STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2010
v	No. 291702 Cass Circuit Court
JAMES MICHAEL DAYSON, Defendant-Appellant.	LC No. 08-010125-FH

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree home invasion, MCL 750.110a(2), two counts of breaking and entering a building with intent to commit a larceny therein, MCL 750.110, breaking and entering a motor vehicle to steal property with a value of less than $200, MCL 750.356a(2)(a), unlawful driving away of an automobile (UDAA), MCL 750.413, attempted breaking and entering of a vehicle causing damage, MCL 750.356a(3), and two counts of assault and battery, MCL 750.81. Defendant was sentenced to 14 to 30 years' imprisonment on each of the first-degree home invasion convictions, 7 to 15 years' imprisonment on each of the building breaking and entering convictions, 93 days in jail on the conviction for breaking and entering a vehicle to steal property, 4 to 15 years' imprisonment on the UDAA conviction, 2 to 15 years' imprisonment on the conviction for attempted breaking and entering of a vehicle causing damage, and to 93 days in jail on each of the assault and battery convictions. The sentences are to run concurrently. Defendant appeals as of right. We affirm.

At approximately 1:30 a.m. on the morning of Sunday, April 13, 2008, defendant went to the home of the Winchester family on Dutch Settlement Road in rural Cassopolis, Michigan. Between 3:30 a.m. and 4:30 a.m. that same morning, he went to the nearby home of Terry Elrod and drove off with Elrod's truck. From there, defendant drove to the home of Michael Anders, and he removed several compact discs (CDs) from inside the glove box of Anders' Ford Explorer, leaving several of them inside and next to the vehicle. Defendant also pulled off the rear driver's side handle of a Pontiac Grand Prix owned by Anders' daughter, which was parked in Anders' driveway next to the Explorer, and he broke into Anders' garage, where defendant removed two rototillers and a gas can to the yard outside. At some point, defendant put a key in the ignition of a tractor inside the garage, which he left in the "on" position, killing the engine. From there, defendant went across the street onto property owned by Garret Metz, where he left approximately ten of Anders' CDs strewn about the yard. He also entered Metz's Ford Taurus and scattered throughout the vehicle numerous documents and paperwork. Defendant also tore

down the door to a nearby pole barn so that it hung by a single hinge, and he left documents scattered inside. Defendant additionally entered Metz's garage, attached to the lower level of his home, and then he entered the home itself. Next, defendant drove to the home of Steven Pease and Daniel Paulos. At approximately 6:30 a.m., he kicked open their front door and entered their living room. The startled Pease and Paulos ascended from the basement and encountered defendant, who growled at them and raised his arms in the air. Defendant then engaged in a physical fight with Paulos. During the altercation, Pease hit defendant approximately 12 times with a large piece of hardwood flooring, but defendant continued to assault Paulos. Eventually, the fight between Paulos and defendant carried into the basement, at which point Pease contacted the authorities and opened an exterior door. Defendant then ran up the stairs and out of the house. Road Patrol Sergeant Todd McMichael of the Cass County Sheriff's Department was dispatched to the home. He thereafter learned that an officer with the Dowagiac Police Department had detained defendant. Cass County Sheriff's Deputy Al Strukel later drove Pease and Paulos to the scene of defendant's detainment. Once there, both men identified defendant as the perpetrator. McMichael also reported to the scene and had defendant admitted to a hospital for treatment of his bloody head. He arrested defendant before his release at which point McMichael searched defendant and found a crack pipe in his pocket, along with a key to Anders' garage door.

On appeal, defendant first argues that evidence of the crack pipe should not have been admitted at trial because it was irrelevant, MRE 401, because he was never charged with possession, and because it was unfairly prejudicial, MRE 403. We generally review a trial court's decision to admit evidence for an abuse of discretion, but underlying or preliminary questions of law, such as whether an evidentiary rule or statute precludes admission, are reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion exists if the court's ruling falls outside a range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Because defendant failed to preserve this issue for appeal, we review for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763 (citation omitted). The third requirement necessitates a showing of prejudice, and even after all three requirements are satisfied, reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously compromised the fairness and integrity of the proceedings independent of whether the defendant was innocent. *Id.*

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The more the jurors know about the full transaction, the better equipped they are to perform their duties as jurors. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Thus, as our Supreme Court stated in *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978):

> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some

> antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. [Citations omitted.]

Put simply, "[n]ormally the facts and circumstances surrounding the commission of a crime are properly admissible as part of the res gestae." *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979). This holds true even when those circumstances involve other criminal acts. *Delgado*, 404 Mich at 83. When evidence touching on other bad or criminal acts is so blended or connected with the charged crimes that it explains the circumstances of the charged crimes, the evidence is admissible. *Id.* That said, MRE 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" All relevant evidence is inherently prejudicial to some extent, and it is only *unfairly* prejudicial evidence that may warrant preclusion. *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994). "'This unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock.'" *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995), quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984).

Here, while defendant was not charged with possession of drug paraphernalia, evidence of the crack pipe, when considered in conjunction with other evidence, supported an inference that his behavior on the morning of April 13, 2008, which was truly bizarre, was the result of being high on cocaine at the time. At trial, defendant denied being high, but he admitted to using the pipe to smoke crack in the past. However, he also denied having any memory of the morning in question and testified that although he might have committed the acts, he never possessed the requisite intent. In contrast, McMichael testified that defendant was under the influence of something at the time and exhibited symptoms of such intoxication when confronted.[1] The crack pipe tended to discredit defendant's version of events, or at least help explain why he could have lost his memory. In this way, the evidence supported an inference that defendant in fact committed the criminal acts, had the requisite intent with no valid intent defense available,[2] and

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[1] McMichael testified that defendant did not make any sense when talking, was slurring his words, was wobbling back and forth, and was generally talking about "weird things."

[2] We note that MCL 768.37 provides in part:

> (1) Except as provided in subsection (2) [not applicable here as seen below], it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.
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> (2) It is an affirmative defense to a specific intent crime, for which the defendant has the burden of proof by a preponderance of the evidence, that he or

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was legally responsible for his actions; it was relevant. MRE 401. The challenged evidence provided a possible explanation for defendant's odd and criminal behavior, thereby giving the jury the "complete story." Although the crack pipe was inherently prejudicial, *Pickens*, 446 Mich at 336, its probative value was not substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in allowing the crack pipe into evidence; plain error did not occur. Contrary to defendant's assertion, his right to a fair trial was not denied, nor did the prosecutor commit misconduct in eliciting evidence of the crack pipe.

Next, defendant argues two instances of prosecutorial misconduct. We review the unpreserved claims for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Claims of prosecutorial misconduct are reviewed on a case-by-case basis. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). We consider the prosecutor's comments in context relative to the pertinent portions of the record. *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Here, defendant first argues that the prosecutor impermissibly denigrated defendant's credibility during closing argument by using the prestige of his office to inject his personal opinion and vouch that defendant's version of events was unbelievable. However, the record indicates that nothing in the prosecutor's comments constituted improper vouching, nor suggested that he was using the prestige of his office to sway the jury's opinion. Although the prosecutor used a sarcastic analogy about selling a fictional bridge to question defendant's credibility, he did not "denigrate[]. . . defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). Rather, he argued the evidence and common sense inferences. *Id.* at 282. Defendant also contends that the prosecutor impermissibly denigrated defense counsel by stating in rebuttal closing argument that defense counsel intentionally misled the jury and that his arguments were a "smoke screen." We find that in the broader context of defendant's closing argument and the rest of the prosecutor's rebuttal closing argument, the comments were not inappropriate. *Rodriguez*, 251 Mich App at 30; *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999). The comments were directed to the arguments, not defense counsel. Moreover, although the term "smoke screen" arguably constituted "hard language," the prosecutor was not required to use the most polite or blandest terms to express his theory. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Defendant's heavy reliance on *People v Dalessandro*, 165 Mich App 569, 579; 419 NW2d 609 (1988), is misplaced because *Dalessandro* is easily distinguishable, where there the prosecutor's remarks were numerous and egregious, invoking such words as "sham," a "bunch of

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> she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired.

lies," "disreputable," "damnable lies," "demonstrative lies," "fabrications of evidence," a "boat load" of "red herrings," and "decei[t]." This Court has found that reversal is unwarranted under *Dalessandro* even where prosecutors have used the term "red herrings," given that the overall arguments did not generate the type of accusatory prejudice decried in *Dalessandro*. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007); *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). Furthermore, we conclude that any prejudice that might have resulted from the challenged prosecutorial comments was remedied by the trial court's numerous jury instructions regarding evidence, lawyers' comments, and witness credibility. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). Thus, defendant was not denied a fair trial. *Thomas*, 260 Mich App at 453.

Next, defendant argues that his trial counsel was ineffective for failing to object to the challenged prosecutorial comments and for failing to request cautionary instructions. "Because defendant did not request a *Ginther*[3] hearing, our review is limited to mistakes apparent on the record." *People v Randolph*, 242 Mich App 417, 422; 619 NW2d 168 (2000), rev'd in part on other grounds 466 Mich 532 (2002). Here, because the challenged prosecutorial comments were not improper, any objection by defense counsel would have been futile. Not lodging a futile objection does not fall below the objective standard for reasonableness. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Accordingly, ineffective assistance of counsel did not occur. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003). Moreover, the requisite prejudice has not been shown, assuming deficient performance. See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Next, we address several arguments raised by defendant in his standard 4 brief. First, he argues that the prosecutor improperly argued that he was high on cocaine on the morning of April 13, 2008, and that it caused him to commit the criminal acts. We again review this unpreserved claim for plain error affecting defendant's substantial rights to determine if defendant was denied a fair trial. *Thomas*, 260 Mich App at 453. However, as previously indicated, the record supported the inference of cocaine use. Thus, the prosecutor's comments were not improper, and defendant was not denied a fair trial.

Next, defendant argues that after receiving a discovery request from defense counsel, the prosecutor either withheld or destroyed exculpating video and audio recordings that would show that he did not match the description given by Pease and Paulos. However, nothing in the lower court record indicates that defense counsel made such a request, or that the prosecutor destroyed the evidence. In fact, nothing in the record supports that the evidence even existed. Thus, we cannot conclude that the prosecutor did anything improper or that defendant was denied a fair trial. Defendant presents accompanying arguments that the prosecution withheld or destroyed other material evidence; however, there is no record support for these claims.

Next, defendant argues that there was insufficient evidence to convict him of UDAA with respect to Elrod's pickup truck. On appeal for sufficiency of the evidence, we review all evidence in a light most favorable to the prosecution to determine whether a rational trier of fact

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

could have found that the prosecution proved all elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The trier of fact, not this Court, determines what inferences may be drawn from the evidence and the weight to be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Questions of credibility are also left for the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Conflicts in the evidence must be resolved in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

MCL 750.413 provides:

> Any person who shall, wilfully [sic] and without authority, take possession of and drive or take away, and any person who shall assist in or be a party to such taking possession, driving or taking away of any motor vehicle, belonging to another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years.

To be convicted of UDAA, the prosecutor does not have to prove a specific intent to permanently deprive the owner of his automobile. *People v Hendricks*, 446 Mich 435, 449; 521 NW2d 546 (1994) (citation omitted). Rather, the purpose of the statute is to deter the simple trespassory taking and use of a vehicle, i.e., joyriding. *Id.* "In light of this lower standard of intent, UDAA requires only that the unauthorized use of the vehicle be done 'wilfully' or 'wilfully and wantonly.'" *Id.* at 449 (further internal quotations omitted). Here, the facts indicate that before defendant took and drove away Elrod's pickup truck, he entered a truck owned by Elrod's neighbor. As Elrod left the keys to his truck on his dash, and his neighbor did not, the evidence supports the reasonable inference that defendant was deliberately searching for a vehicle he could easily take. Elrod testified that he did not give defendant permission to drive his truck. In light of these facts, we conclude that there was sufficient evidence to enable a reasonable jury to convict defendant of UDAA beyond a reasonable doubt.

Next, defendant argues that there was insufficient evidence to prove the requisite criminal intent for the following convictions: Count II, first-degree home invasion of Metz's home, MCL 750.110a(2); Count III, breaking and entering of Anders' garage with intent to commit a larceny therein, MCL 750.110; Count IV, breaking and entering of Metz's barn with intent to commit a larceny therein, MCL 750.110; Count V, breaking and entering of Anders' Ford Explorer to steal or unlawfully remove property therefrom with a value of less than $200, MCL 750.356a(2)(a); and Count VII, attempted breaking and entering of Anders' daughter's Pontiac Grand Prix to steal or unlawfully remove property resulting in damage to the vehicle, MCL 750.356a(3).

We first consider Counts II, III, and IV together because they all require the criminal intent to commit a larceny.[4] "Larceny" is defined as "the taking and carrying away of the

[4] The first-degree home invasion statute, MCL 750.110a(2), provides in pertinent part:

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property of another, done with felonious intent and without the owner's consent." *People v Malach*, 202 Mich App 266, 270; 507 NW2d 834 (1993). Larceny is a specific intent crime, *People v Ainsworth*, 197 Mich App 321, 324; 495 NW2d 177 (1992), which means that "an offender would have to subjectively desire or know that the prohibited result will occur," *People v Lerma*, 66 Mich App 566, 569; 239 NW2d 424 (1976). "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *Kanaan*, 278 Mich App at 622. "A factfinder can infer a defendant's intent from his words or from the act, means, or the manner employed to commit the offense." *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001).

Here, the facts indicate that defendant committed numerous illegal acts, including several break-ins, throughout the morning, starting with the theft of Elrod's pickup truck. From there, he drove to Anders' property, where he entered his garage and removed items to the yard. Defendant entered and attempted to start a tractor. He also took several CDs from Anders' Ford Explorer, scattered them around the vehicle, and then took some of them to Metz's home across the street. There, defendant entered Metz's Ford Taurus and accessed his personal documents and papers, scattering some throughout the vehicle and others inside a neighboring pole barn. He also tore down the door to the pole barn so that it hung by a single hinge. At some point, defendant gained access to Metz's garage and eventually entered his house, leaving a light on as he went. From there, defendant drove to Pease and Paulos' home, where he kicked in their front door, entered without permission, and was found looking into a closet at stereo equipment and an i-pod. He then assaulted the men and escaped on foot. Although it is difficult to categorize defendant's actions that morning, to put it simply, a reasonable inference could be drawn that he was on the prowl for places to break into and items to steal. Accordingly, viewing all the evidence in the light most favorable to the prosecution, we find that there was circumstantial evidence on the record to enable a reasonable trier of fact to conclude that defendant specifically intended to commit a larceny while inside Metz's home and pole barn and while inside Anders' garage.

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> A person who breaks and enters a dwelling with intent to commit a . . . larceny . . . in the dwelling [or] a person who enters a dwelling without permission with intent to commit a . . . larceny . . . in the dwelling. . . 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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> * * *
>
> (b) Another person is lawfully present in the dwelling.

The breaking and entering statute, MCL 750.110, provides in pertinent part:

> (1) A person who breaks and enters, with intent to commit a . . . larceny therein, a . . . barn . . . or other building [or] structure . . . is guilty of a felony punishable by imprisonment for not more than 10 years.

Similarly, we hold that these same facts support a finding of the requisite criminal intent for the breaking and entering of Anders' Ford Explorer and the attempted breaking and entering of Anders' daughter's Pontiac Grand Prix, both of which were in Anders' driveway that morning. Both crimes require proof that defendant intended to "unlawfully remove property" from inside the vehicles.[5] The facts clearly indicate that defendant intended to unlawfully remove property. In fact, he removed numerous CDs from the Ford Explorer around the same time he pulled the door handle off the Grand Prix. This alone satisfies MCL 750.356a(2). Considering that the Grand Prix was physically and temporally close to the Ford Explorer, and in light of the other facts showing defendant's criminal intent throughout the morning, we conclude that a reasonable trier of fact could have concluded beyond a reasonable doubt that defendant intended to unlawfully remove property from the Grand Prix as well as the Ford Explorer.

It is somewhat difficult to ascertain the full parameters of defendant's sufficiency arguments. That said, we find that there was sufficient evidence with respect to all of the elements pertaining to each of the offenses upon which defendant was convicted.

Finally, defendant argues that his trial counsel gave notice of his intent to assert an insanity defense, that trial testimony suggested that he was insane at the time of the crimes, and that therefore the prosecutor bore the burden of proving his sanity beyond a reasonable doubt. "The proper application of [the statute governing the defense of insanity] is a question of law subject to de novo review." *People v Carpenter*, 464 Mich 223, 230; 627 NW2d 276 (2001). Contrary to defendant's argument, the record indicates that defense counsel considered, but later abandoned, the defense of insanity. In fact, defense counsel went so far as to obtain a forensic examination, but the examiner's opinion did not support an insanity defense. The issue is waived on appeal. *People v Shahideh*, 482 Mich 1156, 1157; 758 NW2d 536 (2008) (issue was waived where "the defendant elected to abandon an insanity defense"). Moreover, we note that defendant incorrectly recites the burden of proof for the affirmative defense of insanity. Once asserted, the prosecutor does not bear the burden of proving sanity beyond a reasonable doubt. MCL 768.21a(3), as amended by 1994 PA 56, clearly indicates that "[t]he defendant has the

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[5] MCL 750.356a(2) provides:

> Except as provided in subsection (3), a person who enters or breaks into a motor vehicle . . . to steal or unlawfully remove property from it is guilty of a crime as follows:
>
> (a) If the value of the property is less than $200.00, the person is guilty of a misdemeanor . . . .

MCL 750.356a(3) provides:

> A person who violates subsection (2)(a) or (b) and who breaks, tears, cuts, or otherwise damages any part of the motor vehicle . . . is guilty of a felony . . . .

It is clear that the criminal intent element of MCL 750.356a(2)(a), is the relevant criminal intent for both convictions. Thus, the issue is whether defendant attempted to "unlawfully remove property."

burden of proving the defense of insanity by a preponderance of the evidence." See *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000); *People v Stephan*, 241 Mich App 482, 488-491; 616 NW2d 188 (2000).

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray