STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 12, 2009
v	No. 273684 Muskegon Circuit Court
LEE MICHAEL STERHAN, Defendant-Appellant.	LC No. 05-052051-FH

Before: Markey, P.J., and Whitbeck and Gleicher, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, resisting or obstructing a police officer, MCL 750.81d(1), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 20 to 40 years for the first-degree home invasion conviction, 76 months to 40 years for the felon in possession conviction, and 46 months to 15 years for the resisting or obstructing conviction, and a consecutive two-year term of imprisonment for the felony-firearm convictions.[1] Defendant appeals as of right. We affirm.

I. Background

On the evening of July 25, 2005, defendant was drinking at the home of Kristen Mura, and by the early morning hours of July 26, 2005, he had begun acting out of control. Mura repeatedly urged defendant to leave, then told him that she intended to call the police. Before leaving, defendant threatened "to gut" Mura. About seven hours later, defendant broke into Mura's house and then through Mura's locked bedroom door. He told Mura he felt upset that she had earlier called the police. Defendant had a gun in his waistband, which he took out and held in his hands. He had stolen the gun from a neighbor's house a few hours earlier. Mura managed to escape. The police apprehended defendant when he came out of the house and approached a car in Mura's driveway. Defendant presented an insanity defense at trial, which was supported by the testimony of Dr. Steven Pastyrnak. In rebuttal, the prosecution presented

[1] Because defendant was on parole when he committed the offenses, all sentences were required to be served consecutive to the remaining portion of defendant's sentence for the parole offense.

testimony by Dr. Thomas Shazer, who concluded that defendant did not qualify as insane at the time of the offenses.

II. Prosecutorial Misconduct

This Court reviews de novo a preserved claim of prosecutorial misconduct. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The test of prosecutorial misconduct is whether the defendant received a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate the prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Defendant first contends that the prosecutor engaged in misconduct when he played for Dr. Pastyrnak, outside the presence of the jury, an unredacted recording of a conversation between defendant and his mother while defendant was in jail. The conversation occurred on June 1, 2006, just after Dr. Pastyrnak had evaluated defendant, and suggested that he was fabricating the insanity defense. When the prosecutor began cross-examining Dr. Pastyrnak about the tape in the jury's presence, defendant objected and the trial court sustained his objection.

We reject defendant's assertion that when the prosecutor played for Dr. Pastyrnak off the record the recorded jail conversation between defendant and his mother, the prosecutor knowingly violated the trial court's evidentiary ruling precluding admission of the recording at trial. The trial court's ruling only applied to the admissibility of defendant's mother's statements in the recording.[2] It did not prevent Dr. Pastyrnak from listening to the recorded conversation off the record. Additionally, the prosecutor never revealed the substance of the recorded conversation to the jury.

Defendant also maintains that the prosecutor's questions, which elicited Dr. Pastyrnak's testimony that the unredacted conversation caused his confidence in his opinion to waver, amounted to misconduct because MRE 703 prohibits an expert from offering an opinion based on inadmissible evidence. MRE 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

On several occasions during trial, the trial court addressed the applicability of MRE 703 on cross-examination. None of the court's rulings suggested that it would not permit the prosecutor to question Dr. Pastyrnak about how and whether his opinion had changed based on the unredacted recording. Because nothing in the record makes apparent that the prosecutor was

[2] The trial court ruled that the prosecutor could introduce a redacted recording of only defendant's statements.

clearly trying to elicit prohibited testimony as defendant asserts, the prosecutor's good-faith effort to admit evidence does not constitute misconduct. *Dobek*, *supra* at 70.

Although Dr. Pastyrnak testified that his consideration of additional evidence caused his level of confidence in his original opinion that defendant was insane to diminish, and referenced the recorded conversation between defendant and his mother as one part of the basis for his decreased level of confidence, the trial court sustained defendant's objection with regard to any opinions premised on the recorded conversation, and the substance of that conversation was never disclosed to the jury. The trial court later instructed the jury to disregard excluded evidence or stricken testimony, and jurors presumptively follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Furthermore, a review of Dr. Pastyrnak's testimony reveals that more than just the recording caused his confidence in his original opinion regarding defendant's sanity to waver. He admitted that his consideration of other evidence also affected the confidence level of his original opinion. Moreover, despite Dr. Pastyrnak's wavering testimony with regard to defendant's sanity, Dr. Pastyrnak remained steadfast in his belief that defendant had a mental illness that impaired his judgment. The jury had the option of finding defendant guilty but mentally ill, but declined to do so. The jury's rejection of that option signifies that the jury rejected even the portion of Dr. Pastyrnak's opinion that had not wavered. Consequently, the prosecutor's conduct did not deprive defendant of a fair trial.

Defendant also avers that the prosecutor improperly attacked defense counsel during closing argument, denying him a fair trial. A prosecutor may not personally attack defense counsel. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003).

The challenged portion of the prosecutor's argument reads as follows:

> The second thing I want to say though is this, is that they knew what they were calling. They knew what they were doing in this case. I mean, I submit to you that this was a very strategic decision by the defense to call this kind of a poorly qualified expert who has never tried to do this before. That was their strategic decision. They probably didn't think he would implode the way he did on the witness stand, I will grant you that, but going into this case they wanted that kind of expert.

The prosecutor did not personally attack defense counsel, but rather commented on her choice of expert. The testimony disclosed that Dr. Pastyrnak had never testified before regarding a defendant's legal sanity and was not an experienced forensic evaluator. In light of Dr. Pastyrnak's dearth of experience and his wavering testimony at trial, the prosecutor's remarks fairly commented on the evidence and the reasonable inferences arising from it. And the prosecutor need not phrase his inferences in the blandest possible terms. *Dobek*, *supra* at 66. Therefore, the prosecutor's remarks were proper.

Lastly, defendant argues that the prosecutor committed misconduct by frequently asking questions that were not supported by the evidence. However, defendant does not specifically identify any instances when this occurred. Therefore, he has abandoned appellate review of this argument. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

III. Testimony of Dr. Pastyrnak and Dr. Shazer

Defendant next claims that the trial court erred by not striking Dr. Pastyrnak's cross-examination testimony and all of Dr. Shazer's testimony. This Court reviews for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). An abuse of discretion occurs when the trial court chooses an outcome falling outside a range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). This Court considers de novo any preliminary issues of law regarding admissibility involving construction of a rule of evidence or statute. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court's findings of fact are reviewed for clear error. MCR 2.613(C). A finding qualifies as clearly erroneous if, after a review of the entire record, we are left with a definite and firm conviction that a mistake has been made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

A. Pastyrnak's Cross-Examination Testimony

Defendant's objection to the admission of portions of Dr. Pastyrnak's cross-examination testimony focuses on the prosecutor's use of defendant's Muskegon County Mental Health records (exhibit 17) to challenge Dr. Pastyrnak's opinion that defendant was legally insane. Dr. Pastyrnak had not reviewed the exhibit before trial and admitted that the malingering diagnosis in it caused him to question his initial opinion of defendant's legal insanity.

Defendant first challenges the prosecutor's use of exhibit 17 based on the trial court's interpretation of MRE 703. The trial court ruled as follows:

> On cross-exam either party may bring up information not in evidence in the form of questions as to what the expert did not rely on and was not aware of because the court rule only requires facts or data which the expert bases his opinion on. [MRE 703] does not deal with evidence that the expert did not base his original opinion on which, under cross-exam, might be used to challenge if his opinion would have been any different had he known that or been aware of that. It can be done in the form of a hypothetical; it can be done directly.

Defendant asserts that exhibit 17 had to be in evidence for the prosecutor to ask Dr. Pastyrnak questions about it. However, the plain language of MRE 703 simply does not require that a record be in evidence for a party to question the expert with regard to whether he reviewed or considered the record in formulating his opinion.

The next question becomes whether a record must be in evidence when an expert renders a new opinion premised on consideration of the record. We conclude that it does. Nothing in MRE 703 limits its applicability to only direct examination of an expert witness. The rule contemplates that facts or data on which an expert bases "an opinion" must be in evidence. The prosecutor asked Dr. Pastyrnak to reevaluate his original opinion in light of exhibit 17. Even though Dr. Pastyrnak did not change his ultimate conclusion, his "less confident" opinion was based on exhibit 17. Accordingly, the trial court erred to the extent that it found that exhibit 17 did not need to be admitted in evidence for the prosecutor to question Dr. Pastyrnak about its effect on his opinion.

But the error was harmless because the trial court eventually received exhibit 17 into evidence. Under MRE 703, an expert's testimony may be taken either before or after the court admits the evidence on which the expert's opinion rests. We also reject defendant's arguments that exhibit 17 was inadmissible. Contrary to defendant's argument, MCL 768.20a(7) did not require notice of the exhibit five days before trial. Pursuant to MCL 768.20a(7),

> Within 10 days after the receipt of the report from the center for forensic psychiatry or from the qualified personnel, or within 10 days after the receipt of the report of an independent examiner secured by the prosecution, whichever occurs later, but not later than 5 days before the trial of the case, or at another time the court directs, the prosecuting attorney shall file and serve upon the defendant a notice of rebuttal of the defense of insanity which shall contain the names of the witnesses whom the prosecuting attorney proposes to call in rebuttal.

By its clear and unambiguous terms, the statute refers only to a notice of rebuttal of an insanity defense and only requires that the notice list the names of rebuttal witnesses. It does not require the prosecution to provide a defendant with notice of other evidence that may be introduced to rebut the insanity defense.

The record does not substantiate defendant's contention that the defense did not receive a copy of exhibit 17 before trial. An exchange of the parties at trial regarding exhibit 17 reveals that defendant objected to not having the opportunity to review the exhibit before the prosecutor presented it to Dr. Pastyrnak; defense counsel did not suggest that he had never seen the substance of the exhibit before trial. Furthermore, later during trial defense counsel acknowledged that before trial she had reviewed the records that comprised exhibit 17.

We also find unpersuasive defendant's argument that exhibit 17 was not admissible because the prosecutor failed to establish a proper foundation to admit the exhibit under MRE 803(6), as a business record. The parties stipulated to the authenticity of the exhibit before trial. When a dispute arose concerning the scope of the stipulation, defendant conceded that the parties intended the stipulation to avoid the necessity of producing a records custodian to testify to the authenticity of the documents. We agree with the trial court that, given the parties' stipulation, the prosecutor need not have produced a records custodian to lay a foundation for admissibility under MRE 803(6). It would be unreasonable and make little sense to interpret the parties' stipulation as excusing the necessity of producing a records custodian to establish authenticity under MRE 901, but still require the custodian's presence as a prerequisite for admissibility under MRE 803(6).

Defendant lastly challenges the admissibility of exhibit 17 on the basis that it contained tests and diagnoses by another doctor who did not testify, thereby violating his right of confrontation. The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination," regardless of their admissibility under the rules of evidence. *Crawford v Washington*, 541 US 36, 50-51, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Business records admissible under MRE 803(6) necessarily are not prepared in anticipation of litigation against a defendant and, therefore, do not qualify as testimonial. *Id*. at 56; *People v Jambor (On Remand)*, 273 Mich App 477, 483-484, 487; 729 NW2d 569 (2007). The Muskegon County Mental Health records comprising exhibit 17 were prepared for the purpose of

treating defendant. Because the records had no connection to any litigation against defendant and defendant does not dispute that it qualifies for admission under MRE 803(6), the prosecutor's use of the records did not violate the Confrontation Clause.

For all the reasons set forth above, we conclude that the trial court did not abuse its discretion by refusing to strike Dr. Pastyrnak's cross-examination testimony.

B. Dr. Shazer's Testimony

Defendant also insists that the trial court abused its discretion by refusing to strike Dr. Shazer's opinion testimony, which defendant argues rested on inadmissible evidence, contrary to MRE 703. Dr. Shazer testified that he based his opinion in his written report on his interview of defendant and the police reports. Defendant correctly observes that police reports in criminal cases generally constitute inadmissible hearsay. *People v McDaniel*, 469 Mich 409, 412-413; 670 NW2d 659 (2003). However, MRE 703 does not mandate that the facts on which an expert relies be admitted at trial in the same form that the expert considered them. Here, numerous witnesses testified to the relevant facts contained in the police reports that the prosecutor reviewed with Dr. Shazer. The record contains no indication that Dr. Shazer premised his opinion on any facts in the police reports that were not brought out in other trial testimony, and defendant does not identify any such facts.

Defendant also argues that Dr. Shazer improperly based his opinion on other inadmissible records, such as exhibit 17, school records, and prison and jail records. The critical question is whether Dr. Shazer's opinion was "base[d]" on any records beyond the police reports and defendant's interview. Dr. Shazer testified that after he concluded that defendant was sane and prepared his written report, he reviewed other materials pertaining to defendant, but that they did not affect his opinion. According to Dr. Shazer, the additional materials were either irrelevant or simply confirmed his opinion.

Defendant broadly interprets "base[d]" on in MRE 703 as encompassing any materials that an expert reviewed. But defendant offers too expansive a construction of the rule, which does not find support in the rule's language. Moreover, in discussing MRE 703, this Court recently stated the following:

> It necessarily follows that an expert witness may not base his or her testimony on facts that are not in evidence. An expert witness need not rule out all competing and alternative theories, but he or she must have a sound evidentiary basis for his or her conclusions. An expert witness's opinion is objectionable if it is based on assumptions that do not accord with the established facts. When an expert's opinion is based on assumptions that are contrary to the facts in evidence, it is technically irrelevant to the actual issues at trial. [*People v Unger (On Remand)*, 278 Mich App 210, 248; 749 NW2d 272 (2008) (citations and footnote omitted).]

If MRE 703 aims to ensure that the expert has an evidentiary basis for his opinion, this purpose is not offended when an expert reviews inadmissible materials not factored into his opinion. Because Dr. Shazer testified that the additional records did not form the basis for his opinion, the trial court did not abuse its discretion by allowing Dr. Shazer's testimony.

IV. Motion to Amend Information

Defendant contends that the trial court erred in granting the prosecutor's motion to amend the information to add an alternative theory for the home invasion charge. Defendant asserts that the late amendment prejudiced him and that the prosecutor improperly added the new theory to punish him for going to trial.

This Court reviews a trial court's decision to grant a motion to amend the information for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). An allegation of prosecutorial vindictiveness involves an issue of due process. *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996). This Court reviews constitutional issues de novo. *People v Brown*, 239 Mich App 735, 750; 610 NW2d 234 (2000).

A trial court may permit amendment of the information at any time to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant. MCL 767.76; MCR 6.112(H); *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005). The original information charged defendant with first-degree home invasion under a theory that he broke into Mura's house with the intent to commit assault, two counts of felony-firearm, felon in possession of a firearm, and resisting or obstructing a police officer. Eight days before trial began, the prosecutor filed a motion to amend the information to add an alternative theory to the home invasion charge, specifically that defendant broke into Mura's house and therein committed a felony, i.e., felon in possession of a firearm. The trial court determined that the amendment would not cause unfair surprise or prejudice to defendant because the prosecutor had charged both home invasion and felon in possession of a firearm in the original information. Although the prosecutor filed the motion to amend just over a week before trial, defendant had notice of the separate charges in the original information. We conclude that the trial court did not abuse its discretion by granting the prosecutor's motion to amend because adding felon in possession as an alternative theory in support of the home invasion charge did not substantively require defendant to defend against a new charge, and defendant already had notice that he had to defend against a felon in possession of a firearm charge.

Defendant also submits that the prosecutor's motion to amend constituted prosecutorial vindictiveness. Prosecutorial vindictiveness occurs when a prosecutor violates a criminal defendant's due process rights by prosecuting him for asserting a protected statutory or constitutional right. *People v Ryan*, 451 Mich 30, 35-36; 545 NW2d 612 (1996). The two types of prosecutorial vindictiveness are presumed vindictiveness and actual vindictiveness. *Id*. at 36. Actual vindictiveness exists when objective evidence shows an expressed hostility or threat that suggests the defendant was deliberately punished for the exercise of a protected right. *Id*. The defendant has the burden to demonstrate actual vindictiveness. *Id*.

A presumption of prosecutorial vindictiveness arises "only in cases in which a reasonable likelihood of vindictiveness exists." *United States v Goodwin*, 457 US 368, 373; 102 S Ct 2485; 73 L Ed 2d 74 (1982). "[R]egarding presumptive vindictiveness, this Court held that 'it is well established that the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is not sufficient to warrant *presuming* that subsequent changes in the charging decision are vindictive and therefore violative of due process.'" *People v Jones*, 252 Mich App 1, 8; 650 NW2d 717 (2002) (emphasis in original), quoting *People v Goeddeke*, 174 Mich App

534, 536; 436 NW2d 407 (1988). Therefore, in this case defendant bore the burden of proving actual vindictiveness.

Defendant's only proffered evidence of vindictiveness is the prosecutor's statement that he routinely would "review the files before trial to see if there is [sic] other charges that can or should be brought." No reasonable interpretation of this statement conveys "an expressed hostility or threat" toward defendant designed to punish him for exercising his right to a trial. Instead, it describes a routine practice of thorough trial preparation. Therefore, the trial court did not clearly err in finding that the prosecutor's motion to amend did not constitute prosecutorial vindictiveness.

V. Directed Verdict

Defendant complains that the trial court erred in denying his motion for a directed verdict on two of the charges. In reviewing a denial of a motion for a directed verdict, we review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

A. First-Degree Home Invasion

Defendant avers that the trial court erred in denying his motion for a directed verdict on the home invasion charge under the theory that he broke into Mura's house intending to commit an assault. Defendant maintains that insufficient evidence proved that he intended to assault Mura. An 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 Musser*, 259 Mich App 215, 223; 673 NW2d 800 (2003). Circumstantial evidence and the reasonable inferences drawn from it may suffice to prove the elements of the crime. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

Before defendant left Mura's house in the early morning hours, he threatened to return and kill her. Although Mura did not believe that defendant would return, he did. Defendant broke into her house and her bedroom. He wore a mask and possessed a gun. After removing the mask, defendant told Mura that he felt upset that she had called the police. He pulled the gun out of his waistband and held it in his hand, causing Mura to be scared. Although defendant did not point the gun directly at Mura, he need not have done so to have intended an assault. Viewing the evidence in the light most favorable to the prosecution, a reasonable jury could have inferred beyond a reasonable doubt from defendant's actions that he intended to assault Mura by placing her in fear of receiving an imminent battery.

B. Resisting or Obstructing a Police Officer

Defendant also asserts that insufficient evidence established that he resisted or obstructed a police officer. Pursuant to MCL 750.81d(1), "an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony[.]" To be guilty of this offense, a person must know or have reason to know that the officer is performing his duties, and the knowledge element requires the factfinder to determine whether the facts and circumstances of

the case substantiate that the defendant had actual knowledge or reason to have actual knowledge that the person resisted was an officer performing his duties. *People v Nichols*, 262 Mich App 408, 413-414; 686 NW2d 502 (2004). A person may not use force to resist an arrest made by an officer performing his duties. *People v Ventura*, 262 Mich App 370, 377; 686 NW2d 748 (2004).

Defendant asserts that no evidence tended to prove that he knew the police were giving commands, that he heard the commands, or that he assaulted, resisted, or obstructed the police. When defendant exited Mura's house, numerous marked patrol cars had arrived outside, and police officers in uniform and marked tactical gear had gathered around the scene. Trooper Brian Cribbs identified himself as the police, and several times ordered defendant to get down on the ground. Defendant showed his defiance by yelling profanities and continuing to walk toward the car. The police tazered defendant after he turned toward the officers and reached toward his waistband. Trooper Cribbs testified that defendant did not cooperate with his efforts to handcuff him. Officer Chris Mahoney also testified that defendant failed to cooperate, moving his hands around in an apparent attempt to thwart being handcuffed, and yelled.

This evidence sufficed to enable a rational jury to find beyond a reasonable doubt that defendant knew or should have known that Trooper Cribbs was a police officer attempting to apprehend him, and that he intentionally resisted Trooper Cribbs's and other officers' efforts to handcuff him. The fact that defendant was tazered did not signify that he could not physically control his arms when Trooper Cribbs tried to handcuff him. In summary, the trial court did not err when it denied defendant's motion for a directed verdict on this basis.

VI. Jury Instructions

A. Special Unanimity Instruction

Defendant contends that the trial court erred in failing to give a special unanimity instruction with regard to the separate theories underlying the home invasion charge. Because defendant did not request a special unanimity instruction at trial, he has failed to preserve this issue. We thus review the issue only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"A defendant has the right to a unanimous verdict and it is the duty of the trial court to properly instruct the jury on this unanimity requirement." *Martin, supra* at 338, citing *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994). The trial court gave a general unanimity instruction in this case. "Under most circumstances a general instruction on the unanimity requirement will be adequate." *Martin, supra* at 338.

> However, the trial court must give a specific unanimity instruction where the state offers evidence of alternative acts allegedly committed by the defendant and "1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." [*Id.*, quoting *Cooks, supra* at 524.]

In *Cooks*, *supra* at 513-515, the Supreme Court distinguished between multiple theory cases and multiple acts cases. The Supreme Court explained that "'when a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory.'" *Id.* at 515 n 16, quoting *People v Johnson*, 187 Mich App 621, 629-630; 468 NW2d 307 (1991).

Here, MCL 750.110a(2) affords alternative means of committing a single offense of first-degree home invasion. The prosecutor did not charge defendant with two separate and distinct home invasion offenses, but charged him with committing one offense under alternate theories. Therefore, a special unanimity instruction was not required. Even if the trial court erred by omitting a special unanimity instruction, any error was harmless. Because the jury unanimously found defendant guilty of the separately charged felon in possession of a firearm offense, it necessarily unanimously found him guilty of first-degree home invasion under the felon in possession theory for that offense.

B. Layperson Opinion Testimony

Defendant alleges that the trial court erred in denying his request for a jury instruction on lay witness opinion testimony. Although defendant appeared to have initially requested such an instruction, he later withdrew his request. Therefore, defendant waived review of this issue. *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003). Regardless, the trial court instructed the jury to consider all the evidence, including lay witness testimony, and determine the weight it should be given. The court's instruction sufficiently protected defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

VII. Felon in Possession of a Firearm

A. Two Supporting Convictions

Defendant additionally challenges the trial court's decision to allow evidence of two prior convictions as factual support for the felon in possession of a firearm charge. The prosecutor presented a certified record that defendant had convictions of the felony offense of possession of analogue drugs and felony breaking and entering. Defendant objected to the evidence on the ground that evidence of two prior convictions injected undue prejudice under MRE 403, but the trial court disagreed, reasoning that the jury could choose to disbelieve one of the prior convictions.

A trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice or needless presentation of cumulative evidence. MRE 403; *People v Osantowski*, 274 Mich App 593, 609; 736 NW2d 289 (2007), rev'd in part on other grounds 481 Mich 103; 748 NW2d 799 (2008). A danger of unfair prejudice exists when a jury might give marginally probative evidence undue weight. *Id.*

The prosecutor had to establish defendant's status as a convicted felon to prove the felon in possession of a firearm charge. Because defendant did not stipulate to the existence of a prior felony conviction, the prosecutor properly could present evidence of defendant's prior felony conviction. *People v Nimeth*, 236 Mich App 616, 627; 601 NW2d 393 (1999), citing *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997). However, the trial court

abused its discretion in allowing the prosecutor to present evidence of two prior felony convictions when only one conviction was necessary. The prosecutor presented certified evidence of defendant's prior conviction, and defendant did not present any evidence contesting the validity of the prior conviction, so no reasonable basis existed for the jury to disbelieve the validity of the conviction. The second conviction, even if technically relevant to the felon in possession charge, qualified as cumulative and unduly prejudicial.

Nevertheless, we conclude that the error was harmless beyond a reasonable doubt because the prosecutor introduced overwhelming, properly admitted evidence of defendant's guilt on all the charges against him. *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005). The principal issue at trial involved defendant's sanity, not his identity or his commission of the charged offenses. The erroneous admission of the additional prior conviction bore no relevance to the issue of defendant's sanity. Therefore, reversal is not required.

B. Predicate Felony to First-Degree Home Invasion

Defendant argues that the jury erroneously convicted him of first-degree home invasion under a theory that he broke into Mura's house and committed the felony offense of felon in possession of a firearm because the home invasion statute does not contemplate the use of that felony to establish first-degree home invasion. The construction of a statute presents a question of law subject to de novo review. *Gillis*, *supra* at 113. The primary task in construing a statute is to discern and give effect to the intent of the Legislature. The words of a statute comprise the most reliable evidence of that intent, and in construing a statute a court must consider both the plain meaning of the language and its placement and purpose in the statutory scheme. Statutory language must be read in its grammatical context unless it is clear that some other meaning was intended. If statutory language is clear and unambiguous, the Legislature is presumed to have intended its plain meaning and the statute must be enforced as written. *Id.* at 114-115.

The plain language of MCL 750.110a(2) provides that an unlawful entrant is guilty of first-degree home invasion when the entrant "commits *a* felony, larceny, or assault." (Emphasis added). This Court has explained that the Legislature's failure to distinguish between felony and misdemeanor assaults and larcenies means that any larceny or assault can establish the offense underlying first-degree home invasion. *People v Sands*, 261 Mich App 158, 163; 680 NW2d 500 (2004). The term "a" is an indefinite article. *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 148; 644 NW2d 715 (2002). Accordingly, under the plain language of MCL 750.110a(2), a defendant's commission of "a" felony properly may support a first-degree home invasion charge. The Legislature has classified felon in possession of a firearm as a felony. MCL 750.224f(3). Because felon in possession constitutes a felony, a defendant's commission of felon in possession of a firearm may support a conviction of first-degree home invasion.

C. Double Jeopardy

Defendant urges that the multiple punishments imposed for felon in possession of a firearm and first-degree home invasion with felon in possession of a firearm as the predicate felony violate double jeopardy principles. The first-degree home invasion statute expressly provides that the imposition of a penalty for home invasion does not preclude "the imposition of a penalty under any other applicable law." MCL 750.110a(9). The Legislature thus plainly intended that multiple punishments could apply for the first-degree home invasion conviction

and the predicate felony. *People v Conley*, 270 Mich App 301, 311-312; 715 NW2d 377 (2006). "Put otherwise, 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." *Id.* Accordingly, defendant's dual convictions of felon in possession of a firearm and first-degree home invasion with felon in possession of a firearm as the predicate felony do not violate the double jeopardy protection against multiple punishments for the same offense.

VIII. Motion for New Trial

This Court reviews for an abuse of discretion a trial court's decision on a motion for a new trial. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Defendant premised his motion for a new trial on the same issues previously addressed in this opinion. Because we have found no errors entitling defendant to a new trial, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

IX. Sentencing

A. Habitual Offender Status

Defendant complains that the trial court improperly sentenced him as a fourth habitual offender because two of his prior convictions arose from the same criminal transaction. A person previously convicted of three or more felonies is subject to an increased sentence if convicted of a subsequent felony. MCL 769.12.

Before committing the instant offenses, defendant was convicted of possession of analogue drugs, breaking and entering, and second-degree home invasion, all felonies. Our Supreme Court has held that multiple convictions obtained in the same judicial proceedings may count as separate convictions for purposes of the habitual offender statutes, even if they arose out of the same criminal transaction.

> Here, the relevant language states that "(i)f a person has been convicted of any combination of 2 or more felonies or attempts to commit felonies . . . and that person commits a subsequent felony within this state," the person shall be sentenced under the habitual offender laws. MCL 769.11(1). The text clearly contemplates the *number* of times a person has been "convicted" of "felonies or attempts to commit felonies." Nothing in the statutory text suggests that the felony convictions must have arisen from separate incidents. To the contrary, the statutory language defies the importation of a same-incident test because it states that *any combination* of convictions must be counted. [*People v Gardner*, 482 Mich 41, 50-51; 753 NW2d 78 (2008) (emphasis in original), overruling *People v Preuss*, 436 Mich 714, 717, 738; 461 NW2d 703 (1990), and *People v Stoudemire*, 429 Mich 262, 278; 414 NW2d 693 (1987).]

Consequently, the trial court did not err in sentencing defendant as a fourth habitual offender.

B. Jail Credit

Lastly, defendant contends that he is entitled to jail credit for time served awaiting trial for the instant offenses, despite that he was held on a parole detainer. Defendant acknowledges that this Court has repeatedly held that a parole detainee who is convicted of a new criminal offense cannot claim credit against his new sentences for time served in jail as a parole detainee. *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006); *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Nonetheless, defendant insists that a denial of credit in this situation violates a parolee's equal protection rights because the parolee has already served his minimum sentence and, accordingly, there is no prior sentence against which credit may apply. But defendant ignores that even though a parolee may have served the minimum portion of his prior sentence, he still remains "liable . . . to serve out the unexpired portion of his or her *maximum* imprisonment" if arrested for "violating the provisions of his or her parole." MCL 791.238(2) (emphasis added). Because defendant's jail credit applies toward the maximum term of his prior punishment, his argument lacks merit.

Affirmed.

/s/ Jane M. Markey
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher