STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2006
v	No. 262303 Calhoun Circuit Court
JEROME ISAIAH FREDERICK, Defendant-Appellant.	LC No. 2004-004090-FH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of first-degree home invasion, MCL 750.110a(2), and assault and battery, MCL 750.81. The trial court sentenced defendant to 4 to 30 years' imprisonment for his first-degree home invasion conviction and to 93 days in jail for his assault and battery conviction. We affirm.

I. Facts

On October 29, 2004, at approximately 11:00 p.m., defendant arrived at the residence of his ex-wife, Elizabeth Taylor. Defendant wanted to see his four-year-old daughter, who lived with Taylor in the downstairs apartment of a two-family home. Defendant's prior visits were problematic, and after Taylor obtained a second personal protection order (PPO) against defendant, she refused to allow him any visitation. Defendant had visited his daughter in August 2004, though he repeatedly violated the PPO by turning up at Taylor's house to see the child.

Taylor testified that, on the night of October 29, 2004, she answered the main door of the house and saw defendant through the closed glass storm door. Defendant angrily demanded to see his daughter, he began to yell and scream, and he threatened Taylor with physical harm. The two argued and, when Taylor told defendant to leave, he "snatched" open the storm door and said "I'm gonna see my daughter, I know she's in there." Defendant then took Taylor's arm and "slammed" her against the open door, pushing her out of the way so he could enter the foyer.

Brandon Reed, Taylor's seventeen-year-old son, opened the door to Taylor's apartment when he heard a loud bang, which was his mother hitting the opened main door. Reed then saw defendant coming at him. Reed was afraid that defendant would attack, and he tried to stop defendant at the apartment door. Defendant then hit Reed and bit him. Reed fought back and

pushed defendant out of the doorway of the apartment and into the foyer where the fight continued.

Taylor's upstairs neighbor had also heard the loud bang and defendant's threat to Taylor. When he saw defendant and Reed fighting in the foyer, he went downstairs to hold defendant until police arrived because, when defendant had threatened Taylor in the past, defendant always fled before police could get to the house to enforce the PPO. When the police arrived, they found Reed and Taylor holding the defendant down on the ground.

At trial, defendant testified that, as permitted in the couple's divorce decree, he arrived at his ex-wife's home at 8:30 p.m. on October 29 to try to visit his daughter. He further testified that no one was home and he left. According to defendant, he returned to the apartment several times until, at about 11:00 p.m., Taylor answered the door. Defendant admitted that the two argued, that he "snatched the screen door open" and entered the foyer, but he denied that he pushed Taylor and denied that he had any intention of assaulting her. Rather, defendant claimed that Taylor stepped aside to let him into the foyer. Defendant also testified that he was actually the victim because Reed came out of the apartment and attacked him, and defendant ended up badly beaten. Defendant admitted that he had yelled threats and obscenities at Taylor and threatened her with hospitalization two weeks before, but he denied that he did so that night. He also admitted that he swore when Taylor refused to let him in the house. As noted, a jury convicted defendant as charged and he now appeals.

II. Analysis

Defendant argues that the prosecutor presented insufficient evidence to support his conviction for assault or assault and battery and thus, both that conviction and his conviction of first-degree home invasion based on an assault must be vacated.

We review a challenge to the sufficiency of the evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Viewing the evidence in the light most favorable to the prosecution, this Court must determine whether a rational jury could find "that the essential elements of the crime were proven beyond a reasonable doubt." *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002), quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Any conflicts in the evidence are resolved in the prosecution's favor, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), and the jury's verdict is given great deference, particularly in matters of credibility of conflicting testimony. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A conviction for first degree home invasion requires proof that (1) defendant broke and entered a dwelling or entered a dwelling without permission; (2) the defendant (a) intended to commit a felony, larceny, or assault at the time of entry or (b) committed a felony, larceny, or assault while entering, present inside, or leaving the dwelling; and (3) did so either (a) armed with a dangerous weapon or (b) while another person is lawfully present in the dwelling. MCL 750.110a(2). Here, the evidence clearly showed that defendant entered the dwelling—the foyer of the two-family home—without permission. Defendant admitted that, without Taylor's permission, he pulled open the storm door to enter the foyer. A dwelling is "a structure or shelter that is used . . . as a place of abode, including appurtenant structures attached to that structure or shelter." MCL 750.110a(1)(a). A reasonable jury could conclude that the foyer, to which only

the landlord and tenants had keys, was part of the dwelling, and that by entering into the foyer without permission, defendant entered the "dwelling" itself. The evidence also established that Taylor was lawfully present in the dwelling at the time defendant entered. Thus, the only remaining element of the crime is defendant's intent to commit an actual assault.

An assault under MCL 750.81(1) 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 Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). "A battery is an intentional, unconsented and harmful or offensive touching of the person of another. . . . " *Id*. Assault is a specific intent crime. *People v Norwood*, 123 Mich App 287, 295; 333 NW2d 255 (1983). However, a defendant need not announce his intent; it may be inferred from all the facts and circumstances including words, conduct, or the manner in which the crime was committed. *Hawkins, supra* at 458.

Here, the evidence presented reveals that defendant intended to assault Reed and that he assaulted him. We reject defendant's claim that the witnesses' testimony was "unanimous" that defendant only wanted to enter the home to see his daughter, and that he did not assault anyone. While witnesses testified that defendant demanded to see his daughter, Reed testified that he was afraid he would be attacked when he saw defendant coming toward him. Reed also testified that defendant hit him first while trying to get into the apartment. Not only was there evidence that defendant actually hit Reed first, but there was evidence that he intended to do so. Defendant was "ranting and raving," and he threatened Taylor by stating, "If you don't let me in you gonna have plenty of time to think about this when you laying up in the hospital." Defendant was inside the house, within Reed's hearing, when he told Taylor "your bitch ass is gonna let me see my child, I'm not leaving here until you do. . . [G]o get my child."

Further, defendant's visit to the home was a violation of the PPO, and defendant earlier threatened to violate the PPO to see his wife and child. A reasonable jury could infer from defendant's words and conduct that he wanted to see his daughter so badly that he was willing to use force to do so. Thus, defendant's assault on Reed supported both his assault and battery conviction and his first-degree home invasion conviction.

Additionally, defendant's assault on Taylor supported the first-degree home invasion conviction. Defendant was charged with first-degree home invasion based on the commission of an assault, but a specific person was not identified, and the trial court instructed the jury that it had to find an assault took place, not that it had to find that defendant assaulted Reed. There was credible testimony that defendant pushed Taylor so forcefully that he "slammed" her against the door. Clearly, defendant's push was a harmful or offensive touching and formed the basis for the underlying assault for first-degree home invasion conviction.[1]

[1] Defendant further asserts that the home invasion statute, MCL 750.110a, is void for vagueness because it fails to clearly define what conduct elevates an offense to first-degree home invasion from third-degree home invasion. He also claims that, because a misdemeanor assault can be the basis for either charge, the statute is ambiguous and does not provide fair notice of the conduct
(continued…)

Also, defendant claims that the trial court erroneously instructed the jury when it stated that defendant was charged with *third*-degree home invasion in count 1, but instructed the jury on the elements of *first*-degree home invasion. He contends that the misleading instruction may have caused the jury to ignore its ability to convict defendant of one of the lesser offenses upon which they were also instructed. Defendant expressly waived any claim of error in the instructions. His counsel specifically waived "written claims and contentions" after the trial court's instructions to the jury. The waiver extinguished any error, and there is no issue for this Court to address. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

However, defendant also argues that he was deprived of effective assistance of counsel by his lawyer's failure to object to the "erroneous" jury instruction. When the trial court instructed the jury on first-degree home invasion, it incorrectly stated, "Now as to count 1, the defendant is charged with the home invasion in the third degree." The trial court, however, specifically instructed the jury on the correct elements of first-degree home invasion, and then stated that jury could also consider the "lesser charge of home invasion in the third degree." It then correctly instructed the jury on those elements. Nonetheless, defendant contends that the misstatement was plainly erroneous and his counsel's failure to object was objectively unreasonable. Further, he contends that this denied him a fair trial because the error may have caused the jury to ignore the possibility that he could be convicted of a lesser offense.

Defendant did not raise the issue of ineffective assistance of counsel below by filing a motion for an evidentiary hearing or a new trial and, therefore, our review is limited to mistakes apparent on the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was deficient under an objective standard of reasonableness, and that, but for counsel's error, the result of the proceeding would have been different. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004). Defendant bears the "heavy burden" to overcome the presumption that counsel is effective. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

We agree with defendant that the trial court made a mistake when it stated that defendant was charged with "third-degree" home invasion in count one, and we agree that counsel could

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proscribed. Further, because the prosecution may charge a defendant with either crime, defendant maintains that it grants the prosecution unlimited discretion.

This Court addressed the same arguments in *People v Sands*, 261 Mich App 158; 680 NW2d 500 (2004), and found them to be without merit. The home invasion statute clearly identifies when a misdemeanor assault may be the underlying crime to elevate a home invasion from third-degree to first-degree—only when the aggravating circumstances are present. *Id*. at 163. Thus, a reasonable person has fair notice of what is proscribed under each subsection, and because each subsection may be enforced under different circumstances, arbitrary enforcement is not encouraged. *Id*. at 164. Therefore, the statute is constitutional and defendant's challenge fails.

have objected. However, we do not believe that the jury instructions as a whole were plainly erroneous. We also find that it was not objectively unreasonable for defense counsel to fail to object to one word when the elements of the charged offense were properly submitted to the jury and when the trial court clarified that the charge was first-degree home invasion and specified the lesser charges the jury could consider.

Jury instructions must fairly present the issues to be tried and sufficiently protect the defendant's rights, or reversal may be required. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). They must be read as a whole; portions "must not be 'extracted piecemeal to establish error,' and even if the instructions are somewhat imperfect, a new trial is not required "where a jury could not have been misled by the charge as a whole." *People v Schwitzke*, 316 Mich 182, 184; 25 NW2d 160 (1946). Because all of the elements of first-degree home invasion were correctly stated, as were the elements of the lesser-included offenses of third-degree home invasion and entering a building without the owner's permission, the jury instructions were not misleading or confusing. And, in later clarifying the charge and lesser offenses, the trial court, in effect, "corrected" its mistake in the first instruction.

Because the jury instructions fairly presented the issues to be tried and sufficiently protected defendant's right to a fair trial, it was not objectively unreasonable to fail to object. Moreover, we note that, if counsel had objected to the instruction, it would not have affected the outcome of the trial. The court would have again corrected itself, and the jury would have heard that defendant was charged with first-degree home invasion on three occasions instead of two. Defendant cannot demonstrate that the correction would have changed the verdict. Accordingly, he was not denied a fair trial.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder