

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN MANUEL HOWARD,

Defendant-Appellant.

UNPUBLISHED

November 28, 2006

No. 263563

Wayne Circuit Court

LC No. 05-001407-01

Before: Wilder, P.J. and Kelly and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for first-degree home invasion, MCL 750.110a(2), and possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), for which he was sentenced to concurrent terms of 7 to 20 years and 6 months to 4 years in prison. We affirm.

Defendant first argues that there is insufficient evidence to support his first-degree home invasion conviction. "Generally, we review a challenge to the sufficiency of the evidence in a bench trial de novo and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39; 642 NW2d 339 (2002). We review the trial court's findings of fact in a bench trial for clear error, giving consideration "to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

Pursuant to MCL 750.110a(2),

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault, 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 exists:

(a) The person is armed with a dangerous weapon.

(b) Another person is lawfully present in the dwelling. [See also *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004).]

Defendant contends that the evidence does not support the trial court's finding that he entered the Roys' home with the intent to commit larceny, but, on the contrary, supports his duress defense. Defendant cites his own testimony that he screamed for help while outside the Roys' window because he was being chased. Once defendant broke the window and entered the house, he ran past the Roys and their dogs, went into a room and shut the door. Defendant testified that he had no confrontation with Larry Roy, but when Larry tried to open the door, defendant held it shut and asked him to call the police. Defendant then pushed a bookshelf against the door and searched for something he could use to defend himself if the two men chasing him arrived. After several minutes, Larry told defendant the police had arrived, so he could calm down. The police entered the room, threw defendant down, handcuffed him, and took him away. According to defendant, he told the police that he was glad they had arrived and he had asked the Roys to call for them.

The Roys, on the other hand, testified that defendant broke a window and entered their home. When Teresa saw defendant, she began backing up and screaming. Defendant moved toward her with his hands outstretched looking aggressive. Larry moved Teresa out of the way, and one of their two dogs went after defendant, but caught Teresa's arm, biting it. After Larry and defendant struggled, Larry managed to get defendant into the computer room and pull the door shut. Larry testified that defendant had an aggressive look on his face when the struggle began, but once the dogs began barking, defendant saw them and looked scared. When the police arrived, they had difficulty opening the door to the computer room because there was something against it. Defendant did not tell the police that someone was chasing him. After the police left, Teresa found a bag of cocaine in the room and reported this to the police.

The trial court found both that defendant entered the home with the intent to commit larceny and that he entered the home and assaulted Teresa. A simple criminal assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Because MCL 750.110a(2) does not limit the term "assault" to any particular type of assault, both misdemeanor and felony assaults are properly charged as crimes underlying first-degree home invasion. *Sands, supra* at 163. In this case, there was evidence that defendant either attempted to commit a battery of Teresa or moved toward her aggressively placing her in reasonable apprehension of immediate battery. Therefore, there was evidence that defendant committed an assault in the Roys' home. Thus, regardless of whether the evidence supported the trial court's finding of intent to commit larceny, there was sufficient evidence to support defendant's conviction and reversal is not warranted.

Defendant also contends that the trial court erred in assessing 10 points against him when scoring Offense Variable (OV) 3 because defendant did not cause anyone to suffer physical harm. We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). " 'Scoring decisions for which there is any evidence in support will be upheld.' " *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

OV 3 applies when there is physical injury to a victim. *People v Cathey*, 261 Mich App 506, 512; 681 NW2d 661 (2004); MCL 777.33. Ten points should be scored if “bodily injury requiring medical treatment occurred to a victim.” *Cathey*, *supra* at 512; MCL 777.33(1)(d). After defendant entered the home, one of the Roys’ dogs went after defendant but caught Teresa’s arm, biting it. Teresa went to the hospital for treatment. Regardless of whether defendant directly caused Teresa to suffer physical harm, she suffered the harm as a result of and during the commission of defendant’s crime. Therefore, the evidence supports the trial court’s scoring of 10 points for OV 3.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello