STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 23, 2000
v	No. 212508 St. Clair Circuit Court
SHAWN J. SILVER, Defendant-Appellant.	LC No. 98-000946-FH

Before: Cavanagh, P.J., and Holbrook, Jr., and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12(1)(a); MSA 28.1084(1)(a), to twenty to forty years' imprisonment; in addition, the court ordered defendant to pay restitution in the amount of $669.77. We affirm defendant's conviction but remand for resentencing.

I

Defendant first argues that the trial court erred in denying his request for an instruction on the misdemeanor offense of entering without permission, MCL 750.115; MSA 28.310. Entering without permission is a lesser included offense of first-degree home invasion.

When properly requested, a trial court should instruct a jury on appropriate lesser included misdemeanors if a rational view of the evidence could support a verdict of guilty of the misdemeanor and not guilty on the felony, provided that the defendant has proper notice or has made the request, and the instruction would not result in confusion or injustice. Failure to give such an instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling made. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

However, instruction on a misdemeanor offense is only proper where the requested misdemeanor instruction is supported by a rational view of the evidence presented at trial. *People v Steele*, 429 Mich 13, 18-21; 412 NW2d 206 (1987). The differentiating elements of the charged

offense and lesser included misdemeanor must be factually disputed, and the factual dispute must be great enough for a jury to rationally reject the existence of the greater offense and accept the existence of the lesser misdemeanor offense. See *id*. at 21.

Under MCL 750.110a(2); MSA 28.305(a)(2),

> A person who . . . enters a dwelling without permission with intent to commit a felony or a larceny in the dwelling is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exist:
>
> * * *
>
> (b) Another person is lawfully present in the dwelling.

MCL 750.115; MSA 28.310 provides in pertinent part:

> Any person who shall break and enter, or shall enter without breaking, any . . . house . . . whether occupied or unoccupied, without first obtaining permission to enter from the owner[,] . . . shall be guilty of a misdemeanor[.]

For purposes of this case, the elements differentiating first-degree home invasion and entering without permission are that the former requires proof that another person is lawfully present and that the defendant intended to commit a larceny in the dwelling. It was undisputed that the complainant returned while defendant was in her house; thus, the only element in dispute was whether defendant possessed the requisite intent.[1]

The trial court refused to instruct on entering without permission because it believed that the use of similar terms in the two offenses could create confusion for the jury. We conclude that the trial court erred. Because they share one or more elements, instructions on a lesser included offense will always be substantially similar to instructions on the greater offense. Moreover, with instructions on only one lesser offense, there was little danger that the jury would be "confuse[d] . . . with too long a list of instructions." *People v Stephens*, 416 Mich 252, 260; 330 NW2d 675 (1982).

Having concluded that the trial court erred in refusing defendant's request for an instruction on entering without permission, we must now determine whether the error requires reversal of defendant's conviction. We note that rules of automatic reversal are disfavored. *People v Graves*, 458 Mich 476, 481; 581 NW2d 229 (1998). Rather, preserved, nonconstitutional error must be evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

After carefully reviewing the record, we are not persuaded that it is more probable than not that a different outcome would have resulted if the jury had been given the option of convicting defendant of entering without permission. The jury obviously rejected defendant's claim that he entered the

complainant's house only to use the bathroom; otherwise, it would have acquitted him rather than convicting him of first-degree home invasion.[2] Accordingly, it is unlikely that the jury would have chosen to convict defendant of the lesser offense of entering without permission, which does not require the prosecution to prove that defendant intended to commit a larceny.[3]

Defendant argues that "[t]he jury knew that [he] had broken a law by going into [the complainant's] house without permission, but was presented with only one option for punishing him," and therefore chose to convict him of first-degree home invasion rather than acquit him. However, the jury was instructed that it could find defendant guilty of first-degree home invasion only if it found that the elements of that offense had been established beyond a reasonable doubt. It is well established that jurors are presumed to follow their instructions, *Graves*, *supra* at 486, and we will not assume that the jury here disregarded those instructions because it had a vehement desire to punish defendant for entering a stranger's house to use the bathroom.

II

Defendant next contends that he was denied due process because the trial court required him to wear restraints during trial. The decision to shackle a defendant is within the sound discretion of the trial court; thus, this Court reviews a decision by a trial court to shackle a defendant for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Freedom from shackling during trial is an important component of a fair and impartial trial. *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994). A defendant may only be shackled where record evidence establishes that such a measure is necessary to prevent the defendant's escape, to prevent injury to persons in the courtroom, or to maintain order. *Id.* at 425.

In this case, the trial court found that the reports by the security officers of defendant's pattern of destructive behavior and propensity for combativeness indicated that he was not likely to conform his behavior to acceptable standards during trial. The court particularly noted defendant's demonstrated ability to fashion homemade weapons, his previous threats to staff or other court personnel, and the fact that defendant's behavior had caused the jail to employ special security measures.[4] The court conceded that shackling "would not enhance [defendant's] case before this jury," but concluded that safeguarding the jurors and courtroom personnel was paramount. However, the court also took various actions to downplay the fact that defendant was in shackles, such as allowing defendant to be sworn in and to take the stand outside the presence of the jury. Under the circumstances, we find no abuse of discretion.[5]

III

Next, defendant contends the trial court erred by failing to properly respond to defendant's objections to the accuracy of the presentence investigation report. We agree.

A sentence that is based on inaccurate information is invalid. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). At sentencing, a defendant may challenge the accuracy of information contained in the presentence report pursuant to MCL 771.14(6); MSA 28.1144(6) and MCR 6.425(D)(3). When a challenge is made, a court must either (1) make a finding with respect to the challenge, or (2) determine that a finding is unnecessary because it will not consider the challenged information for sentencing purposes. If the court finds merit to the challenge or decides not to consider the information in sentencing, then the court must direct the probation officer to correct or delete the information, as appropriate. MCL 771.14(6); MSA 28.1144(6); MCR 6.425(D)(3).

Here, in response to defendant's challenges to several items in the presentence report, the trial court asked if defendant had documents that refuted the accuracy of the information in the presentence report. When defendant admitted that he did not, the trial court stated that he would accept the representations in the presentence report. By so doing, the trial court improperly shifted the burden of proof on the disputed matters to defendant.[6] Under the circumstances, the trial court should have either adjourned the proceedings to allow the prosecutor to prepare a response to defendant's challenges, MCL 771.14(6); MSA 28.1144(6), or ordered the disputed items deleted from the presentence report.[7] Because the trial court did not respond appropriately to defendant's challenges to the presentence report, we vacate defendant's sentence and remand for resentencing.

IV

Finally, defendant contends that his sentence is disproportionately harsh. However, in light of our resolution of the previous issue, we need not address this claim.

Defendant's conviction is affirmed, but we remand for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael J. Kelly

[1] Defendant testified that he entered the complainant's house only to use the bathroom and did not intend to commit larceny, while the complainant testified that she noticed change missing after defendant left her house.

[2] In fact, it does not appear that the jury harbored much doubt on the issue. The jury was excused shortly before 5:00 to begin deliberations. Around 5:15, the jury was brought back in so that the trial court could answer two questions it had raised regarding the existence of fingerprint evidence and the value of the money taken from the complainant. By 5:26, the jury had reached its verdict.

[3] Indeed, given that defendant admitted in his testimony that he entered the complainant's house without permission, the trial court's refusal to instruct on the offense of entering without permission could have worked to his advantage. Had the jury not been convinced that defendant had the intent to commit larceny, its only option would have been to acquit him.

[4] On appeal, defendant argues that the evidence that defendant posed a security risk was based on hearsay. Because defendant did not raise this issue below, it is not preserved for appellate review. See *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997).

[5] Defendant points out that when he was tried on another charge several months later, he was not shackled. However, the fact that another judge may have decided this issue differently does not mean the judge in the instant case abused his discretion.

[6] A defendant has a due process right to be sentenced on the basis of accurate information. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990). Furthermore, MCR 6.425(A) requires the probation officer to "verify material information."

[7] We note that the probation officer acknowledged at the sentencing hearing that she had not been able to verify all the convictions and that some of the dates might have been inaccurate.