

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN BRYAN ZAVORSKI,

Defendant-Appellant.

UNPUBLISHED

October 1, 2002

No. 227973

Gladwin Circuit Court

LC No. 99-006407-FH

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count each of: (i) first-degree home invasion, MCL 750.110a(2); (ii) possession of a firearm during the commission of a felony, MCL 750.227b; and (iii) felon in possession of a firearm, MCL 750.224f.¹ Defendant was sentenced, as a third habitual offender, MCL 769.11, to concurrent terms of 17½ to 40 years' imprisonment for the home invasion conviction and six to ten years' imprisonment for the felon in possession of a firearm conviction. In addition, defendant was sentenced to a consecutive term of two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I

Defendant contends that the victim's pretrial identification violated his due process rights because the photographic lineup was "impermissibly suggestive." Although defendant objected below, he argued that the photograph was "not a fair and accurate representation" of him on either the day of the incident or the preliminary examination. Defendant also contended that the victim's identification violated the discovery process because it occurred approximately one week before the trial started and the prosecutor failed to provide defendant this new information.

¹ The jury acquitted defendant on an additional charge of receiving and concealing stolen property, MCL 750.535b.

As such, defendant did not challenge the suggestiveness of the photographic lineup below. As a result, this issue is forfeited for appellate review.

In order to avoid forfeiture under the plain error rule, defendant must prove the following: (1) error occurred, (2) the error was plain, i.e. clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Generally, the third requirement requires a showing that the error affected the outcome of the lower court proceedings. *Id.*

“A photographic identification procedure violates a defendant’s right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification.” *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1997). In determining whether a photographic identification procedure is impermissible suggestive, we review the totality of the circumstances, including the following factors: “the opportunity for the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of a prior description, the witness’ level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation.” *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998). Where a defendant establishes that an identification procedure was impermissibly suggestive, the remedy is exclusion of the resulting in-court identification. *Gray*, *supra* at 114 n 8.

Here, we agree with defendant’s assertion that the photographic lineup was impermissibly suggestive. At the preliminary examination, the victim testified that she did not know whether defendant was the person that struck her. However, at the trial—approximately one week after viewing the photographic lineup—she testified that defendant was, in fact, the person that struck her. Her testimony certainly suggested that it was the photographic lineup that formed the basis of her in-court identification. Accordingly, we believe that the admission of the victim’s in-court identification was plainly erroneous.

However, as noted above, to avoid forfeiture, defendant must also show that the plain error affected the outcome of the proceedings. *Carines*, *supra* at 763. Although the victim’s in-court identification may have been tainted by the photographic lineup, this “taint” was certainly presented to the jury. For example, during defense counsel’s cross-examination, the victim conceded that she described the perpetrator as much smaller than defendant. Similarly, defense counsel elicited testimony that the victim was unable to identify defendant in a photographic lineup that took place shortly after the incident. Defense counsel’s questioning significantly undermined the reliability of the victim’s in-court identification. In light of the record, it is more likely that the jury convicted defendant *despite* the victim’s in-court identification, rather than *because* of her in-court identification.

Moreover, the prosecutor presented reliable and convincing identification testimony. Several witnesses, including defendant’s brother, linked defendant to the crimes by placing the stolen contraband in his possession within hours of the incident. There was ample testimony indicating that defendant’s behavior following the incident reflected a “consciousness of guilt.” The testimony indicated that defendant had enough time to commit the crime between leaving work and arriving at his next destination. In light of this other evidence, we are not persuaded

that the victim's in-court identification was "outcome determinative" of defendant's guilt. Consequently, defendant may not avoid forfeiture of this issue.² *Carines, supra* at 763.

II

Next, defendant challenges the sufficiency of the evidence supporting his convictions. A challenge to the sufficiency of the evidence requires us to determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Circumstantial evidence, and reasonable inferences arising from it, may be sufficient to prove the elements of a crime. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Specifically, defendant contends that there was insufficient evidence placing him at the scene of the crime. As noted above, the victim's in-court identification was not very reliable. However, the victim and another witness credibly testified that the perpetrator drove the same car that defendant did. Several witnesses placed stolen contraband in defendant's possession—and in defendant's car—shortly after the incident. As also noted above, several witnesses testified that defendant's behavior was consistent with someone who had committed the crime. Thus, viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence supporting the jury's finding that defendant was the perpetrator. *Nowack, supra* at 399.

Defendant also contends that there was insufficient evidence supporting the first-degree home invasion conviction because there were no facts supporting the aggravating circumstances. MCL 750.110a(2) provides in pertinent part that a person is guilty of first-degree home invasion, rather than second-degree home invasion, if "at any time while the person is entering, present in, or exiting the dwelling" the person is either "armed with a dangerous weapon" or "[a]nother person is lawfully present in the dwelling." Defendant contends that even if the jury found that he *possessed* the firearms that he allegedly stole, there was no evidence that he was *armed* with the firearms at any time.

² Defendant also contends that trial counsel's failure to object to the in-court identification on the grounds that it was impermissibly suggestive deprived him of his constitutional right to effective assistance of counsel. Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Id.* at 423-424. Again, in light of the damaging identification testimony introduced by witnesses other than the victim, we do not believe that defendant's conviction was based on the victim's in-court identification. Thus, defense counsel's failure to argue that the photographic lineup was impermissibly suggestive was not outcome determinative. Moreover, defense counsel's vigorous cross-examination, which significantly undermined the reliability of the victim's identification, prevents us from concluding that the representation was deficient. Therefore, defendant was not deprived of his constitutional right to effective assistance of counsel.

Generally, we review de novo issues of statutory construction. *Hinkle v Wayne Co Clerk*, 245 Mich App 405, 413; 631 NW2d 27 (2001). The *Hinkle* panel added:

The primary goal of statutory interpretation is to give effect to the intent of the Legislature. This determination is accomplished by reviewing the plain language of the statute itself. If the statutory language is unambiguous, it is presumed that the Legislature intended the clearly expressed meaning, and judicial construction is neither required nor permitted. If the statutory language is ambiguous, only then may we look outside the statute to ascertain the Legislature's intent. [*Id.* at 414 (citations omitted).]

Here, defendant fails to cite any authority indicating that there is a meaningful distinction between possessing a firearm and being “armed” with a firearm. MCL 750.110a does not define “armed.” Similarly, our Legislature did not define “armed” in MCL 750.529, the armed robbery statute. In construing MCL 750.529, we have opined that a person may be convicted of armed robbery if he or she *possesses* a dangerous weapon because “the mere possession of a dangerous weapon escalates the risk of violence and the degree of danger to the victim, even if the weapon is not seen by the victim.” *People v Hayden*, 132 Mich App 273, 294; 348 NW2d 672 (1984). We believe that this logic applies to home invasion. The risk of danger to victims (and perpetrators, for that matter) is greatly enhanced when the perpetrator possesses a dangerous weapon at any time during a criminal act. Indeed, the Legislature broadly defines “dangerous weapon” to include both unloaded and inoperable firearms. MCL 750.110a(1)(b)(i). Thus, we believe that the Legislature plainly intended for the mere possession of any firearm while committing a home invasion to constitute an aggravating circumstance. Consequently, we decline defendant's invitation to construe “armed” as requiring something more than mere possession.

Returning to the facts of the instant matter, there was circumstantial evidence indicating that defendant possessed the stolen firearms at some time during the home invasion. Accordingly, viewing the facts in a light most favorable to the prosecutor, sufficient evidence was introduced to support defendant's first-degree home invasion conviction. *Nowack, supra* at 399.

Defendant also challenges the sufficiency of the evidence supporting his felony-firearm conviction. MCL 750.227b provides that a defendant is guilty of felony-firearm where he or she “carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony” Viewing the facts in a light most favorable to the prosecution, the evidence established that defendant possessed the firearms at some point during the home invasion. Defendant contends, however, that a felony-firearm conviction cannot be based on a firearm obtained during the commission of a felony.

In *People v Mitchell*, 431 Mich 744, 749-750; 432 NW2d 715 (1988), our Supreme Court reversed a felony-firearm conviction based on the theft of a firearm following a breaking and entering. The breaking and entering served as underlying felony. *Id.* at 745 n 3. The Court summarily opined that it did “not view a conviction on these facts as consonant with the legislative purpose underlying the felony-firearm statute.” *Id.* at 749. Accordingly, the Court remanded to give the prosecutor an opportunity to establish that “defendant was in possession of a firearm during the commission of the breaking and entering.” *Id.* at 750.

Accordingly, there is some merit to defendant's contention of error. However, we believe that the *Mitchell* decision is distinguishable. The elements of "breaking and entering" are as follows: "(1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny therein." *People v Cornell*, 466 Mich 335, 360; 646 NW2d 127 (2002). Thus, a breaking and entering is complete once the defendant, possessing the intent to commit a larceny, breaks into and enters the building. Any subsequent possession of a firearm would not, technically, be a possession *during* the commission of the breaking and entering, but possession *after* it is accomplished.

In contrast, defendant's underlying conviction was home invasion. A person is guilty of home invasion where he or she enters the dwelling without permission and, at any time, commits a felony or larceny. See generally MCL 750.110a. In other words, unlike breaking and entering, home invasion is a continuous felony—requiring both an unlawful entry and prohibited conduct. Thus, unlike a breaking and entering, a home invasion is not complete until the individual stops engaging in prohibited conduct within the dwelling. A defendant who possesses a firearm during the continuous felony does possess the firearm during the commission of the felony. Accordingly, we do not believe that the *Mitchell* decision precludes a finding that a defendant may be guilty of felony-firearm where the underlying conviction is home invasion based on the theft of firearms.

Here, as noted above, there was a sufficient factual basis to establish that defendant possessed the stolen firearms at some point during the home invasion, but before its conclusion. Accordingly, defendant's challenge to the sufficiency of the evidence supporting his felony-firearm conviction is without merit. *Nowack, supra* at 399.

III

Defendant contends that he was deprived of his constitutional right to effective assistance of counsel because trial counsel should have simply stipulated to defendant's prior felony conviction (which was relevant to the felon in possession of a firearm charge). Instead, the jury heard that defendant had been convicted of breaking and entering. Defendant contends that he was prejudiced by the similarity between a breaking and entering and home invasion.

Again, defendant must "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Snider, supra* at 423-424. Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *Id.* at 423.

Here, an argument can certainly be made that defense counsel should have stipulated that defendant had been convicted of "a felony," rather than allowing the jury to hear that defendant had been convicted of "breaking and entering." The jury only needed to know the date of his earlier conviction to determine whether defendant was a felon. Defendant may have been prejudiced by the similarity of the earlier conviction and the charges. However, it is not clear that substituting a vague reference to an unnamed felony would have reduced the prejudice. Moreover, defense counsel argued that it was defendant's breaking and entering conviction that

caused the police to unfairly assume that he was guilty of the instant offense. This argument required that there be some nexus between the prior felony and the charged offense. Accordingly, we are not persuaded that trial counsel's representation was deficient.

Regardless, even if counsel was deficient for not stipulating to this fact, it did not affect the outcome of the proceedings. As noted above, several witnesses testified about defendant's possession of the stolen contraband, as well as his post-incident behavior. This evidence was far more damaging to defendant's case than the brief reference to his criminal past. Consequently, defendant was not deprived of his constitutional right to effective assistance of counsel.

IV

Next, defendant contends that prosecutorial misconduct deprived of him of his constitutional right to a fair trial. Although defendant contends that several of the prosecutor's comments during closing argument and rebuttal were improper, he did not object to any of the alleged misconduct below.

Ordinarily, we review claims of prosecutorial misconduct "case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). If the prosecutorial misconduct issue is preserved, we evaluate "the challenged conduct in context to determine if the defendant was denied a fair and impartial trial." *Id.* Where, as here, a defendant fails to timely and specifically object below, appellate review of the allegedly improper conduct is precluded "unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice." *People v Rodriguez*, 251 Mich App 10, 30; 645 NW2d 294 (2002).

First, defendant contends that the prosecutor improperly argued that defendant was "a liar." Our review of the record reveals, however, that the prosecutor merely argued that defendant's post-incident conduct reflected a "consciousness of guilt."³ The prosecutor's arguments fall well short of arguing that defendant was a liar. Moreover, the prosecutor may argue the evidence, as well as reasonable inferences to be drawn from the evidence, as it relates to the prosecution's theory of the case. *People v Fisher*, 220 Mich App 133, 159; 559 NW2d 318 (1996). Accordingly, we find no error.

Second, defendant contends that the prosecutor's arguments misstated the law and the facts. In light of our analysis of defendant's challenge to the sufficiency of the evidence supporting his convictions, we do not believe that the prosecutor misstated the law. Similarly,

³ We further reject defendant's suggestion that the prosecutor's argument was contrary to CJI2d 4.4. Although the jury instruction states that flight does not "prove guilt" and that a person may flee for "innocent reasons," it also states that a person may flee because of "consciousness of guilt." Ultimately, the instruction states that the relevance of a defendant's flight is for the jury to decide. Here, there was evidence that defendant fled. Accordingly, the prosecutor was permitted to argue that certain facts indicated that the flight reflected a "consciousness of guilt," rather than an innocent reason.

the prosecution's argument that defendant "confessed that he had done it" was fair commentary on the testimony about defendant's post-incident statements. *Fisher, supra* at 159.

Finally, defendant contends that the prosecutor expressed his personal belief in defendant's guilt. A prosecutor may not "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, the record reveals that the prosecutor never expressed a personal belief that defendant was guilty, but argued that the evidence suggested that defendant was guilty. More importantly, the prosecutor's arguments fell well short of arguing a "special knowledge concerning a witness' truthfulness." Accordingly, we find no error. Consequently, we conclude that defendant was not deprived of a fair trial because of prosecutorial misconduct.

V

Defendant also contends that the trial court's jury instructions were erroneous. It should be noted, however, that defense counsel expressly approved the jury instructions after they were given by the trial court. Thus, defendant has waived appellate review of the jury instructions. *People v Carter*, 462 Mich 206, 213-214; 612 NW2d 144 (2000).

Nevertheless, defendant further contends that defense counsel was ineffective for failing to raise these challenges to the jury instructions below. Again, our review of this issue is limited to the record, and defendant must "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Snider, supra* at 423-424.

First, defendant contends that defense counsel was ineffective for failing to request a limiting instruction regarding the proper use of defendant's breaking and entering conviction. Defense counsel's strategy was to characterize defendant's prior conviction as the *reason* why the police wrongfully accused defendant of committing the crimes. As part of this strategy, defense counsel presented a consistent case to the jury. In other words, defense counsel's strategy may have been to demonstrate defendant's confidence in his innocence by allowing the jury to hear about the earlier crime without any limiting instruction. Alternatively, defense counsel may have decided that it was not worth reminding the jury about the breaking and entering conviction—even in the context of a limiting instruction. It is well established that we will not substitute our judgment "for that of trial counsel regarding matters of trial strategy, even if that strategy backfired." *People v Rogers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). Accordingly, we are not persuaded that defense counsel was deficient for failing to request the jury instruction. *Snider, supra* at 423-424.

Second, defendant contends that defense counsel should have requested CJI2d 7.8. CJI2d provides a list of factors for a jury to consider when weighing identification testimony. Although the trial court did not read CJI2d 7.8, the trial court generally instructed the jury regarding some of the factors to consider when weighing witness testimony. Moreover, if CJI2d 7.8 had been read in full, the jury would have been instructed that it could "use the identification testimony alone to convict the defendant, as long as you believe the testimony and you find that it proves

beyond a reasonable doubt that the defendant was the person who committed the crime.” Thus, although CJI2d 7.8 includes several factors for the jury to consider that would have undermined the victim’s identification testimony, it also would have invited the jury to convict defendant if it believed her testimony. Further, defense counsel vigorously cross-examined the identifying witnesses, and placed particular emphasis on the weaknesses in their testimony. In other words, defense counsel ensured that the jurors were aware of the weaknesses. Therefore, even if we were to find that counsel was deficient for failing to request the jury instruction, we would nevertheless conclude that the failure to request the jury instruction was not outcome determinative. *Snider, supra* at 423-424.

Finally, defendant contends that defense counsel was ineffective for failing to request CJI2d 5.5 and 5.6. CJI2d 5.5(2) broadly defines an “accomplice” as a “person who knowingly and willingly helps or cooperates with someone else in committing a crime.” CJI2d 5.6 states: “In general, you should consider an accomplice’s testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.” CJI2d 5.6 further states that, in closely examining an accomplice’s testimony, the jury should consider whether the accomplice has an interest in slanting his or her testimony against the defendant, has a criminal record, or was promised leniency by the prosecutor in exchange for his or her testimony.

Both of these instructions involve accomplices. Because one of defendant’s theories was that his brother had committed these crimes, he contends that these instructions should have been given. Indeed, defense counsel elicited testimony indicating that the prosecutor agreed not to charge defendant’s brother (for assisting defendant’s flight and possessing the stolen firearms) if defendant’s brother testified against defendant. Thus, there was a “deal,” as contemplated by CJI2d 5.6. But defendant’s brother was subject to vigorous cross-examination, which was sufficient to fairly present these issues to the jury. Accordingly, even if we were to conclude that defense counsel was deficient for failing to request these jury instructions, we would not conclude that the deficiency was outcome determinative. *Snider, supra* at 423-424.

VI

Defendant’s final issue challenges the scoring of two offense variables: OV-10 and OV-17. Defendant contends that he was improperly scored five points for each variable. However, defendant did not challenge the scoring of these variables below. Accordingly, appellate review of the scoring of these variables is foreclosed. See *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002).

Regardless, MCL 777.41(1)(c) provides that five points should be scored for OV-10 if the “offender exploited a victim by his or her difference in size or strength” The victim testified that defendant punched her in the face. While the victim was recovering from the punch, defendant fled. In other words, the punch allowed defendant to escape. Thus, the victim was not able to get a longer look at defendant or his car; as noted above, the victim’s identification testimony was not very reliable. Defendant’s punch, at the very least, contributed to the weakness of plaintiff’s identification testimony. The record plainly indicates that defendant is much larger than the victim. Whether based on size or strength, we believe that

defendant exploited the victim by punching her. Accordingly, we do not believe that the trial court erred in scoring this variable at five points.

MCL 777.47 provides that OV-17 is properly scored at five points where “the offender failed to show the degree of care that a person of ordinary prudence in a similar situation would have shown.” Contrary to defendant’s assertion, the statute does not limit this offense variable to offenses involving the operation of a vehicle. Here, if anything, defendant’s conduct showed a wanton or reckless disregard for the victim’s property. At the very least, by invading the victim’s home and punching her, defendant failed to show the degree of care that a person of ordinary prudence would have shown. Accordingly, we do not believe that the trial court erred in scoring this variable at five points.

Defendant also contends that trial counsel was ineffective for failing to challenge the scoring of these two variables below. However, trial counsel is not ineffective for failing to advocate a meritless position. *Snider, supra* at 425.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ Donald S. Owens