

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD FREDERICK ROACH,

Defendant-Appellant.

UNPUBLISHED

October 21, 2008

No. 278791

Kent Circuit Court

LC No. 06-011646-FH

Before: Markey, P.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for first-degree home invasion, MCL 750.110a(2), assault (domestic), MCL 750.81(2), and larceny in a building, MCL 750.360. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 10 to 20 years' imprisonment for the home invasion conviction, 93 days in jail for the domestic violence conviction, and 2 to 15 years' imprisonment for the larceny in a building conviction, to be served concurrently. We affirm.

The instant charges arose out of an incident that occurred on November 3, 2006, in connection with an "on again, off again" romantic relationship that existed between defendant and the victim. The couple had been dating for approximately six months when the victim ended the relationship, citing verbal and physical abuse by defendant. Defendant had been living with the victim in the house she rented, and after the breakup, the victim went to stay with a friend because she feared defendant's reaction would be volatile. The victim moved back into the house after a week or two, but had friends stay with her because she was afraid. She told defendant to move out and not return, or she would call the police; she indicated that, in reaction, defendant became upset, and she claimed that there were instances where he climbed into her house using a ladder. At 5:00 a.m. on November 3, 2006, defendant appeared outside the victim's upstairs bathroom, while she was using the restroom. Defendant threatened the victim and the friend who was staying with her, and then threw his keys at the victim, striking her face. Defendant left after the victim stated that she was going to call the police. The victim thereafter discovered that her cellular telephone was missing, that one of the windows showed evidence of tampering, including broken and tipped over flower pots in front of the window, and that there were footprints outside leading up to the window and muddy footprints on the floor inside near the window. The police later performed a traffic stop on defendant's car and discovered the victim's cellular telephone underneath the passenger seat.

Defendant first argues that his conviction for first-degree home invasion was based on insufficient evidence. We review the evidence de novo, in the light most favorable to the prosecution, to determine whether any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

We find that there was sufficient evidence to enable any rational trier of fact to find, beyond a reasonable doubt, that defendant committed the home invasion. The prosecution must show that defendant (1) entered the dwelling without permission; (2) while intending to commit a larceny or assault, or actually committing a larceny or assault while entering, exiting or while in the dwelling; and (3) that another person was lawfully present in the dwelling at the time. *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004); MCL 750.110a(2). “Without permission” is defined as “without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling.” MCL 750.110a(1)(c). Defendant’s challenge focuses on the “without permission” element.

Although the victim may initially have given defendant permission to stay at her house when she moved out temporarily and while he awaited sentencing in connection with an unrelated case, the evidence was sufficient to show that this permission was revoked when she decided to move back in. The evidence indicated that the couple’s relationship became more tumultuous near the end. Defendant had moved most of his belongings to another friend’s house by the time of the incident, he was staying at least intermittently with a third friend, and the victim had spoken to his parents regarding her fear of defendant. The victim believed that defendant had returned the key to her house. When defendant returned the victim’s television set to her in between the time of the breakup and the time of the incident, he knocked on her door instead of walking right in. The victim testified that she made it clear that the relationship was over. She had friends staying with her for protection. She also indicated that she told defendant she would call the police if he came back to the house, and she testified to past incidents where defendant entered the house unauthorized.

There was competing testimony that defendant may have still had the key, or a copy of the key, to the victim’s house or that the victim may have left defendant a note granting him permission to stay at her house when she temporarily moved out. Defendant maintains that this evidence called into question the victim’s truthfulness on the issue of permission. However, it is the province of the jury to assess the credibility of the witnesses and decide how much weight to give their testimony. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). In addition, in reviewing a sufficiency of the evidence claim, we must “draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Thus, we view the victim’s testimony as credible. And, we conclude that the alleged note only demonstrates that defendant had permission to stay in the house at the time of their initial breakup when the victim moved out; it does not show that defendant still had permission when the victim moved back in and “reclaimed” her house. Moreover, both the victim and the responding police officer testified regarding how defendant likely entered her home that night: the window was tampered with, there were footprints outside leading up to the window, the screen was removed, there were muddy footprints inside the house

in front of the window, and the flower pots near the window were broken and tipped over. Defendant's behavior demonstrates that defendant believed he was entering the victim's house without permission that night. Even if defendant still possessed a key or had permission in the past, he did not simply walk through the front door, but broke in through the window that night. As this Court has stated, the fact that defendant may have possessed a key is not necessarily dispositive as to whether he entered the home with permission. *People v Rider*, 411 Mich 496, 498; 307 NW2d 690 (1981).

Defendant next argues that the trial court erroneously excluded from evidence the key that was included in belongings taken from him at the jail after his arrest.

In a bench conference, the trial court decided to exclude the key because it was not timely disclosed to the prosecution pursuant to the discovery order. MCR 6.201. When deciding to exclude the evidence because of a discovery violation, the trial court "must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). We review the trial court's decision for an abuse of discretion. *Id.* In addition, the complaining party must show actual prejudice, and exclusion of otherwise admissible evidence as a remedy is generally reserved only for egregious cases. *People v Greenfield*, 271 Mich App 442, 456 n 10; 722 NW2d 254 (2006).

The record does not reflect why defendant failed to disclose the key or when defendant first became aware of the existence of the key. The prosecution was surprised by the key at trial, and had no opportunity to investigate this piece of evidence beforehand, or prepare its case knowing of its existence. Thus, the trial court excluded it.

With respect to the disclosure of evidence, the trial court has an interest in ensuring fairness, which encompasses avoiding the presentation of speculative facts, and in ensuring that there is a complete and truthful disclosure of the significant facts. *People v Burwick*, 450 Mich 281, 297; 537 NW2d 813 (1995). The prosecution has an interest in having an opportunity to prepare its case to test the opponent's evidence. *People v Taylor*, 159 Mich App 468, 485; 406 NW2d 859 (1987). We nevertheless hold that exclusion of the key was an abuse of discretion because exclusion is an extreme remedy reserved for egregious cases, and this was not such a case. *Greenfield, supra* at 456 n 10. There was no suggestion by the trial court or the prosecution that defendant purposely failed to disclose the key in an effort to gain a tactical advantage over the prosecution, nor does the record reflect that it was one of several discovery abuses engaged in by defendant before or during the trial in an effort to gain an advantage. There were other remedies available besides exclusion that would have adequately permitted the prosecution to investigate the evidence, such as a continuance. *Taylor, supra* at 485. The trial court also could have allowed a recess for the prosecution to question the witness who was attempting to authenticate the key, or allowed the recall of the victim to let the prosecutor question her regarding the key, or issued a limiting instruction.

Although we conclude there was error, the trial court's decision was harmless error because defendant has not shown that it was more probable than not that the error was outcome determinative, given the substantial evidence presented that defendant entered the victim's home

that night without permission. *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). Relief is not warranted.

Defendant also argues that the exclusion of the key violated his constitutional rights. However, we similarly find that, with respect to this unpreserved constitutional error, defendant has failed to show a clear error that affected his substantial rights by affecting the outcome of the trial. *People v Pipes*, 475 Mich 267, 278-279; 715 NW2d 290 (2006).

Defendant next claims that the trial court's instructions impermissibly shifted the burden of proof to defendant. However, defendant approved of the trial court's instructions. Therefore, this issue is waived. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). Nevertheless, we briefly note that, even if considered, the issue does not warrant relief. Defendant has failed to demonstrate clear error affecting his substantial rights. *Pipes, supra* at 279. The trial court's instructions that the jury should consider all of the evidence, regardless of which party presented it, in determining whether it was "firmly convinced" or left with a reasonable doubt, did not shift the burden of proof. The instructions accurately informed the jury regarding how to view and consider the evidence. *People v Lee*, 243 Mich App 163, 183-184; 622 NW2d 71 (2000). The "firmly convinced" language was approved in *People v Bowman*, 254 Mich App 142, 148-151; 656 NW2d 835 (2002). Jury instructions are not erroneous where they fairly present the issues before the jury and safeguard defendant's rights. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Defendant also argues that defense counsel was ineffective for failing to timely disclose the key and for failing to object to the trial court's jury instructions. Defendant's unpreserved ineffective assistance of counsel claims are limited to a review of the errors that are apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Because the trial court's instructions were not erroneous, defense counsel was not ineffective for failing to raise a futile objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Moreover, defendant's claim that he received ineffective assistance of counsel because defense counsel did not timely disclose the key is also unavailing. Defendant has failed to demonstrate that his trial counsel's failure to comply with the discovery order was a result of trial counsel's own deficient actions, and our review is limited to the errors that are apparent on the record. *Matuszak, supra* at 48. And, in light of the other evidence at trial, even if the key had been introduced, it cannot be said that, but for its admission, it is reasonably likely that the outcome of the trial would have been different. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999).

Lastly, defendant argues that his sentence violated his Sixth Amendment rights because it was based on facts not determined by a jury and proven beyond a reasonable doubt. US Const, Am VI; *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, as defendant concedes, the Michigan Supreme Court held in *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), that *Blakely* was inapplicable to Michigan's sentencing scheme. Thus, defendant's constitutional rights were not violated because the trial court may find facts

relevant to a determination of defendant's sentence as long as the sentence is within the statutory maximum. *Id.*

Affirmed.

/s/ Jane E. Markey

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly