

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILBERT JUNIOR HALL,

Defendant-Appellant.

UNPUBLISHED

November 30, 2004

No. 248648

Wayne Circuit Court

LC No. 02-009935-01

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals from his jury trial conviction of first-degree home invasion. Defendant was sentenced to seven to twenty years' imprisonment. We affirm.

Defendant first argues he was denied a fair trial because the trial court's jury instructions defining home invasion were confusing and unintelligible. We disagree. Errors in jury instructions are questions of law that are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). A reviewing court is to examine the jury instructions as a whole, and reversal is only required when the jury instructions fail to protect a defendant's rights by unfairly presenting the issues to be tried. *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997).

To prove the charge of home invasion, in both the first degree and second degree, the prosecutor is required to prove that a defendant did break and enter, or enter without permission, a dwelling and committed, or intended to commit, a felony, larceny, or assault in the dwelling. MCL 750.110a(2)-(3). In this case, the prosecutor alleged that defendant broke into the dwelling with the intent to commit or committed felonious assault or assault. The trial court instructed the jury on the elements for home invasion and the elements for felonious assault and assault as the underlying crimes for the home invasion charge. The trial court also explained to the jury that defendant was not charged with felonious assault or assault.

"Jury instructions must be read as a whole and not extracted piecemeal in an effort to establish error mandating reversal." *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). An appellate court should not reverse even somewhat imperfect instructions as long as they fairly present the issues to be tried and protect a defendant's rights. *Id.* Here, the jury instructions as a whole were not confusing to the jury and fairly presented the issues to be tried. The felonious assault and assault instructions were given in connection with the home invasion

charges as the underlying charges to the home invasion. The trial court explained to the jury that the assault instructions were part of the home invasion offenses and that defendant was not charged with a separate offense of felonious assault or assault. In reviewing the jury instructions as a whole, we find they fairly presented the issues to be tried and were not confusing or misleading to the jury.

Defendant next argues that his right to a unanimous verdict was violated when the trial court did not instruct the jury that they must render a unanimous verdict as to the same criminal act. Defendant did not request the trial court give this instruction and therefore, the issue will be reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The Michigan Constitution guarantees criminal defendants the right to a unanimous jury verdict. Const 1963, art 1, § 14; *People v Gadowski*, 232 Mich App 24, 30; 592 NW2d 75 (1998). Therefore, a trial court is required to give proper instruction as to the unanimity requirement and in some circumstances the general unanimity instruction will not be sufficient. *Id.* at 30. In *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994), our Supreme Court held a general instruction regarding unanimity will be sufficient “unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant’s guilt.” The Court held that acts are materially identical when they are “tantamount to a continuous course of conduct.” *Id.* at 528

In this case, there was testimony concerning two separate home invasions committed on the same day, against the same victim; one act in the morning and one later that evening. Defendant was bound over for trial on only one count, the incident that occurred in the morning. The victim testified that the morning incident involved a gun, while the evening incident did not. The victim also testified that defendant threatened to kill her during the morning incident and that defendant hit and kicked her and beat her with a tennis racquet during the evening incident. Defendant offered witness testimony to impeach the victim’s testimony regarding the morning incident, but not the evening incident.

Based on the evidence presented at trial, an additional instruction regarding unanimity of the jury verdict in regard to the specific criminal act was not required. While evidence at trial established two separate incidents of home invasion, we cannot say that they involved materially different acts. Both times and on the same day defendant entered the victim’s home and assaulted her while she and others were lawfully in the dwelling. Other distinctions in the two incidents – in the first defendant allegedly was armed with a gun, in the second he allegedly used a tennis racquet as a weapon against the victim – do not compel the conclusion that they were materially different or conceptually distinct or that there was a danger of juror confusion. *Id.* at 517.

Even if a separate unanimity instruction would have been proper if requested, because the issue was not preserved at the trial court, defendant must show that any error meets the test set forth under the plain error doctrine. To show plain error, the defendant must show that “1) error [must have] occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *Carines, supra* at 763. To meet the third requirement of plain error, the

defendant must make a showing of prejudice or that the error affected the outcome of the proceedings. *Id.* Once the defendant demonstrates the above, reversal is only required with a showing that the defendant is actually innocent or that “an error seriously affected the fairness, integrity or public reputation of the judicial proceedings independent of the defendant’s innocence.” *Id.*

As noted above, we do not find that an error was plain or obvious. Nor do we conclude that the lack of the jury instruction affected the outcome of the trial or prejudiced defendant. *Carines, supra* at 763. In determining if a defendant was prejudiced, the court is to review the entire record, including jury instructions and the evidence presented at trial. *Id.* at 772 n 18.

The jury found defendant not guilty of a kidnapping offense and a felony-firearm offense that allegedly occurred at the same time as the morning home invasion. The victim’s testimony about the morning home invasion was also contradicted by a defense witness’ testimony. However, the victim’s testimony about the evening home invasion was supported by her landlord’s testimony and a police report. The jury could have chosen to believe the victim about the evening incident, as to which there was no contradictory evidence, but not the morning incident. Because the jury unanimously acquitted defendant of the kidnapping offense and felony-firearm offense that allegedly occurred at the time of the morning home invasion, it is most likely that the jury unanimously convicted defendant of home invasion based on the evening incident.

Therefore, defendant cannot show that he was more likely than not prejudiced by a non-unanimous verdict. See *Carines, supra* at 763. Defendant has failed to show that any instructional error affected his substantial rights.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff