STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES A. BAKER,

Defendant-Appellant.

UNPUBLISHED
May 26, 1998

No. 199117
Recorder's Court
LC No. 96-002885

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree home invasion MCL 750.110a(2); MSA 28.305(a)(2), and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. Defendant was sentenced as a fourth-felony habitual offender, MCL 769.12; MSA 28.1084, to concurrent terms of six and one-half to twenty years' imprisonment for the first-degree home invasion conviction and five to ten years' imprisonment for the assault conviction. We affirm defendant's convictions and sentences and remand for the limited purpose of correcting the judgment of sentence.

Defendant's first issue on appeal is that the trial court failed to properly instruct the jury on larceny and reasonable doubt. Because defendant failed to object to the jury instructions, our review is limited to whether relief is necessary to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Jury instructions must include all the elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if the instructions are imperfect, they do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* We find no manifest injustice here.

The trial court in this case did not instruct the jury on each of the elements of larceny but instead instructed the jury that larceny was "to steal something," or was "an unlawful taking of some property." However, defendant's defense at trial was that he had never been to the victim's home and that he was misidentified as the perpetrator. In light of the defense, the instruction regarding larceny was not erroneous because the evidence at trial negated any inference other than that whoever entered the

victim's home did so with the intent to commit a larceny. See *People v Petrosky*, 286 Mich 397, 401; 282 NW 191 (1938); *People v Fordham*, 132 Mich App 70, 78; 346 NW2d 899 (Joslyn, J., dissenting), rev'd for the reasons stated in Judge Joslyn's dissent, 419 Mich 874; 347 NW2d 702 (1984).

Additionally, contrary to defendant's argument on appeal, jury instructions regarding reasonable doubt no longer require the "moral certainty" language contained in former CJI 3:1:04 and CJI 3:1:05. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996); *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991). Since the trial court's reasonable doubt instruction in this case was substantially similar to CJI2d 3.2(3), which adequately presents the concept of reasonable doubt, the jury was properly instructed on this issue. *Sammons, supra*.

Defendant next argues that trial counsel was ineffective in failing to object to improper instructions and failing to request proper instructions. Again, we disagree. Because defendant failed to move for a new trial or an evidentiary hearing below, our review is limited to the existing record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Having reviewed the jury instructions, we find that they fairly presented the issues to be tried and sufficiently protected defendant's rights; therefore, trial counsel was not ineffective in failing to request different instructions. *Daniel, supra* at 58.

Next, defendant claims that the prosecutor committed misconduct when she referred to defendant receiving money under the table. We disagree. Defendant failed to object to the prosecutor's closing argument; therefore, appellate review is precluded unless an objection could not have cured the error or unless our failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). During direct examination, defendant testified that he was getting paid under the table. The prosecutor's closing argument, which defendant now claims was error, was made in response to that testimony. Therefore, viewing the prosecutor's remarks in context, *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994), they were permissible comments on the evidence and did not deny defendant a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defendant next argues that the prosecution failed to timely file the notice of intent to enhance sentence under the habitual offender statute, and that the trial court improperly vacated defendant's sentences on the underlying offenses and resentenced defendant as an habitual offender. Once again, we disagree. After carefully reviewing the transcript of defendant's arraignment, it is clear that the prosecutor properly and timely filed the notice and that defense counsel acknowledged receipt of the same. Further, because defendant's habitual offender status was not established until after he was sentenced on the underlying offenses, the initial sentence was properly vacated and defendant was lawfully resentenced as an habitual offender. *People v Gren*, 152 Mich App 20, 27; 391 NW2d 508 (1986).

Accordingly, we affirm defendant's convictions and sentences. However, we remand for the limited purpose of correcting the judgment of sentence to reflect that defendant was convicted

of first-degree, not second-degree, home invasion, and to grant defendant 167 days' credit for time served which the prosecution acknowledges he was erroneously denied.

Remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Barbara B. MacKenzie
/s/ William B. Murphy