STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2008
v	No. 278460 Ionia Circuit Court
DANNY JOE CLAYTON, Defendant-Appellant.	LC No. 06-013333-FH

Before: Hoekstra, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree home invasion, MCL 750.110a(2), possession of a counterfeit prescription form, MCL 333.7407(1)(f), and resisting or obstructing a police officer, MCL 750.81d(1). He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 8 to 30 years for each of the home invasion convictions, 30 months to 6 years for the possession of a counterfeit prescription form conviction, and 24 to 36 months for the resisting or obstructing conviction. Defendant appeals as of right. We affirm.

Defendant presented a fraudulent prescription for OxyContin at a pharmacy. The pharmacist contacted the police, and two police officers confronted defendant at the pharmacy. Defendant ran off as the officers investigated the matter. The officers pursued defendant, announcing that he was under arrest and yelling for him to stop. Defendant ignored the officers' commands. One officer caught up to defendant, but defendant struggled with the officer, causing the officer to spray defendant with pepper spray. Defendant broke free and ran inside a house where he was confronted by the homeowner. Defendant eventually left the house and ran into an occupied apartment, where he was finally apprehended.

At trial, defendant conceded that he presented a fraudulent prescription form and admitted running from the police. However, he claimed that he entered the two residences only to obtain water for his eyes and throat to relieve the effects of the pepper spray.

I. Appellate Counsel's Issues

A. Sufficiency of the Evidence

Defendant challenges his two convictions for first-degree home invasion, arguing that the evidence was both legally and factually insufficient to support the convictions. The two counts of home invasion were based on defendant's conduct of breaking and entering into the two residences while committing the felony offense of resisting or obstructing a police officer, MCL 750.81d(1).

We first address defendant's argument that, because the offense of resisting or obstructing a police officer was a continuing offense that began before he entered the residences and because he did not enter the residences with the intent to commit a new crime inside the homes or against any of the occupants, he could not properly be convicted of home invasion under MCL 750.110a(2). We disagree. This issue presents a question of law, which we review de novo. *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). When interpreting a statute, our fundamental obligation is to ascertain the Legislature's intent from the words used in the statute. *Id.* Where the language of the statute is clear and unambiguous, we must enforce the statute as written and apply its plain meaning. *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004).

MCL 750.110a(2) provides:

> 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.

Contrary to defendant's argument, the scope of MCL 750.110a(2) is not limited to felonies that a defendant intends to commit only after entering a dwelling. The statute expressly applies to a person who either "breaks and enters a dwelling or enters a dwelling without permission and, *at any time while . . . entering, present in, or exiting the dwelling*, commits a felony" (emphasis added). Thus, evidence that defendant broke and entered a dwelling, or entered a dwelling without permission, and committed the felony offense of resisting or obstructing a police officer at any time while entering, present in, or exiting the dwelling, is legally sufficient to support a conviction for home invasion under MCL 750.110a(2).

Defendant also challenges the factual sufficiency of the evidence, arguing that the evidence was insufficient to show that he entered either of the two dwellings with the intent to resist a police officer. An appellate court's review of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended

441 Mich 1201 (1992). The evidence must be reviewed in a light most favorable to the prosecution. *Id*. at 515.

The evidence showed that the police were pursuing defendant, had yelled for him to stop, and had informed him that he was under arrest. Immediately before defendant entered the first residence, he was involved in a physical struggle with a police officer during which defendant resisted the officer's attempts to subdue and handcuff him. The officer used pepper spray, but defendant broke free from the officer and ran. The officer chased defendant, who ran inside the residence and locked the door behind him, preventing the officer from following defendant inside. Defendant eventually left the house and the officer continued to pursue him. Defendant unsuccessfully attempted to stop some cars that were driving by. Other officers joined the pursuit, and defendant eventually ran inside an apartment. Two officers followed defendant inside and grabbed him, but defendant continued to fight and resist the officers' attempts to handcuff him. Although defendant asserts that he entered the two dwellings only to obtain relief from the effects of the pepper spray, and not to resist the police, it was up to the jury to determine defendant's intent. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant entered the two dwellings, which were both occupied, with the intent to resist or obstruct the police, contrary to MCL 750.81d(1), which is a felony. Thus, the evidence was sufficient to support defendant's two convictions of first-degree home invasion.

B. Great Weight of the Evidence

Defendant also argues that the jury's verdict was against the great weight of the evidence. "This Court reviews for an abuse of discretion the trial court's denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id*.

Conflicting testimony and issues of witness credibility are generally insufficient grounds for granting a new trial. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). "[U]nless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*. at 645-646 (citation omitted). In light of the evidence that defendant was being pursued by the police when he entered the two dwellings, and the other evidence of defendant's acts of resistance both before and after he entered the dwellings, the jury's verdict were not against the great weight of the evidence.

C. Double Jeopardy

Defendant next claims that, because his acts of resisting or obstructing a police officer formed the basis for his first-degree home invasion convictions, his convictions for both offenses violate his double jeopardy right to be protected against multiple punishments for the same offense. We disagree. Because defendant did not raise this double jeopardy issue below, this issue is unpreserved, and our review is limited to plain error affecting defendant's substantial rights. *People v Scott*, 275 Mich App 521, 524; 739 NW2d 702 (2007).

"There is no multiple punishment double jeopardy violation if there is a clear indication of legislative intent to impose multiple punishments for the same offense." *People v Conley*, 270 Mich App 301, 311; 715 NW2d 377 (2006). The home invasion statute provides that "[i]mposition of a penalty under this section does not bar imposition of a penalty under any other applicable law." MCL 750.110a(9). Similarly, the resisting or obstructing statute provides that "[t]his section does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating this section." MCL 750.81d(5). Because the Legislature has clearly expressed an intent to allow convictions for both first-degree home invasion and another felony for the same incident, and has similarly expressed an intent to allow convictions for resisting or obstructing a police officer and another crime committed during the same incident, defendant's convictions for both first-degree home invasion and resisting or obstructing a police officer do not violate the constitutional prohibition against double jeopardy. *Conley*, *supra* at 311-312.

D. Prosecutorial Misconduct

Defendant argues that the prosecutor's misconduct denied him a fair trial. Claims of prosecutorial misconduct are decided case by case and challenged comments must be reviewed in context to determine whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Defendant concedes that he did not preserve most of his claims of misconduct with an appropriate objection at trial. We review defendant's unpreserved claims for plain error affecting his substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). Reversal is not warranted if a cautionary instruction could have cured any prejudice resulting from the prosecutor's remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

We disagree with defendant's argument that the prosecutor improperly interjected irrelevant and highly prejudicial information by questioning the pharmacist about problems associated with OxyContin and by questioning defendant about several letters that defendant wrote while the case was pending. A prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the trial court, so long as he does not prejudice the defendant. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). Defendant was charged with possession of a counterfeit prescription form and the prosecutor's examination of the pharmacist was a good-faith attempt to explain why a person might want to use a counterfeit prescription form to obtain OxyContin. Further, the prosecutor's cross-examination of defendant about the many letters that he wrote was a good-faith attempt to show that defendant had changed his theory of the case, which was relevant to defendant's credibility. Defendant also argues that the prosecutor brought out irrelevant and highly prejudicial information when he inquired of defendant what defendant thought the appropriate punishment should be for possessing counterfeit prescription forms. However, the trial court sustained defense counsel's objection to the question, thereby preventing any prejudice to defendant.

We also disagree with defendant's argument that the prosecutor argued facts not in evidence when, during closing and rebuttal arguments, he stated that defendant had claimed that he broke into the dwellings because he was "high." The prosecutor's remarks were supported by a letter that defendant admitted writing. Therefore, the remarks were proper.

Next, to the extent that some of the prosecutor's remarks during his rebuttal argument could be interpreted as an improper appeal for sympathy or as an improper civic duty argument, any prejudice was cured when the trial court promptly instructed the jurors that they had no civic duty or obligation to protect the community and, instead, they were to decide the case solely on the basis of the evidence at trial and the court's instructions.

Defendant further argues that the prosecutor improperly portrayed him as a difficult and unreasonable person. A prosecutor must refrain from denigrating the defendant with intemperate and prejudicial comments. *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005). But a prosecutor has wide latitude in closing argument and is permitted to argue the evidence and all reasonable inferences that can be drawn from it. *Id*. at 453. The prosecutor's comments were based on the evidence and reasonable inferences drawn from the evidence. Defendant did not object to the comments and he has not shown that they were so intemperate or prejudicial as to constitute plain error.

For these reasons, the prosecutor's conduct, whether considered singularly or cumulatively, did not deprive defendant of a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

E. Sentencing Issues

Defendant, relying on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and related cases, argues that he is entitled to be resentenced because the sentencing court improperly relied on facts not found by the jury. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing court was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Although defendant argues that *Drohan* was incorrectly decided, this Court is bound by that decision. See *Paige v City of Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006).

Defendant also challenges the trial court's scoring of offense variables (OV) 9, 10, and 19. When scoring the sentencing guidelines, a court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*

The trial court properly scored ten points for OV 9, two to nine victims were placed in danger of physical injury or death, MCL 777.39(1)(c). Defendant was involved in a physical struggle with two police officers who attempted to take him into custody while inside one of the dwellings. In addition, defendant entered the dwellings while on the run from the police and, therefore, placed the residents at risk of physical injury. Because each of these persons was placed in danger of physical injury during the offense, each is properly considered a victim for purposes of OV 9. MCL 777.39(2)(a); *People v Sargent*, 481 Mich 346, 347-348, 350; 750

NW2d 161 (2008). The statute does not require that a person suffer actual physical injury to qualify as a victim.

The trial court scored ten points for OV 10, exploitation of a victim's physical disability or agedness, MCL 777.40(1)(b), because one of the homeowners was 63 years old and was restricted to using a walker because of a leg injury. The term "exploit" means "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). In *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008), the Supreme Court held that OV 10 should be scored only where the victim's vulnerability is readily apparent and is exploited. Defendant correctly observes that the mere existence of one or more of the statutory factors does not automatically equate with victim vulnerability. See MCL 777.40(2). However, the trial court found that the victim's physical disability was readily apparent and that defendant exploited that disability by not immediately leaving when confronted by the homeowner, instead remaining inside and moving about the house because the homeowner lacked the capacity to do anything about defendant's presence. Because the evidence established that the homeowner was using a walker to get around and that defendant, after being confronted by the homeowner, paced between the front and back doors of the house, we find no error in the trial court's scoring of OV 10.

Similarly, we find no error in the trial court's scoring of 15 points for OV 19. Fifteen points are to be scored for OV 19 if "[t]he offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services." MCL 777.49(b). The phrase "interfered with or attempted to interfere with the administration of justice" includes more than judicial proceedings. *Barbee, supra* at 287-288. It also encompasses the duties of law enforcement officers, which includes the investigation of crimes. *Id.* at 288. Therefore, "[c]onduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference, with the administration of justice, and OV 19 may be scored for this conduct where applicable." *Id*. In *Barbee,* the Court upheld a ten-point score for OV 19 where the defendant provided a false name to the police. Here, the evidence of defendant's conduct in evading and physically resisting the police supported a 15-point score for OV 19.

Additionally, we find no merit to defendant's argument that MCL 777.49 is void for vagueness. In *Barbee, supra* at 286, the Supreme Court found that the language of the statute was plain and unambiguous. Contrary to defendant's argument, the statute identifies the type of behavior that is subject to scoring under OV 19 and does not confer unfettered discretion on the sentencing judge. *People v Hrlic*, 277 Mich App 260, 263; 744 NW2d 221 (2007).

F. Ineffective Assistance of Counsel

Defendant argues that trial counsel was ineffective to the extent that he failed to preserve any of the foregoing issues. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, a defendant must show that there is a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Having considered defendant's various trial and sentencing issues and having found no

error justifying appellate relief or resentencing, we likewise conclude that defendant has not established that counsel's failure to object deprived defendant of the effective assistance of counsel.

II. Defendant's Standard 4 Brief

Defendant argues that he had a serious conflict of interest with his attorney, Gail Benda, and that he was denied his constitutional right to proceed with the attorney of his choice. We find no merit to this argument.

At the root of the Sixth Amendment's right to counsel is the defendant's right to select counsel of his own choosing. *United States v Gonzalez-Lopez*, 548 US 140, 147-148; 126 S Ct 2557, 2563; 165 L Ed 2d 409 (2006). Therefore, a defendant who does not require the appointment of counsel has the right to choose who will represent him. *Id*. at 144. A violation of this right is established when the defendant is erroneously prevented from being represented by his lawyer of choice, regardless of the quality of representation he may receive from another lawyer. *Id*. at 148.

In this case, Benda was originally appointed to represent defendant, but was subsequently replaced by retained counsel, Damian Nunzio. Later, however, Nunzio was discharged and Benda was retained to represent defendant. On the day before trial, another retained attorney, Bruce Lincoln, filed an appearance as co-counsel for defendant. Benda and Lincoln both indicated that it was defendant's preference for them to jointly represent defendant at trial. Defendant was asked if he had anything to say, but declined comment.

Although defendant now argues that he was happy with Nunzio as his attorney and was dissatisfied with Benda, who allegedly had a conflict of interest that prevented her from adequately representing defendant, defendant never raised the issue of a conflict of interest during the proceedings below. Defendant claims that Benda "bribed" his mother into retaining Benda, and that he was unaware of these events until after trial. However, defendant was aware that Benda was retained and, therefore, would have realized that she was being paid by someone else if defendant was not paying her directly. Furthermore, on the day before trial, the trial court accepted the appearance of Lincoln to act as defendant's co-counsel at trial. Defendant does not allege any conflict with Lincoln, and he fails to explain how his right to proceed with counsel of his choice was violated when the trial court allowed Lincoln to represent defendant as co-counsel. In addition, when the court accepted Lincoln's appearance, Benda explained that she had offered to withdraw, but according to both Benda and Lincoln, it was defendant's preference that she continue to represent him at trial as co-counsel with Lincoln. Defendant was given an opportunity to address the court on this matter, but declined to do so. For these reasons, the record does not support defendant's claim that Benda was improperly allowed to represent him despite a serious conflict of interest or that he was denied his right to proceed with counsel of his choice.

Defendant additionally argues that this Court should remand the case for an evidentiary hearing on his claim that Benda was ineffective because of a conflict of interest. Defendant also argues that appellate counsel was ineffective for not raising this ineffective assistance of counsel issue and for not requesting an evidentiary hearing on the issue. We disagree.

Because defendant was represented by co-counsel at trial and does not allege that co-counsel's representation was either deficient or compromised by any alleged conflict by Benda, there is no merit to defendant's claim of ineffective assistance of counsel on this ground and an evidentiary hearing is not warranted. Further, an appellate attorney is not ineffective for weeding out weaker arguments and focusing on those most likely to prevail on appeal. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Having concluded that there is no merit to defendant's pro se ineffective assistance of counsel argument, and that an evidentiary hearing on this issue is not warranted, we likewise conclude that appellate counsel was not ineffective for failing to raise either issue.

Finally, defendant argues that even if a single error does not require reversal, the cumulative effect of multiple errors entitles him to a new trial. Only actual errors may be aggregated to determine if the effect of multiple errors deprived a defendant of a fair trial. *People v LeBlanc*, 465 Mich 575, 591 n 12; 640 NW2d 246 (2002). As explained in our analysis of the foregoing issues, defendant has not established that multiple errors occurred at trial. Therefore, he has failed to establish that he was prejudiced by the cumulative effect of several errors.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio