STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 3, 2009
v	No. 280856 Bay Circuit Court
THOMAS EDWARD IRVING, Defendant-Appellant.	LC No. 06-010924-FC

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), larceny in a building, MCL 750.360, larceny of a firearm, MCL 750.357b, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to serve 24 months for felony-firearm conviction consecutively to concurrent prison terms of 96 to 480 months for first-degree home invasion, 80 to 120 months for larceny of a firearm, 64 to 96 months for larceny in a building, and 80 to 120 months for felon in possession of a firearm. We affirm.

In the summer of 2006, Nancy and George Dengler's home was burglarized. The Denglers had gone on vacation and asked their son to look after the home. The Dengler's son contacted them a couple of days after they left and advised that their home had been broken into. The Denglers immediately returned home and, upon inspection, determined that two safes had been broken open and that jewelry, coins, and several guns had been taken from the home. The Dengler's grandson and defendant were ultimately charged in connection with the burglary.

Testimony at trial established that defendant and the Dengler's grandson, Tim Luepnitz, had broken into the home for the purpose of finding items to steal. Tim opened the safes and both he and defendant removed items from the home, with Tim carrying the jewelry and coins out in a basket, and defendant carrying out several guns, wrapped in a carpet. The majority of the items were ultimately pawned for cash or exchanged for crack cocaine.

On appeal, defendant first argues there was insufficient credible evidence to prove that he committed the crimes for which he stands convicted. Specifically, defendant argues there was insufficient evidence that he was armed with a rifle during the burglary and that the witness testimony at trial was not credible to support his convictions. We disagree.

We review de novo challenges to the sufficiency of the evidence. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). "'[W] hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found 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, amended 441 Mich 1201 (1992). The standard is deferential and requires that we draw all reasonable inferences and make credibility choices in support of the jury verdict.'" *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006), quoting *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

MCL 750.110a(2) provides in pertinent as follows (emphasis added):

> 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.[1]
>
> * * *

This Court in *People v Shipley*, 256 Mich App 367, 377; 662 NW2d 856 (2003) stated the following:

> As the plain language of [MCL 750.110a] indicates, first-degree home invasion is not necessarily completed at the time of entry into a dwelling, but rather can be completed by commission of the final element of the crime while the person is present in (or leaving) the dwelling. Thus, . . . the theft of a firearm following a break-in at a residence can occur *during the commission of* first-degree home invasion. As a result, first-degree home invasion, where there is a larceny of a firearm during a residential breaking and entering, can be the predicate felony for a felony-firearm conviction.

[1] The home-invasion statute defines a dangerous weapon as "[a] loaded or unloaded firearm, whether operable or inoperable." MCL 750.110a(1)(b)(*i*).

Thus, the fact that defendant was not armed when he broke and entered the home is irrelevant. Defendant's accomplice, Timothy Luepnitz, testified that he and defendant broke into a gun cabinet and stole "rifles and shotguns." Further, Luepnitz testified that defendant rolled the guns up into a rug and took them out of the house. Accordingly, defendant obtained the rifle while he was "present in, or exiting the dwelling," and thus possessed a firearm during the commission of the home invasion.

Defendant also argues he was not "armed" because he was not carrying a weapon to be used as a weapon. This argument is without merit. The plain language of the statute simply requires defendant to be armed with a dangerous weapon, there is no mention of intent with respect to using the weapon. In support of his position, defendant cites to a definition of "armed" found in an outdated edition of Black's Law Dictionary, focusing on a portion of the entry discussing an armed water vessel. Black's Law Dictionary (4th ed). That portion of the entry is inapplicable to the case at hand. Additionally, the reference to an armed vessel was removed from subsequent editions of Black's. Under the home invasion statute, defendant need only be "[e]quipped with a weapon" at some point during the home invasion. Black's Law Dictionary (8th ed), p 115.

Accordingly, viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have found the elements of the home-invasion statute were proven beyond a reasonable doubt. This same evidence also supports the finding that defendant was in possession of a firearm during the commission of the home invasion, and thus guilty of felony-firearm.

Defendant also argues that the evidence was insufficient in that the witness testimony given at trial was not credible. Defendant for example, references that testimony of Luepnitz and Vallerie Rivet conflicted as to when the former gave the latter two rings, i.e., was it before or after the break-in of the Dengler home. Defendant also asserts that the witnesses in this case were closer to one another than they were to him and thus would have reason to implicate him rather than each other and that Luepnitz (who had charges pending against him with respect to this incident), and Rivert (who was tangentially involved but not charged with the home invasion) had much to gain by testifying against him.

This Court has consistently held that questions of credibility should be left to the trier of fact to resolve. *People v Odom*, 276 Mich App 407, 419; 740 NW2d 557 (2007); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Moreover, the jury was instructed that where disagreement in testimony exists, it should "think about whether the disagreement involves something important or not, and whether someone is lying or simply mistaken." Further, the jury was instructed that if it determined that a witness had lied about something, it could "choose not to accept anything that witness said. On the other hand," the court continued, "if you think the witness lied about some things but told the truth about others, you may simply accept the part you think is true and ignore the rest." Considering the evidence presented in the appropriate light, the jury's superior ability to assess witness credibility, and the instructions given by the court, the witnesses' testimony does not undermine confidence in the verdict rendered.

Defendant also argues the verdict is against the great weight of the evidence because the testimony of Luepnitz and Rivet was not credible. For the reasons just stated, this argument is without merit. See *People v Lemmon*, 456 Mich 625, 627, 642; 576 NW2d 129 (1998).

Defendant next contends that the trial court denied him his due process rights in excluding defendant's testimony concerning an argument he overheard between Terry and Brandon Yanna allegedly implicating Brandon in the theft of the guns. Defendant believes this conversation was admissible even though there is no specific hearsay exception because of the third party culpability "exception" to the hearsay rule discussed in *Chambers v Mississippi*, 410 US 284; 93 S Ct 1038; 35 L Ed2d 297 (1973), and *People v Barera*, 451 Mich 261; 547 NW2d 280 (1996). However, there is no corroborative evidence to help establish the trustworthiness of defendant's accusations as there was in *Chambers* and *Barera*. Rather, the evidence defendant sought to introduce is simply self-serving hearsay provided only by defendant. Accordingly, the trial court did not abuse its discretion by not allowing defendant to testify to the alleged conversation.

Next, defendant argues the prosecutor committed prosecutorial misconduct and unfairly prejudiced defendant by eliciting irrelevant and highly prejudicial information, and, by making unwarranted comments to the jury. We review unpreserved claims of prosecutorial misconduct for plain error that affected defendant's substantial rights. *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007).

Defendant first argues the prosecutor committed prosecutorial misconduct by eliciting irrelevant testimony from Officer John Ruterbusch that cocaine and a crack pipe were found at the house where the stolen property was discovered. However, Luepnitz had previously testified that after he and defendant took the stolen property to Brandon's house, they split the property between themselves and sold it in Saginaw for crack cocaine. Luepnitz testified to having smoked crack with defendant, among others, in the house. The jury had already heard, then, testimony concerning the presence and use of crack cocaine in the home after the burglary occurred, and the discovery of the crack cocaine and the property that was stolen supported this testimony. Accordingly, the admission of the evidence involving the cocaine was not plain error.

Next, defendant argues that that prosecutor committed prosecutorial misconduct during voir dire when she questioned potential jurors:

> People that commit crimes sometimes live a different lifestyle than different people. Would you all agree with that?
>
> * * *
>
> Because somebody lives a different lifestyle, you might not like their life style, does that immediately say, "I'm not going to be able to listen what they have to say. I'm not going to be able to believe what they . . . what they're gonna say in court"?

and

[W]ould you agree with the idea that people that commit crimes hang out with other people that commit crimes?

When read in context it is clear that the prosecutor was simply asking the jurors if they could be objective even though they may believe people who commit crimes may live a different lifestyle and may associate with others who commit crimes. The prosecutor specifically went on to question whether the jury would be able to objectively listen to the testimony despite its possible disapproval of the lifestyle and the potential background of a witness. The questions objected to, then, were posed simply as a way to discover any bias in a potential juror. See *People v Tyrburski*, 445 Mich 606, 618; 518 NW2d 441 (1994) ("The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury."). Defendant did not object to these questions and there simply is no indication that they resulted in plain error that affected defendant's substantial rights or that the questions "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Defendant also contends that the prosecutor's impeachment of defendant on a collateral matter during rebuttal amounted to misconduct. The following exchange took place between the prosecutor and defendant's brother regarding weather defendant told his brother he was at the Denglers' home:

Q. Okay. Did he tell you that he did go to the residence that we're all—have been talking about? The 2187? Did he tell you he was ever there?

A. Mmm, he said that he knew about the residence, yes.

Q. My question is, sir, did he tell you he went there?

A. I can't say for sure if he said he went there or not.

Q. But he knew about it?

A. Yes.

Q. Did you just chat with Detective Chris Mausolf today?

A. Yes, off the record.

Q. That's not what I'm asking you sir. Did you have a conversation with him?

A. Yup.

Q. Okay. I'm gonna ask ya' again, did Tom tell you that he had been to that residence?

A. Yes.

Q. Okay. And he had been there with [Luepnitz]?

A. He was there with [Luepnitz] and [Rivet] is what I was led to understand.

Defendant's argument that this was improper impeachment on a collateral matter is without merit. Here, defendant's brother testified that defendant told him that he had been to the victims' home. This was relevant and directly related to defendant's claim that he had never been at the victims' home. Accordingly, there was no plain error.

Next, defendant argues the prosecutor committed prosecutorial misconduct by arguing facts not in evidence. In support, defendant relies in part on the statements and questions discussed above raised during voir dire. These statements and questions are simply not argument made in support of conviction. Moreover, the court properly informed they jury prior to voir dire about the process that was going to occur:

> The trial begins with jury selection. The purpose of the procedures used . . . is to obtain information about you that will help us choose a fair and impartial jury to hear this case.
>
> During the jury selection you will be asked questions which are intended to find out whether you know anything about the case, or whether you have opinions or any personal experiences that might influence you for or against the prosecution, the defendant, or any witness.
>
> The questions may probe into your attitudes, beliefs, and experiences, but they are not meant to be an unreasonable prying into your private lives. . . .

Then, in the final instructions after the close of proofs, the jury was instructed not to let "prejudice influence" its decision, to decide the case based on properly admitted evidence, and that the statements and questions of counsel are not evidence. It is well established that jurors are presumed to follow a judge's instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), citing *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that the prosecutor committed misconduct by arguing that defendant said that everyone else who testified was lying. In context, however, it is clear that the prosecutor was not saying that defendant literally testified that everyone was lying. Rather, the prosecutor was noting the stark differences in the stories provided by defendant and the other witness. Further, a prosecutor "need not limit . . . argument[] to the blandest possible terms." *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005). Finally, as noted above, the jurors are presumed to have followed their instructions to decide the case only on the evidence presented. *Graves*, *supra* at 486. Accordingly, there was no plain error.

Defendant also argues that the prosecutor improperly used sympathy to persuade the jury to convict defendant by stating in her opening statement the following:

> He made that choice. It was a quick and easy choice because it was a quick and easy way to get what he needed, regardless of the cost to the

> [victims]—their ability not to feel safe in their home and to have their hard earned things taken from them.

Again, a prosecutor "need not limit . . . argument[] to the blandest possible terms." *Williams, supra* at 71. Additionally, the comment cited was made before the proofs and just after the court had instructed the jury as follows:

> First, the prosecutor makes an opening statement where she gives her theories about the case. The defendant's lawyer may make an opening statement afterwards or may defer the opening statement until later. These statements by the lawyers are not evidence. They are only meant to help you understand how each side views the case.

We presume that the jury followed these instructions. *Graves, supra* at 486. Accordingly, no plain error has been shown.

Defendant's last argument concerning prosecutorial misconduct is that the prosecutor failed to disclose evidence regarding Luepnitz's credibility. Defendant did not provide any authority for his position that when a codefendant is testifying on behalf of the prosecution the prosecutor has a duty to ask the witness if he is hoping to receive a favorable plea agreement in the future. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In any event, testimony was presented that Luepnitz had been charged with respect to the burglary, but that the case had not yet reached resolution. There was nothing requiring the prosecutor to question him regarding his desire or hope for a plea agreement in the matter and, moreover, nothing preventing defendant from asking the same.

Defendant next asserts that his sentence violates *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, based on controlling Michigan Supreme Court precedent this Court must reject defendant's argument. See *People v McCuller*, 479 Mich 672; 739 NW2d 563 (2007).

Defendant's argument that the offense variables (OV) 2, 12, and 16 were incorrectly scored is also without merit. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635,671; 672 NW2d 860 (2003).

Generally, "[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). Further, the variables are determined by reference to the record, using the standard of the preponderance of the evidence. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

OV 2 addresses situations where an individual uses or possesses a "pistol, rifle, shotgun, or knife" during the commission of the charged crime. MCL 777.32(1)(d). Here, there is ample evidence to support the trial court's finding that defendant possessed a rifle during the burglary. Mrs. Dengler testified that guns were stolen from her house and she specifically stated that there was " [a] rifle, shotguns, and there was one revolver" stolen. Her husband also testified that stolen guns included "a 22 revolver; a 30-30 deer rifle; a 20 gauge shotgun; a 12 gauge double-barrel shotgun; and a 40-70 Bullard rifle." In addition, Luepnitz testified that he and defendant broke into the home and "took . . . some guns after we broke into the safes." Luepnitz further testified that defendant carried the guns from the house after they rolled the guns up in "one of the floor mats." Clearly, there is adequate evidence to support the trial court's scoring of OV 2 at five points. MCL 777.32(1)(d).

Next, defendant argues the trial court incorrectly scored OV 12 at ten points. OV 12 concerns situations where two contemporaneous felonious criminal acts were committed. MCL 777.42. Under MCL 777.42(2)(a)(*i*) and (*ii*), a felonious criminal act is contemporaneous if the criminal act occurred within 24 hours of the sentencing offense and the criminal act has not and will not result in a separate conviction.

Here, defendant was charged with, among other things, two counts of safe breaking under MCL 750.53. The safe breaking offenses are "two contemporaneous felonious criminal acts involving crimes against a person" as required by MCL 777.42(1)(b). Defendant argues that he was acquitted of these charges and thus, the charges should not be considered for scoring OV 12. However, the fact that defendant was acquitted of safe breaking under the "beyond a reasonable doubt" standard does not preclude the court from considering these charges under the "preponderance of the evidence" for purposes of scoring the legislative sentencing guidelines. See *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994) ("A sentencing court is allowed to consider the facts underlying uncharged offenses, pending charges, and acquittals.").

Luepnitz testified that there were two safes, one in the bedroom and one in the family room closet. Luepnitz further testified that he and defendant took the pins out of the safe in the bedroom and the door fell off and that they had to open the second safe with a "hammer and a screw driver." Luepnitz stated that he and defendant "pounded on the hammer to get the [safe] door open" and that they "pried it open with the screw driver." This evidence supports the scoring of OV 12.

Lastly, defendant argues OV 16, addressing the degree of property damage, was incorrectly scored at five points. Defendant does not give any authority to support this argument other than the *Blakely* argument advanced above. Accordingly, because *Blakely* is inapplicable, we reject this argument. See *McCuller*, *supra* at 676. Moreover, information contained within the presentence investigation report indicates that the value of the stolen property was around $5,000.00. As the property at issue must have had a value of $1,000 or more but not greater than $20,000 (MCL 777.46(1)(c)) to score OV 16 at 5 points, we find that OV 16 was properly scored.

Further, finding no errors in the scoring of the offense variables, or with respect to defendant's other arguments on appeal, we must also reject defendant's argument that we should remand for resentencing to correct any errors in scoring, and his assertion that trial counsel was

ineffective for failing to challenge the OV scoring. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Affirmed.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly