenour and Goodwin received plea deals in exchange for their testimony. It is well-established that when a defendant challenges the sufficiency of the evidence used to convict him, all credibility disputes are to be resolved in a manner that supports the jury's verdict. See, e.g., *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Indeed, this Court must not interfere with the jury's role in making credibility determinations. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Defendant's argument is without merit.

Next, defendant raises issues related to the trial court's instructions to the jury. We find that defendant waived these issues because his trial counsel affirmatively approved the trial court's instructions. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Nevertheless, we have reviewed the issues and determined that they lack merit.[2]

In an attempt to overcome the waiver, defendant argues that his trial counsel was ineffective for approving the trial court's instructions. However, as noted, we find that defendant's issues lack merit. We will not find that trial counsel was ineffective for failing to advance a meritless position. *Ericksen*, 288 Mich App at 201.

Defendant next alleges several instances of prosecutorial misconduct. However, he failed to preserve his claims for appeal because he did not object to the prosecutor's arguments at trial. Therefore, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). With respect to unpreserved allegations of prosecutorial misconduct, this Court will not find error requiring reversal unless a timely curative instruction could not have cured the prejudice caused by the prosecutor's comments. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first contends that the prosecutor committed misconduct and denied him a fair trial by misstating the law pertaining to conspiracy. "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). Defendant maintains that the prosecutor misstated the law on conspiracy because, defendant alleges, a criminal conspiracy requires an element of preplanning. However, the elements of a criminal conspiracy do not include among them a preplanning requirement. See, generally, *Justice (After Remand)*, 454 Mich at 345-347; see also,

[2] As noted above, there was sufficient evidence to submit both conspiracy charges to the jury. As noted *infra*, there is no requirement that a court instruct a jury that conspiracy requires "preplanning." There was also sufficient evidence to submit the first-degree home invasion charge to the jury because there was evidence of one victim being lawfully present in the home while defendant was present in or exiting it. MCL 750.110a(2).

generally, *People v Barajas*, 198 Mich App 551, 553; 499 NW2d 396 (1993) (a conspiratorial agreement may be implied). Therefore, the prosecutor did not misstate the law on conspiracy and did not commit misconduct.

Next, defendant alleges that the prosecutor argued facts that were not in evidence and that he used those facts to vouch for the credibility of his own witnesses. First, defendant alleges that the prosecutor argued facts not in evidence by arguing that defendant's accomplices were unsophisticated and therefore were incapable of telling a believable lie. Defendant also alleges that the prosecutor argued facts not in evidence by arguing that defendant's accomplices received unfavorable plea deals, and by arguing that the fact that Coughenour cried while talking with law enforcement officers demonstrated he was telling the truth.

Generally, we afford the prosecutor wide latitude in his arguments at trial. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Despite this wide latitude, "[a] prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence." *People v Unger (On Remand)*, 278 Mich App 210, 241; 749 NW2d 272 (2008). However, a prosecutor is permitted to argue all reasonable inferences from evidence produced at trial. *Aldrich*, 246 Mich App at 112. In this case, the prosecutor did not argue facts that were not in evidence, but merely drew reasonable inferences from the evidence. First, his argument concerning the sophistication of the witnesses was a reasonable inference drawn from the witnesses' testimony and demeanor during trial. Second, the prosecutor's argument concerning the unfavorable nature of Coughenour and Goodwin's plea agreements was also a reasonable inference from evidence produced at trial. Coughenour and Goodwin testified that their plea agreements required them to plead guilty to second-degree home invasion and conspiracy to commit larceny in a building, both of which are felonies. Because they pleaded guilty to two felonies, it was reasonable for the prosecutor to argue that their plea deal was unfavorable. Finally, the prosecutor's argument concerning the reason why Coughenour cried during his confession to police officers was a permissible inference drawn from the evidence presented at trial. The prosecutor argued that Coughenour cried during his confession because he knew that he had committed wrongs and he needed to tell the truth. The evidence at trial established that Coughenour initially lied to police officers, but eventually, after crying, confessed. Based on this evidence, it was reasonable for the prosecutor to argue that Coughenour cried because he knew he was in trouble and he needed to make a confession. Moreover, even if the prosecutor's argument was improper, defendant is not entitled to relief because a timely curative instruction could have alleviated the prejudice caused, if any, by the prosecutor's argument. See *Unger (On Remand)*, 278 Mich App at 238.

Likewise, we find that the prosecutor did not impermissibly vouch for the credibility of his witnesses by making any of the arguments set forth above. A prosecutor may not vouch for the credibility of his witnesses by implying that he has special knowledge pertaining to the witnesses' credibility. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). "But a prosecutor may comment on his own witnesses' credibility . . . especially when there is conflicting evidence . . . ." *Id.* We find that the prosecutor did not impermissibly vouch for his witnesses by implying that he had special knowledge of their credibility. Additionally, we find that the prosecutor's arguments were permissible in light of defendant's testimony. There was

conflicting evidence, and the prosecutor permissibly commented on his own witnesses' credibility. See *id.*

Defendant next alleges that the prosecutor disparaged him for exercising his right to a trial. He alleges that the prosecutor noted that Goodwin and Coughenour pleaded guilty, while defendant insisted that he was innocent. The prosecutor's argument in question was:

> [L]ooking at the credibility of these witnesses, the fact that two of these witnesses already . . . pled to their guilt and are going to get sentenced for it compared to [defendant] who's trying to basically get off of these charges. The credibility is very clear. . . . Goodwin and . . . Coughenour are telling you the truth . . . .

We first note that defendant cites no legal authority in support of his appellate argument; this is improper. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, a plausible interpretation of the prosecutor's argument is that, rather than criticizing defendant for proceeding to trial, the prosecutor was emphasizing that the prosecutor's own witnesses were credible. A prosecutor does not commit misconduct by commenting on the credibility of his witnesses. *Thomas*, 260 Mich App at 455. Further, even if the prosecutor's argument were to be deemed improper, defendant is not entitled to relief because a timely curative instruction could have cured the prejudice, if any, caused by the statement. *Unger (On Remand)*, 278 Mich App at 238. We find no error requiring reversal.

Next, defendant argues that the prosecutor committed misconduct by asking him to comment on the credibility of one of the prosecution's witnesses, Michigan State Police Sergeant Fabian Suarez. The prosecutor asked defendant about a discrepancy between his testimony and Suarez's and asked whether Suarez lied. Defendant testified that Suarez had lied.

When the defendant is a witness, the prosecutor should not attempt to tarnish the defendant's image by inducing him to call other witnesses liars. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). We find that it was arguably improper for the prosecutor to ask defendant whether Suarez lied during his testimony. However, in spite of this apparent error, defendant is not entitled to reversal under plain-error review because he cannot demonstrate prejudice. Defendant's theory at trial was that Goodwin and Coughenour lied and conspired against him. We find that because defendant repeatedly suggested that Goodwin and Coughenour lied, he was not materially harmed when the prosecutor asked him if another witness had lied. See *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001) (where the defendant maintains throughout trial that certain witnesses are lying, he does not suffer prejudice when the prosecutor asks him if another witness lied). Defendant is not entitled to relief.

Defendant also argues that the prosecutor improperly denigrated him when, during closing arguments, the prosecutor argued that defendant cried during his testimony in order to manipulate the jury. Defendant also objects to the prosecutor's argument that defendant was unable to explain Suarez's testimony about scratches defendant received on his legs while running through the woods after fleeing from the victims' house. The prosecutor may not denigrate the defendant by personally attacking him. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). Additionally, the prosecutor may not suggest that the defendant is

trying to manipulate or mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001).

We find that the prosecutor did not denigrate defendant in pointing out defendant's inability to account for the cuts on his legs. Defendant's own testimony relating to how he received the scratches was unclear and not complete. In addition, Suarez testified that defendant denied that he had any scratches. Thus, the prosecutor reasonably inferred from the facts that defendant was unable to account for the scratches. Nothing about this argument suggested that the prosecutor personally attacked defendant. The prosecutor's argument concerning why defendant cried was arguably impermissible, but even if it was, defendant is not entitled to any relief, because a timely curative instruction could have alleviated any prejudice caused by the remark. See *Unger (On Remand)*, 278 Mich App at 238. In addition, the trial court properly instructed the jury with regard to the evidence it could consider in the case. In *Unger*, a similar instruction was sufficient to cure the prejudice caused by the prosecutor's argument that the defendant tried to mislead the jury. *Id*. Therefore, defendant is not entitled to relief.

Defendant also alleges that he was denied a fair trial by the cumulative effect of the alleged instances of prosecutorial misconduct. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not." *McLaughlin*, 258 Mich App at 649. However, where none of the errors alleged by a defendant prejudice the defendant, reversal is not warranted based on cumulative error. *Id*. Defendant is not entitled to relief because any potential errors did not result in impermissible prejudice.

Next, defendant challenges his sentence, arguing that the trial court impermissibly engaged in judicial fact-finding in violation of the rule announced by the United States Supreme Court in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We reject this argument. In *Blakely*, the United States Supreme Court ruled that any facts that enhance a defendant's maximum sentence must be either admitted by the defendant or found by a jury beyond a reasonable doubt. *Id*. at 303-304. However, in *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006), the Michigan Supreme Court held that Michigan's indeterminate sentencing system is not affected by *Blakely* because a defendant's maximum sentence in Michigan is set by statute and the jury's verdict. Therefore, the holding from *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme. *Id*. at 164.

Defendant next argues that the trial court abused its discretion by assessing ten points under sentencing offense variable (OV) 9. We review the trial court's scoring decisions for an abuse of discretion. See *McLaughlin*, 258 Mich App at 671. "A trial court's scoring decision 'for which there is any evidence in support will be upheld.'" *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009), quoting *People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Pursuant to MCL 777.39(1)(c), the trial court is authorized to assess ten points for OV 9 if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death . . . ." Under this offense variable, the victims need not suffer injury; instead, the trial court can properly score points when the victims are placed in danger by the defendant's conduct. See, e.g., *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004).

We uphold the trial court's scoring of OV 9 because the record demonstrates that the homeowner and her five-year-old son were placed in danger, given that they arrived in their

driveway during the home invasion. First, they directly encountered Goodwin, who was serving as a lookout. Moreover, Coughenour and defendant were still inside the home when the homeowner and her son entered their driveway, and a reasonable inference can be drawn from the evidence that defendant was still inside when the homeowner partially entered the home. Because of their proximity to defendant and his accomplices, the homeowner and her son were endangered during the offense. See MCL 777.39(1)(c). Because second-degree home invasion is a continuing offense, *People v Shipley*, 256 Mich App 367, 376-377; 662 NW2d 856 (2003), the trial court did not err by finding that the offense was still ongoing when the homeowner and her son arrived. Because there was evidence to support the trial court's scoring decision, we uphold the decision. *Steele*, 283 Mich App at 490.

We reject defendant's argument that the trial court impermissibly scored ten points under OV 9 because defendant was acquitted of first-degree home invasion, which required the jury to find that the victims were lawfully present at the time of the offense. MCL 750.110a(2). Defendant argues that the jury's acquittal precluded the trial court from finding that the victims were in danger during the offense. We do not agree. A sentencing court may rely on conduct of which a defendant has been acquitted, "so long as it satisfies the preponderance of the evidence test." *People v Ewing*, 435 Mich 443, 473; 458 NW2d 880 (1990). Here, while the evidence may not have established beyond a reasonable doubt that an individual was lawfully present in the home, it certainly established by a preponderance that the homeowner and her son were placed in danger when they came home during the midst of a home invasion. Therefore, the trial court did not abuse its discretion in scoring OV 9. Because defendant was sentenced within the guidelines and because we find no error in his sentence, we reject his argument that he is entitled to resentencing. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006).

Finally, defendant argues that he is entitled to a reversal because his trial counsel was ineffective. A criminal defendant is denied effective assistance of counsel in violation of the Sixth Amendment if counsel's "performance fell below an objective standard of reasonableness . . . [and] the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

Defendant alleges that his trial counsel was ineffective for failing to object to any of the errors he has alleged on appeal. Defendant only demonstrated two instances of possible prosecutorial misconduct (the question about Suarez and the comment about defendant's crying). Defense counsel's conduct with respect to the other alleged errors did not fall below an objective standard of reasonableness. *Id.* With respect to the two potential errors by the prosecutor, neither of them prejudiced defendant. Thus, defendant is not entitled to relief based on trial counsel's failure to object to the instances of prosecutorial misconduct because he has not demonstrated that, but for counsel's conduct, the result of trial would have been different. *Id*. at 312.

Defendant also argues that his trial counsel was ineffective for telling the jury that he lied, thereby conceding defendant's guilt to the jury. We do not agree. Indeed, we find that the portion of trial counsel's argument to which defendant objects does not label defendant a liar. Instead, the argument merely attempts to explain a discrepancy in defendant's testimony. Trial counsel made a strategic choice to point out this discrepancy, and defendant has not overcome

the strong presumption of sound trial strategy. *People v Carbin*, 463 Mich 590, 600-601; 623 NW2d 884 (2001).

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens