S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS FRANK BOTHEL,

Defendant-Appellant.

UNPUBLISHED
December 5, 2013

No. 310900
Macomb Circuit Court
LC No. 2011-002403-FH

Before: FORT HOOD, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions for first-degree home invasion under MCL 750.110a(2), and assault with intent to commit great bodily harm less than murder pursuant to MCL 750.84. Defendant was sentenced to 8 to 20 years for first-degree home invasion and 6 to 10 years for assault with intent to commit bodily harm less than murder. For the reasons stated below, we affirm.

I. NECESSARILY INCLUDED LESSER OFFENSES

Defendant argues that the trial court abused its discretion when it denied his request for instructions on necessarily included lesser offenses of the charged offenses. A trial court's determination regarding whether a jury instruction applies is reviewed for an abuse of discretion, and questions of law are reviewed de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Where an instructional error was made involving necessarily included lesser offenses, the harmless error analysis applies. *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002), overruled in part on other grounds *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003). The issue of the court's failure to instruct on a necessarily included lesser offense is a non-constitutional error, and to prevail on such a claim, it must be more probable than not that this failure undermined the reliability of the verdict. *Cornell*, 466 Mich at 363-364. Such a failure undermines the reliability of the verdict "when the evidence 'clearly' supports the lesser included instruction," and "it is only when there is substantial evidence to support the requested instruction that an appellate court should reverse the conviction." *Id.* at 365.

An offense constitutes a necessarily included lesser offense of a greater offense when the elements of the lesser offense "are subsumed within the elements of a greater offense." *People v Lockett*, 295 Mich App 165, 181; 814 NW2d 295 (2012). Such determinations should be made "with an eye toward how the crimes were actually charged." *Id.* at 182. Conversely, an offense

that is merely related to the charged offense—or of the same class or category, but contains "some elements not found in the greater offense"—constitutes a cognate offense. *Cornell*, 466 Mich at 355. "[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." *Cornell*, 466 Mich at 357 (emphasis added); see also *People v Reese*, 466 Mich 440, 447-448; 647 NW2d 498 (2002) (concluding that "[t]he element distinguishing unarmed robbery from the offense of armed robbery" was not in dispute, such that the trial court did not err in denying instruction on the lesser included offense of unarmed robbery). However, a trial court may not instruct the jury on cognate offenses. MCL 768.32(l); *Cornell*, 466 Mich at 355-358.

As such, the trial court was required to instruct on a requested lesser offense only if: (1) the requested lesser offense was necessarily included in the charged offense; and (2) the lesser offense was supported by the evidence. Defense counsel requested instruction for numerous lesser offenses, relating to the charges of first-degree home invasion under MCL 750.110a(2), and assault with intent to commit great bodily harm less than murder pursuant to MCL 750.84. We address each group of suggested instructions in turn.

A. SUGGESTED ALTERNATIVE INSTRUCTIONS FOR FIRST-DEGREE HOME INVASION

Here, defendant requested jury instructions for the following lesser offenses, with regard to the charged offense of first-degree home invasion under MCL 750.110a(2): (1) entry without breaking, MCL 750.111; and (2) entry without permission, MCL 750.115(1). We begin the *Cornell* analysis by determining whether these lesser offenses are necessarily included lesser offenses of the charged offense.

The elements of first-degree home invasion, the charged crime, are: (1) "break[ing] and enter[ing] a dwelling" or "enter[ing] a dwelling without permission[,]" (2) "intend[ing] when entering to commit a felony, larceny, or assault in the dwelling" or "at any time while entering, present in, or exiting the dwelling commits a felony, larceny, or assault[,]" and (3) "while . . . entering, present in, or exiting the dwelling," either "is armed with a dangerous weapon" or "another person is lawfully present in the dwelling." *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010). Defendant was specifically charged with "enter[ing] without permission a dwelling . . . , and while entering, present in, or exiting did commit an assault, and while entering, present in, or exiting the dwelling Michael Dzikowski, was lawfully present therein[.]" The elements of entry without permission are: "(1) [breaking and entering or] entering without breaking and (2) entering without the owner's permission." *People v Heft*, 229 Mich App 69, 74; 829 NW2d 266 (2012). The elements of entry without breaking are: "(1) entering a building or structure without breaking and (2) having the intent to commit a larceny therein when entering." *Id*. at 74.

Accordingly, entry without permission is a necessarily included lesser offense of first-degree home invasion—its elements are "subsumed within the elements of a greater offense."

Lockett, 295 Mich App at 181.[1] It is important to note that MCL 750.115(1) contains alternative elements—breaking and entering *or* entering without breaking. Similarly, first-degree home invasion alternatively requires either breaking and entering or entering without permission. Therefore, whether the situation involves breaking and entering, or entering without breaking, entry without permission is a necessarily included lesser offense of first-degree home invasion.

But for this instruction to be appropriate under *Cornell*, there must be substantial evidence to show that the lesser offense is actually what happened. Here, there was evidence presented at trial to prove the perpetrator (1) entered a dwelling without permission, (2) committed an assault inside, while (3) another person was lawfully within the dwelling.[2] Michael Dzikowski, the victim, testified that he did not give anyone permission to enter his home that night, that he was assaulted by defendant, and that he was in his home sleeping on his couch when defendant entered. Further, Starla Weissinger, a friend of defendant's and a witness for the prosecution, also testified that defendant asked her to be his alibi for Michael's assault. He told her that he: (1) watched Michael go to sleep; (2) went into Michael's house; (3) hit Michael on the head with a hammer; and (4) stated "that's what you get for sleeping with my wife."

Defendant did not present evidence to counter this evidence showing the elements of first-degree home invasion. Instead, he focused on showing mistaken identity. See *Reese*, 466 Mich at 447-448. Defendant thus failed to prove that there is substantial evidence supporting an instruction for entry without permission. Accordingly, the trial court did not abuse its discretion in refusing to instruct the jury on this offense.

Defendant's other suggested instruction—entry without breaking—is not a necessarily included lesser offense of first-degree home invasion. Because defendant's charge for first-degree home invasion specifically alleges that he entered without permission, as opposed to breaking and entering, the first element of first-degree home invasion in this case is entry without permission. It is possible to commit first-degree home invasion without first committing entry without breaking, because first-degree home invasion requires either breaking and entering or entry without permission, not entry without breaking. Therefore, entry without breaking is not a necessarily included lesser offense of first-degree home invasion.

In any event, defendant failed to demonstrate that the evidence supported an instruction on entry without breaking. "A breaking is any use of force, however slight, to access whatever the defendant is entering[,]" and "a breaking only exists if the defendant entered *without*

---

[1] We also note that our Supreme Court has explicitly stated that entry without permission is a necessarily included lesser offense of first-degree home invasion. *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002) ("[i]t is impossible to commit . . . first-degree home invasion without first committing a breaking and entering without permission").

[2] "When dealing with a crime that includes alternative elements, this Court must be careful to examine *only* the specific elements necessary to the defendant's charge in our case." *Heft*, 299 Mich App at 75 (emphasis in original).

permission . . . ." *Heft*, 299 Mich App at 76 (emphasis in original). Michael testified that he shut his door and did not give anyone permission to enter his home on the night at issue. Defendant presented no evidence to counter this testimony. As such, the evidence demonstrates that a breaking occurred and would not support an instruction for entry without breaking.

B. SUGGESTED ALTERNATIVE INSTRUCTIONS FOR ASSAULT WITH INTENT TO COMMIT GREAT BODILY HARM

Defendant also requests jury instructions for the following lesser offenses, with regard to the charged offense of assault with intent to commit great bodily harm less than murder under MCL 750.84: (1) simple assault, MCL 750.81(1); (2) felonious assault, MCL 750.82(1); and (3) aggravated assault, MCL 750.81a(1). Again, we begin the *Cornell* analysis by determining whether these lesser offenses are necessarily included lesser offenses of the charged offense.

"The elements of assault with intent to do great bodily harm less than murder are: '(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm *less than murder*.'" *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997) (emphasis in original). The elements of simple assault are: "'an attempt to commit a battery,'" or "'an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995), quoting *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). "'The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.'" *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007), aff 277 Mich App 1 (2007), quoting *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). The elements of aggravated assault are: (1) "the defendant tried to physically injure another person," (2) "the defendant intended to injure" that person "or intended to make [that person] reasonably fear an immediate battery," (an assault), and (3) "the assault caused a serious or aggravated injury." CJI2d 17.6. While the Michigan Criminal Jury Instruction does not include this as an element, MCL 750.81a(1) indicates that aggravated assaults must occur without a weapon.

Simple assault is a necessarily included lesser offense of assault with intent to do great bodily harm less than murder—its elements are subsumed by those of the greater crime. However, defendant presented no evidence to suggest that a simple assault occurred on the night in question. The people showed that Michael was sleeping when the attack occurred and that he received a two-centimeter injury that required medical treatment. Defendant did not rebut this evidence. Therefore, the record lacks substantial evidence to support a charge of simple assault.

Defendant's other suggested instructions—for felonious assault and aggravated assault—are not warranted. The elements of these offenses are not subsumed in the elements of assault with intent to do great bodily harm less than murder—meaning that these offenses are not necessarily included lesser offenses of the charged crime. One of the elements of felonious assault is that defendant committed an assault with a dangerous weapon. Assault with intent to do great bodily harm less than murder does not contain this element. In a similar vein, aggravated assault requires a serious or aggravated injury; assault with intent to do great bodily harm less than murder does not. Therefore, the trial court did not abuse its discretion in denying

defendant's request for a jury instruction regarding these offenses because these offenses do not constitute necessarily included lesser offenses.

Further, defendant again failed to present evidence to counter the people's evidence that he committed assault with intent to do great bodily harm less than murder. The elements distinguishing these suggested, lesser offenses from the charged crimes were not in dispute at trial. Therefore, the trial court did not err by denying defendant instructions on these offenses. *Reese*, 466 Mich at 447-448.

II. MOTION FOR MISTRIAL

Defendant argues that (1) the prosecutor made allegations that a ticket defendant presented at trial[3] was fraudulent, and (2) the trial court's apparent concurrence with and adoption of those accusations prejudiced defendant such that it should have granted his motion for mistrial. Neither of these arguments is convincing.

We review a trial court's denial of a motion for mistrial for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). "This Court finds such abuse of discretion where the denial of the motion deprives the defendant of a fair trial and results in a miscarriage of justice." *People v Green*, 131 Mich App 232, 236; 345 NW2d 676 (1983). Claims of prosecutorial misconduct are reviewed "de novo to determine whether the defendant was denied a fair and impartial trial[,]" and such claims are reviewed "on a case-by-case basis," with the prosecutor's remarks considered in context. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). "A trial court should only grant a mistrial when the prejudicial effect of the error cannot be removed in any other way." *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). Therefore, if there is no error and no prejudice, it is appropriate for the trial court to deny a defendant's motion for mistrial. "A prosecutor has the responsibility of a minister of justice, not simply that of an advocate." *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003).

Upon review of the record, contrary to defendant's claims, the trial court's conduct does not demonstrate that it lacked impartiality. Instead, the trial court, recognizing that the formatting of the ticket appeared to be improper because it lacked a signature from an officer, appropriately allowed the prosecutor to further investigate the matter. Further, the entire discussion of this ticket occurred outside the presence of the jury. Thus, had the prosecutor engaged in misconduct by accusing defendant of producing a forged document in court, defendant did not suffer prejudice as a result. Therefore, defendant is not entitled to reversal on his claim of prosecutorial misconduct, and the trial court did not abuse its discretion in denying his motion for a mistrial.

III. PROSECUTORIAL MISCONDUCT

---

[3] Defendant presented the ticket to counter the prosecutor's objection to a line of questioning of the prosecution's witness, Weissinger, which was intended to demonstrate Weissinger's bias against the defendant.

Defendant claims that the prosecutor's failure to disclose Michael's medical records and criminal records, which could have been used to impeach Michael, the key witness for the prosecution, constitutes prosecutorial misconduct. This argument lacks merit.

A defendant may "preserve a claim of prosecutorial misconduct for appellate review" by "timely and specifically object[ing] below, unless objection could not have cured the error." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Defendant did not object to the prosecutor's failure to provide him with Michael's medical and criminal records at trial. Therefore, this issue was not properly preserved for appellate review. To prevail on a claim of prosecutorial misconduct generally, a defendant must demonstrate that he or she was "denied a fair and impartial trial." *Brown*, 294 Mich App at 382. However, "[u]npreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights." *Id.*

A criminal defendant's due process rights require the prosecutor to disclose both impeachment and exculpatory "evidence that might lead a jury to entertain a reasonable doubt about a defendant's guilt." *People v Lester*, 232 Mich App 262, 280; 591 NW2d 267 (1998). A violation of these rights is known as a "*Brady*" violation in light of the United States Supreme Court's decision in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). *Id.* A prosecutor has a "duty to disclose any information that would *materially* affect the credibility of his witnesses." *Id.* at 281 (emphasis added). A defendant must prove all of the following to establish a *Brady* violation:

> (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Id.*]

This Court has explained that even if "the prosecution's case depends largely on the credibility of a particular witness[,]" failure to disclose such evidence will not result in automatic reversal; "[t]he court still must find the evidence material." *Id.* To prove that the evidence the prosecutor failed to produce was material, a defendant must demonstrate that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different[,]" and "[a] 'reasonable probability' is 'a probability sufficient to undermine confidence in the outcome.'" *Id*. at 282, quoting *United States v Bagley*, 473 US 667; 105 S Ct 3375; 87 L Ed 2d 481 (1985). Where the undisclosed impeachment evidence pertained to a witness who "supplied the only evidence linking the defendant to the crime or where the likely effect on the witness' credibility would have undermined a critical element of the prosecutor's case[,]" such impeachment evidence has been found to be material. *Id*. However, if the testimony of such a witness is corroborated by other witnesses' testimony or the witness has been impeached on other grounds, "a new trial is generally not required." *Id.*

Defendant argues that because Michael denied being under the influence of drugs or alcohol at the time of the incident, disclosure of his medical report would have allowed defense

counsel to impeach him.[4] The report would have demonstrated that he had consumed an excessive amount of alcohol and was under the influence of drugs, including cocaine, at the time of the incident. In addition, defendant asserts that this evidence would have demonstrated that Michael was cognitively impaired at the time of the incident, which would have affected his ability to see and experience the events that he testified about. Defendant also claims that had Michael's criminal record been produced, defense counsel could have used this evidence to impeach Michael, which would likely have resulted in defendant's acquittal because Michael was the sole eyewitness and there was no corroborating physical evidence.

Though defendant alleges that the prosecutor failed to produce Michael's entire hospital report in response to his discovery request, he fails to offer proof that the prosecutor had this report. Defendant also merely alleges "on information and belief" that Michael "had a history of impeachable offenses[,]" without offering any proof that this is true or that the prosecutor had this information.

If defendant's assertions are taken as fact—namely, that the prosecutor had Michael's full medical report and criminal record, that defendant could not have obtained this evidence with reasonable diligence, and that the prosecutor suppressed this evidence—defendant failed to show that "a reasonable probability exists that the outcome of the proceedings would have been different." *Lester*, 232 Mich App at 281. While it is true that Michael was the only eyewitness to the incident, Steven Dzikowski, Michael's brother, testified that defendant called him from Michael's phone the morning after the attack and asked if Steven was "doing the same thing"—presumably, sleeping with Nicole Williams, defendant's wife—and whether Steven wanted "the same thing to happen to [him,]"—presumably, being attacked. Further, Weissinger also testified that defendant asked her to be his alibi for Michael's assault and told her that he hit Michael in the head with a hammer and said, "that's what you get for sleeping with my wife." Even if the medical report and criminal record would have impeached Michael, other witnesses corroborated his account of the attack and his claim that defendant was the perpetrator. Accordingly, it is not reasonably probable that the outcome of trial would have been different had the prosecutor produced the documents.

Defendant further argues that the medical report would have demonstrated that Michael exaggerated what was only a minor two-centimeter cut. The medical report, supposedly, would thus indicate that the perpetrator lacked the intent to cause great bodily harm, an element the prosecutor had to prove. However, the jury saw pictures of Michael's injury at trial, and determined the severity of the injury. Therefore, disclosure of Michael's medical report would not likely have changed the jury's mind regarding the severity of the injury.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

[4] We note that defense counsel conducted a thorough cross-examination of Michael in which he elicited testimony that Michael had consumed alcohol on the night in question—meaning that Michael admitted to one of the substance-related issues supposedly contained in his medical record. Counsel also asked if Michael had taken drugs that evening, which he denied.

Defendant argues that defense counsel's failure to obtain, analyze, and disclose Michael's medical and criminal records constitutes ineffective assistance of counsel because, had counsel done so, it is reasonably probable that the result of trial would have been different. Again, this claim is unfounded.

It is also not preserved for review. To preserve an ineffective assistance of counsel claim for appellate review, a defendant must move for a new trial or a *Ginther*[5] hearing in the trial court. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). While defendant did move for a new trial, defendant did so on the basis of the prosecutor's alleged misconduct regarding the accusations of forgery, not because he was denied the effective assistance of counsel. Defendant also did not move for a *Ginther* hearing. Therefore, this issue was not properly preserved for appellate review.

"[T]his Court's review of unpreserved claims of ineffective assistance of counsel is limited to mistakes apparent on the record." *Brown*, 294 Mich App at 387. To prove that counsel's conduct constituted ineffective assistance of counsel, defendant must demonstrate that:

> (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. [*Id.* at 387, 388.]

To demonstrate that counsel's performance fell below an objective standard of reasonableness, defendant must overcome a strong presumption that counsel's conduct constituted sound trial strategy. *Id.* at 388.

Assuming that the medical and criminal records would have impeached Michael—and defense counsel obtained them and used them to do so—it is not reasonably probable that the outcome of the trial would have been different. Other witnesses corroborated Michael's account of the attack and his claim that defendant was the perpetrator. Therefore, defendant's inability to demonstrate prejudice precludes his ability to prevail on his ineffective assistance of counsel claim.

V. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence for the jury to find him guilty beyond a reasonable doubt. Specifically, he challenges the credibility of several of the prosecution's witnesses who identified him as the perpetrator. Again, these assertions have no merit.

Sufficiency of the evidence claims are reviewed de novo. *People v Kissner*, 292 Mich App 526, 533; 808 NW2d 522 (2011). In reviewing sufficiency of the evidence claims, this

---

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

Court views the evidence in the light most favorable to the prosecutor to determine "'whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.'" *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010), quoting *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). This Court does "not interfere with the jury's assessment of the weight and credibility of witnesses or the evidence . . .[,]" and the jury "determine[s] the weight to be accorded any inferences." *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013) (internal citations omitted). Direct evidence linking the defendant to the crime is not necessary, and, instead, circumstantial evidence along with the reasonable inferences drawn from such evidence may be sufficient to prove the elements of the offense. *Kissner*, 292 Mich App at 534. Additionally, the prosecutor is not required to disprove every reasonable theory of the defendant's innocence in order for the evidence to constitute sufficient evidence. *Id.* "Once having found that the jury could reasonably draw the inferences that it did, and that the evidence, considered with those inferences, was sufficient to establish defendant's guilt beyond a reasonable doubt, the review of the appellate court is complete." *Hardiman*, 466 Mich at 430-431. "[I]dentity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

The prosecutor correctly points out that defendant's arguments on appeal only challenge the credibility of witnesses whose testimony identified defendant as the perpetrator. Because there was ample testimony that identified defendant as the perpetrator, and because this Court leaves questions of witness credibility and the weight to give to a witness's testimony for the jury, viewing the evidence in the light most favorable to the prosecutor, defendant has failed to demonstrate that there was insufficient evidence such that a rational jury could not find defendant guilty of the charged offenses beyond a reasonable doubt. *Dunigan*, 299 Mich App at 582.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Stephen L. Borrello