STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2010
v	No. 288925 Saginaw Circuit Court
MARK ANTHONY WINTERS, Defendant-Appellant.	LC No. 07-029951-FC

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.111, attempted murder, MCL 750.91, four counts of kidnapping, MCL 750.349, two counts of felonious assault, MCL 750.82, and carrying a weapon with unlawful intent, MCL 750.226. Prior to the start of trial, defendant pled guilty to felony firearm, MCL 750.227, and felon in possession of a firearm, MCL 750.224. Defendant was sentenced as a habitual third offender, MCL 769.11, to 240 to 480 months for his first-degree home invasion, attempted murder, and kidnapping convictions, 48 to 96 months for his felonious assault convictions, 60 to 120 months for his carrying a weapon with an unlawful intent conviction, 24 months for his felony firearm conviction, and 60 to 120 months for his felon in possession of a firearm conviction. Defendant appeals as of right. We affirm.

I. EVIDENTIARY ISSUES

Defendant first argues that the trial court made several erroneous evidentiary rulings that deprived him of a fair trial. We disagree.

Admissibility of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). "When reviewing a trial court's decision to admit evidence, we do not assess the weight and value of the evidence, but only determine whether the evidence was the kind properly before the jury." *Cole v Eckstein*, 202 Mich App 111, 113-114; 507 NW2d 792 (1993).

Defendant argues that the trial court abused its discretion in admitting MRE 404(b) evidence without requiring the prosecutor to provide proper notice or demonstrate good cause why he could not do so prior to trial. Specifically, defendant argues that because testimony regarding previous incidences of alleged domestic violence between him and the complainant

was "other acts" evidence, the prosecutor was required to comply with MRE 404(b)'s notice requirements before the trial court could properly admit the evidence.[1] Although we conclude that the failure to give notice was plain error, see *People v Hawkins*, 245 Mich App 439, 453; 628 MW2d 105 (2001), we find the error harmless.

It does not appear that defendant would have posed a different defense had he had notice. See *id.* at 455-456. More generally, given the defense posed, we cannot find that the admission of the "other acts" evidence was outcome determinative. *People v Williams*, 483 Mich 226, 243; 769 NW2d 605 (2009). Defendant testified at trial that on the date of the incident, he was angry with the complainant, went to her house with a loaded gun that he "borrowed" from a friend without his knowledge, forced his way into her home, and once inside said many of the things the complainant and the other victims testified that he said. Defendant also testified that he fired a shot from the gun, albeit unintentionally. In addition, defendant's testimony regarding the events that transpired next was remarkably similar to that of the complainant and other victims. Indeed, defendant testified that he knew that the complainant and the other victims did what he wanted them to because they knew that he had a gun. Further, in his closing argument, defendant conceded that he was guilty of felony firearm, assault with a dangerous weapon, and unlawful imprisonment. Moreover, the trial court instructed the jury that it could only consider the "other acts" testimony presented to determine whether defendant had intended to commit murder and not for any other purpose. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). For these reasons, defendant is not entitled to relief based on this issue.

Defendant also argues that the trial court abused its discretion when it allowed the prosecutor to introduce several character rebuttal witnesses. Specifically, defendant argues that he did not open the door to his character on direct examination, so that the prosecutor could not properly introduce character rebuttal witnesses. We disagree.

Although typically relevant, the rules of evidence severely limit the circumstances in which character evidence may be admitted at trial. *People v VanderVliet*, 444 Mich 52, 62; 508 NW2d 114 (1993); MRE 405. MRE 404(a) prohibits the admission of character evidence to prove that the defendant, on a particular occasion, acted in conformity with that character. Nevertheless, MRE 404(a)(1) allows a defendant to introduce character evidence to show that it is less likely he committed an offense. Once a defendant introduces evidence of his or her character, MRE 404(a)(1) allows the prosecution to the do the same to rebut the defendant's character evidence. *People v Roper*, 286 Mich App 77, 93; 777 NW2d 483 (2009). Generally, when a defendant opens the door to his or her character, the prosecutor may only rebut the defendant's character for peacefulness through reputation and opinion evidence. MRE 405. However, where a defendant places his or her character for peacefulness in issue, a prosecutor

[1] Based on our review of the record, we conclude that the only issue is that of notice, since the "other acts" evidence was otherwise admissible. It was offered for the proper purpose of establishing intent to murder in light of the defense's claim that the defendant did not intend to fire the gun and that it discharged accidentally. We also conclude that it was more probative than prejudicial.

may inquire into specific instances of conduct, despite the limitations imposed by MRE 405, if the following circumstances exist:

> (1) the defendant places his or her character at issue through testimony on direct examination; (2) the prosecution cross-examines the defendant about specific instances of conduct tending to show that the defendant did not have the character trait he or she asserted on direct examination; (3) the defendant denies the specific instances raised by the prosecution in whole or in part during the cross-examination; and (4) the prosecution's rebuttal testimony is limited to contradicting the defendant's testimony on cross-examination. [*Roper*, 286 Mich App at 105, citing *People v Vasher*, 449 Mich 494, 504-506; 537 NW2d 168 (1995).]

Having carefully reviewed defendant's testimony, we find that he opened the door to his character on direct examination. Defendant testified that although he went to the complainant's home with a loaded gun and forced his way into her home, he had not done so with the intent to harm her or the other victims. Defendant also testified that he had never been physically abusive toward the complainant during any of the numerous fights that they had had throughout their relationship. Indeed, he testified that he was a laid back person and that he was the person who walks away. Based on this testimony, we find that defendant put his character for peacefulness at issue because he invited the jury to conclude that while he took a loaded gun to the complainant's home, he was not the kind of person who would use the gun to hurt people, especially the complainant and the other victims. On cross-examination, when questioned about specific instances of alleged aggressive conduct toward the complainant, defendant denied having committed those acts. Indeed, defendant testified that if the complainant had been injured during any of their arguments, it was the complainant who had harmed herself and then blamed defendant. Because of defendant's testimony on direct examination and his explicit denial of having committed any wrongdoing when questioned about specific instances of alleged aggression toward the complainant, we find that the trial court did not err when it allowed the prosecutor to call rebuttal witnesses to testify about specific instances denied by defendant on cross-examination. *Roper*, 286 Mich App at 105.

We similarly find that the trial court did not err when it allowed plaintiff to call the complainant's landlord and Saginaw County Sheriff Ricky Shaft as rebuttal witnesses. These witnesses were called to rebut defendant's testimony that he lived with the complainant at the time the instant offenses were committed. Whether defendant lived with the complainant was material to the first-degree home invasion charge. Accordingly, we find that the testimony was admissible. *People v Pesquera*, 244 Mich App 305, 314; 625 NW2d 407 (2001).

II. INSUFFICIENCY OF THE EVIDENCE

Defendant argues that, because the testimony reflected that he lived with the complainant, there was insufficient evidence to properly convict him of first-degree home invasion. We disagree.

We review de novo sufficiency of the evidence claims in the light most favorable to the prosecution to determine whether a rational trier of fact could find beyond a reasonable doubt that all essential elements of the prosecution's case were proven. *People v Aldrich*, 246 Mich

App 101, 122; 631 NW2d 67 (2001). This is a deferential standard requiring the reviewing court to draw all reasonable inferences and resolve credibility issues in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The first-degree home invasion statute, MCL 750.110a(2), provides, in relevant part as follows:

> 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:
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> * * *
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> (b) Another person is lawfully present in the dwelling.

"'Without permission' means 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).

At trial, defendant testified that when he forced his way into the complainant's home, he did so knowing that the complainant did not want him in the house. The testimony reflects that defendant did not have a key to the complainant's home, his name was not on the lease, and his personal papers did not list the complainant's address as his home address. Based on this record, a rational juror could find defendant guilty of first-degree home invasion. That the jury was presented with conflicting testimony does not change our finding. It is well-settled that it is the jury, not the courts, that determines the weight and credibility of the evidence presented. See e.g., *People v Stiller*, 242 Mich App 38, 42; 617 NW2d 697 (2000). Because the record allows for a finding that defendant did not have a legal right to possession in the complainant's home, we find that defendant's reliance upon our holdings in *People v Pohl*, 202 Mich App 203; 507 NW2d 819 (1993), and *People v Szpara*, 196 Mich App 270; 492 NW2d 804 (1992) is misplaced.

III. PROSECUTORIAL MISCONDUCT

Defendant argues that he was deprived of a fair trial when the prosecutor improperly informed the jury during his closing rebuttal argument that the district court had determined that defendant had been properly charged. We disagree.

We review defendant's unpreserved claim for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Prosecutorial misconduct issues are decided on a case-by-case basis. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's statements is determined from an evaluation

of the statements in light of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Defendant's argument focuses on the following statement:

> There appears to be some effort to try to suggest to you that somehow there is an over reaching on the part of the prosecution to try and take your focus off the evidence and place it on the institutional body that is set up by the law. There are prosecutors in every county that try and enforce the criminal laws. We can go back and talk about all those along the way. It's not as though police officers and prosecutors can willy-nilly come up with charges without being in a courtroom to come up with charges, first in the District Court, and now in the Circuit Court, making rulings on evidence and ultimately for the ultimate protection of each and every citizen, each and every one of you.

It is improper for a prosecutor to imply to the jury that another court had adjudicated the case and found that the defendant had committed the charged acts and that, because of the former adjudication, the charges were proper. See *People v Hudson*, 123 Mich App 624, 625; 333 NW2d 12 (1982); *People v Humphreys*, 24 Mich App 411, 418-419; 180 NW2d 328 (1970). Contrary to defendant's argument, when viewed in context, the prosecutor's statement was not improper. Rather, the prosecutor's statements tangentially referred to the criminal process in response to defendant's argument that the prosecutor and the police officers themselves decided the crimes to be charged and that they had overcharged defendant. Even if we were to hold otherwise, because we find that the prosecutor's statements were a fair response to the arguments defendant made in his closing argument, defendant would not be entitled to relief. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003).

IV. INSTRUCTIONAL ERROR

Defendant argues that he is entitled to reversal of his conviction because the trial court failed to give the Michigan Criminal Jury Instruction 3.9 on specific intent. Defendant waived this issue below when he stated that the trial court's instructions to the jury were appropriate and that there were no corrections that needed to be made. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). Even if defendant had not waived this issue, because the trial court gave the substantive instructions for the specific intent crimes charged, which referenced the requisite intent needed to find defendant guilty, it was unnecessary for the trial court to give a supplemental instruction on specific intent. *People v Maynor*, 470 Mich 289, 296-297; 683 NW2d 565 (2004).

Defendant also argues that he was deprived of a fair trial when the trial court did not give the CJI2d 3.9 instruction after the jury asked for clarification regarding specific intent. We disagree. First, there is no indication in the record that defendant requested that the trial court give this instruction. Even if defendant had made such a request, the Michigan Criminal Jury Instructions do not have the sanction of our Supreme Court and trial courts are not required to use them. *People v McFall*, 224 Mich App 403, 414; 569 NW2d 828 (1997). Second, defendant does not argue, nor do we find, that the substance of the trial court's response to the jury's question was nonresponsive or misleading. See *People v Katt*, 248 Mich App 282, 311; 639

NW2d 815 (2001). Even if we were to find that the trial court's response was somewhat imperfect, when viewed as a whole, the trial court's instructions to the jury fairly represented the issues to be presented and adequately protected defendant's rights. Thus, defendant is not entitled to relief. *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006). For this reason, we also find that defendant is not entitled to relief on his alternative ineffective assistance of counsel argument based on his trial counsel's failure to request the CJI2d 3.9 instruction.

V. SENTENCING

Defendant raises specific objections to the scoring of several offense variables. Specifically, defendant argues that the trial court erred when it scored points for offense variables (OV) 4, 6, 8 and 10.

We disagree with defendant's argument that the trial court erred when it assessed 10 points for OV 4 simply because the complainant had not testified that she suffered a serious psychological injury. The complainant testified that during the instant offenses she was fearful of defendant and honestly believed that he would kill her if she did not do what he said. The complainant's expression of fear when coupled with her testimony of repeated abuse by defendant was sufficient evidence upon which the trial court could assess 10 points for OV 4. *People v Davenport*, 286 Mich App 191, 200; ___NW2d___ (2009), citing *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004); MCL 777.34(1)(a).

We also disagree with defendant's argument that the trial court erred when it assessed 15 points for OV 10. We find that there was sufficient evidence upon which the trial court could find that defendant had engaged in pre-offense conduct by a preponderance of the evidence. Defendant testified that he knew that the complainant did not want him in her home and that on previous occasions she had sought the help of her neighbors to keep him from entering her home. Defendant also testified that he "borrowed" a loaded gun from a friend for the express purpose of making sure that he was not prevented from "talking" to the complainant. Based on this testimony, we find that the trial court properly assessed 15 points for OV 10. *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008).

We also find no error in the trial court's assessment of points under OV 6 and OV 8. Defendant argues that these points were improperly assessed because the sentencing offense should have been kidnapping. That is, defendant contends that, because his attempted murder and kidnapping convictions were both class A felonies, the rule of lenity required that the trial court sentence him based on his kidnapping conviction instead of his attempted murder conviction. We disagree.

Under the sentencing guidelines, the probation department must prepare a sentencing information report recommending the minimum sentencing range for the crime that has the highest crime class. MCL 771.14(e)(*ii*)-(*iii*); *People v Mack*, 265 Mich App 122, 128; 695 NW2d 342 (2005). Although the sentencing guidelines do not provide guidance as to which offense a trial court should use as the sentencing offense when a defendant has been convicted of multiple convictions that are of the highest offense class, we find unconvincing defendant's argument that the rule of lenity required the trial court to use his kidnapping conviction as the sentencing offense. Indeed, in *People v Gonzalez*, 197 Mich App 385; 496 NW2d 312 (1992), this Court addressed a similar argument. In that case, we upheld the trial court's decision to

sentence the defendant on the offense that carried a higher penalty when it chose to sentence the defendant to a term of years rather than the statutory maximum sentence. *Id*. at 401.[2] Defendant does not argue that the points for OV 6 and OV 8 were improperly scored for the attempted murder charge. Thus, because we conclude that the trial court properly used the attempted murder conviction as the sentencing offense, there is no scoring error.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio

[2] Defendant also raises a separation of powers argument pertaining to the trial court's decision to sentence him on his attempted murder conviction rather than his kidnapping convictions. We find this argument to be without merit.