STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2013
v	No. 307485 Kent Circuit Court
DAVID ZEFFLIN SCHWARTZ, Defendant-Appellant.	LC No. 10-011256-FH

Before: GLEICHER, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his conviction of second-degree home invasion, MCL 750.110a(3). We affirm.

Defendant's conviction arose out of incidents that occurred in September 2010, while defendant was with Felix Iginoef. According to Iginoef's testimony, he and defendant needed money to purchase drugs and decided to break into the residence of a woman who occasionally employed Iginoef. Iginoef testified that he kicked in the front door while defendant waited across the street, and then they both entered the residence. They stole several items, including electronics, some prescription medication, a "weedwhacker," and jewelry. They took the jewelry to a pawn shop, but after they were unable to pawn the jewelry, they returned to the residence and broke in a second time. Some youths playing across the street saw defendant and Iginoef's actions. The youths telephoned 9-1-1 after witnessing defendant and Iginoef return to the residence the second time. The police responded and subsequently arrested defendant and Iginoef.

Defendant first argues that the trial court erred by declining to instruct the jury on third-degree home invasion as a lesser included offense of second-degree home invasion, and that this error entitles him to a new trial. We disagree. "This Court reviews de novo questions of law arising from jury instructions." *People v McMullan*, 284 Mich App 149, 152; 771 NW2d 810 (2009). However, "[a] preserved, nonconstitutional error is not a ground for reversal, unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Cornell*, 466 Mich 335, 363-64; 646 NW2d 127 (2002) (internal quotation marks and citation omitted), overruled in part on other grounds in *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003).

The statutory basis for lesser included offense instructions is found in MCL 768.32(1), which our Supreme Court interpreted as permitting "the trier of fact to find a defendant guilty of a lesser offense if the lesser offense is necessarily included in the greater offense." *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010). "A lesser offense is necessarily included in the greater offense when the elements necessary for the commission of the lesser offense are subsumed within the elements necessary for the commission of the greater offense." *Id.* However, our Supreme Court has noted that "it is not error to omit an instruction on such lesser offenses, where the evidence tends to prove only the greater." *Cornell,* 466 Mich at 355-356 (citation omitted). As such, "a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id.* at 357.

Our Supreme Court concluded in *Wilder* that, on the basis of the facts as charged, third-degree home invasion was a necessarily included lesser offense of first-degree home invasion. 485 Mich at 45. The Court explained that evaluation of degreed offenses like home invasion "requires examining the charged predicate crime to determine whether the alternative elements of the lesser crime committed are subsumed within the charged offense." *Id.* at 44. The Court continued:

> As long as the elements at issue are subsumed within the charged offense, the crime is a necessarily included lesser offense. Not all possible statutory alternative elements of the lesser offense need to be subsumed within the elements of the greater offense in order to conclude that the lesser offense is a necessarily included lesser offense. [*Id*. at 44-45.]

In this case, the prosecutor charged defendant with second-degree home invasion for breaking and entering the residence with the intent to commit larceny therein. The elements of second-degree home invasion, as charged in this case, were: (1) breaking and entering a dwelling, (2) with the intent to commit a larceny. MCL 750.110a(3). With regard to third-degree home invasion, the elements fit only under MCL 750.110a(4)(a): defendant (1) broke into and entered a dwelling (2) with intent to commit a misdemeanor.

The initial elements of the greater and lesser offenses are identical. The second elements differ in that under second-degree home invasion the intent has to be to commit a larceny, while under third-degree the intent only has to be to commit an unspecified misdemeanor. MCL 750.110a(3); MCL 750.110a(4)(a). In *Wilder*, 485 Mich at 46, the Court explained, "The second element of the lesser crime, [intended] commission of a misdemeanor while present in the dwelling, is subsumed within the second element of the greater crime charged, [intended] commission of a larceny while present in the dwelling, because every felony larceny necessarily includes within it a misdemeanor larceny." While *Wilder* compared first-degree home invasion with third-degree home invasion, the relevant language of the first-degree home invasion statute is the same as that of the second-degree home invasion statute. Therefore, under the facts charged in this case, third-degree home invasion under MCL 750.110a(4)(a) is a lesser included offense of second-degree home invasion, MCL 750.110a(3). See *Wilder*, 485 Mich at 46.

Nevertheless, defendant was not entitled to an instruction on third-degree home invasion unless "a rational view of the evidence would support it." *Cornell*, 466 Mich at 357. In *People v Sands*, 261 Mich App 158, 163; 680 NW2d 500 (2004), this Court reasoned that, "because felonies are specifically listed as underlying crimes for first-degree home invasion, it would be redundant to list assault and larceny separately if subsection 110a(2) was referring to only felony assaults and larcenies." Therefore, the language of MCL 750.110a(2), first-degree home invasion, permits a misdemeanor larceny or a misdemeanor assault to serve as the predicate offense. *Sands*, 261 Mich App at 163. Because the language, with regard to the predicate offenses, of first-degree and second-degree home invasion is identical, the holding in *Sands* also applies to second-degree home invasion, MCL 750.110a(3), permitting either misdemeanor or felony larceny to serve as the predicate offense.

Here, there is no evidence of record that defendant entered the residence to do anything other than commit a larceny. In fact, the trial court mentioned this when declining to instruct the jury on third-degree home invasion, stating, "[t]he crime that is alleged here is larceny, period. From the evidence, larceny is what occurred. There is no other evidence of the defendant's intent or that a misdemeanor other than larceny occurred." Because both felony and misdemeanor larceny may serve as the predicate offense underlying second-degree home invasion, *Sands*, 261 Mich App at 163, we conclude the evidence in this case did not support an instruction on third-degree home invasion. *Cornell*, 466 Mich at 364.

Next, defendant argues the prosecutor engaged in misconduct by allowing Iginoef to testify that his plea agreement did not require him to testify against defendant. Additionally, defendant argues that his trial counsel was ineffective for failing to cross-examine Iginoef about the requirements of his plea agreement. Defendant did not object to the alleged prosecutorial misconduct at trial; therefore, this issue is not preserved. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Because defendant "failed to preserve this issue at trial, our review is actually for plain error that affected his substantial rights." *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

"Under MCR 6.201(B)(5), a prosecutor has a duty to disclose the details of a witness's plea agreement, immunity agreement, or other agreement in exchange for testimony." *McMullan*, 284 Mich App at 157. Moreover, "Michigan courts have . . . recognized that the prosecutor may not knowingly use false testimony to obtain a conviction, and that a prosecutor has a duty to correct false evidence." *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Here, however, there is no evidence of record that Iginoef's testimony against defendant was, in fact, part of Iginoef's plea agreement. Therefore, defendant has not shown prosecutorial misconduct regarding the plea agreement.

Likewise, because there is no evidence of record that Iginoef testified against defendant as a condition of his plea agreement, defendant cannot demonstrate that his counsel was ineffective for declining to cross-examine Iginoef about the contents of the plea agreement. Defense counsel's decision was within the objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Next, defendant argues that the trial court abused its discretion when it denied the jury's request to view the crime scene during deliberations. Defense counsel and defendant voiced

support of the jury's request for a site visit on the record; therefore, this issue is preserved. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Whether to grant a jury view "is entrusted to the trial court's discretion, which requires us to review the issue for an abuse of that discretion." *People v Herndon*, 246 Mich App 371, 418; 633 NW2d 376 (2001).

Here, the trial court denied the jury's request for a site visit because the issue "did not come up within the context of the trial" and was not part of either party's theory of the crime. Furthermore, photographs of the scene were already in evidence and several witnesses, including a police officer and Iginoef, testified during the trial with regard to the layout of the property. On this record, we conclude that the trial court did not abuse its discretion in denying the jury's request. See *Herndon*, 246 Mich App at 418.

Finally, defendant argues that he was denied his right to a timely preliminary examination. We disagree. This issue is not preserved and we therefore review for plain error. MCR 6.110(B); *People v Carines*, 460 Mich 750, 763-764; 579 NW2d 130 (1999). MCL 766.7 states that "[a]n adjournment, continuance, or delay of a preliminary examination shall not be granted by a magistrate except for good cause shown." Here, the trial court adjourned because the victim was unavailable to testify without the aid of an interpreter. Defendant asserts that this was not good cause for adjournment, but cites no case law in support of this assertion. In the absence of contrary authority, we find no plain error in the trial court's adjournment of the preliminary hearing.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Christopher M. Murray