STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 28, 2013
v	No. 310969 Ingham Circuit Court
SHERMAN LANCE WASHINGTON, Defendant-Appellant.	LC No. 11-000543-FH

Before: HOEKSTRA, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as a fourth-offense habitual offender to 240 months to life in prison. For the reasons stated in this opinion, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant's conviction arises from a home invasion that occurred on May 7, 2011, at approximately 1:15 a.m. The victim testified that she woke up when she heard someone in her home and discovered defendant in her daughter's bedroom going through a dresser drawer. Defendant was holding a bottle of vodka apparently taken from the victim's refrigerator and had a pair of sunglasses from the victim's car. Later the victim found keys that were also in her car near the dresser through which defendant was rummaging. When the victim approached defendant, he asked if "Chelsea" was there several times. The victim told defendant to leave her home and asked for her sunglasses back. Defendant gave her the sunglasses and left the house with the vodka. The victim called the police and reported the incident. She described defendant as wearing gray or dark pants and a cream or white hooded sweatshirt. She also stated that defendant was wearing a multi-colored backpack. The victim indicated that she noticed three or four bottles of beer were also missing from her refrigerator, and several months after the incident she found three bottles of the same type of beer in her backyard.

About 90 minutes after the home invasion was reported, Erika Stasi witnessed a man, later identified as defendant, attempting to open car doors. She watched defendant move from car to car until he found a vehicle that was unlocked; defendant entered the unlocked vehicle. Stasi, who was on her way home from work and lives in the same neighborhood as the victim, called 911. Stasi described the man trying to open car doors as wearing a white hooded sweatshirt.

The police officer who responded to the 911 dispatch found defendant walking down the middle of the street. Defendant did not comply with her verbal commands. Another officer responded to the dispatch and observed that defendant matched the description of the home invasion suspect. Defendant was eventually handcuffed and questioned. The officers testified that defendant was extremely intoxicated and indicated that his name was Sherwin or Sherman Williams and that he was born in 1986. The officers were unable to match the name defendant gave them with their records of every person in the state with a license or identification card. The officers asked defendant for his name again, and defendant provided incorrect information a second time. The officers eventually discovered paperwork in defendant's backpack bearing his actual name. The officers were able to match defendant's true name with their system that keeps a record of every person who has ever been a witness to a crime, been a victim, or been accused of a crime. Defendant's record contained a photograph of defendant and his birth date, which did not match the date defendant gave the officers. No alcohol or stolen property was recovered from defendant.

A jury trial was commenced on May 7, 2012. Defendant elected to represent himself, and standby counsel was appointed. On May 8, 2012, opening arguments were presented. During his opening argument, defendant stated that he was representing himself because he did not have "$5,000 to give to a lawyer." The prosecution objected, and stated that it believed defendant's comment was a basis for a mistrial but that a curative instruction would be satisfactory. The trial court admonished defendant, instructed standby counsel to go over defendant's opening argument and explain to defendant what was appropriate, and instructed the jury to disregard defendant's opening argument. After consulting with standby counsel, defendant was permitted to start his opening over. During his second opening statement, defendant stated that home invasion "can get a person up to 20 years in prison." The prosecution immediately objected and moved for a mistrial. Standby counsel stated that when he discussed defendant's opening argument with him, he specifically warned defendant not to mention the possible penalty and punishment for the charged crime. In regard to the prosecution's motion for a mistrial, standby counsel stated that he would "leave it to the discretion of the court." Defendant did not make any statement in regard to the motion for a mistrial.

The trial court granted the prosecution's motion for a mistrial. The trial court explained that defendant's statement about not being able to afford an attorney already invited the jury to sympathize with him, and that his statement about the penalty for the crime injected more sympathy into the proceedings. The trial court stated that it had no choice but to grant a mistrial because it already gave one curative instruction and defendant had demonstrated that he was either not willing or able to appropriately represent himself. In its explanation to the jury regarding the mistrial the trial court noted that jurors cannot "forget" the penalty for a crime once it has been revealed. Defendant's second trial began on May 14, 2012, and defendant was represented by the attorney who was originally appointed as standby counsel. Following the second jury trial, defendant was convicted of one count of first-degree home invasion. Defendant now appeals his conviction.

II. DOUBLE JEOPARDY

On appeal, defendant first argues that his retrial following the trial court's grant of a mistrial violated his constitutional right to be free from double jeopardy.

We review de novo a constitutional double jeopardy challenge because it presents a question of law. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002). "Necessarily intertwined with the constitutional issue . . . is the threshold issue whether the trial court properly declared a mistrial." *Id.* at 213. The grant or denial of a mistrial is within the sound discretion of the trial court. *People v Gonzales*, 193 Mich App 263, 265; 483 NW2d 458 (1992).

The Double Jeopardy Clause found in both the United States Constitution and the Michigan Constitution prohibits an accused from being placed in jeopardy twice for the same offense. Const 1963, art 1, § 15; US Const, Am V. "The Double Jeopardy Clause of the Fifth Amendment protects against two general governmental abuses: (1) multiple prosecutions for the same offense after an acquittal or conviction; and (2) multiple punishments for the same offense." *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001) (emphasis removed), citing *Ohio v Johnson*, 467 US 493, 497; 104 S Ct 2536, 81 L Ed 2d 425 (1984). However, retrial is permitted when a defendant requests or consents to a mistrial, or when a mistrial is required because of manifest necessity. *Lett*, 466 Mich at 215. Manifest necessity refers to "the existence of sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible." *People v Rutherford*, 208 Mich App 198, 202; 526 NW2d 620 (1994). "Determining whether manifest necessity exists to justify the declaration of a mistrial requires a balancing of competing concerns: the defendant's interest in completing his trial in a single proceeding before a particular tribunal versus the strength of the justification of a mistrial." *People v Hicks*, 447 Mich 819, 829; 528 NW2d 136 (1994).

In this case, the trial court granted a mistrial after defendant made two improper comments to the jury during opening argument. Both of defendant's statements were made to seek the jury's sympathy—first, he indicated that he had to represent himself because he could not afford a lawyer, and second, he indicated that he could face up to 20 years in prison if convicted. Despite the fact that the trial court was already concerned about juror sympathy resulting from defendant's self-representation because several potential jurors were dismissed after indicating that they had such sympathy, the trial court did not rush to grant a mistrial after defendant's first improper statement. After defendant indicated he could not afford an attorney, the trial court gave a curative instruction and gave defendant a chance to talk to standby counsel regarding the rest of his opening statement. However, after defendant again improperly sought the jury's sympathy by indicating that if convicted he could be imprisoned for 20 years, the trial court granted the prosecution's motion for a mistrial. The trial court noted that defendant was instructed not to make sympathy statements and standby counsel indicated that he specifically informed defendant that statements about the possible penalty were improper. The trial court concluded that a mistrial was necessary because there were too many sympathetic comments or representations to the jury for the trial to be fair.

We conclude that under these circumstances a mistrial was a manifest necessity; accordingly, defendant's retrial did not violate double jeopardy principles. There was manifest necessity because defendant's actions, despite the trial court's warnings and instructions, could be found to prevent a jury from reaching an impartial verdict because of the danger that the jury would be swayed by its sympathy for defendant. See *People v Echavarria*, 233 Mich App 356, 363; 592 NW2d 737 (1999); *Lett*, 466 Mich at 215. Moreover, the trial court's implicit finding that defendant would continue to disregard the rules and inject improper information into the trial was supported by defendant's repeated failure to abide by the trial court's and standby counsel's

warnings. Accordingly, there were compelling circumstances supporting the conclusion that a fair trial was not possible. *Rutherford*, 208 Mich App at 202.

Defendant specifically argues that the trial court erred by not considering a curative instruction before granting a mistrial. However, the trial court had already instructed the jury not to consider sympathetic remarks and did not believe that another instruction would be effective. Defendant's repeated failure to follow the trial court's and standby counsel's instructions supports the trial court's conclusion that defendant could not reasonably be expected to follow the rules throughout the remainder of the trial. Thus, contrary to defendant's argument, the trial court did use and consider other alternatives before declaring a mistrial.

III. PROPENSITY EVIDENCE

Defendant next argues that admission of testimony regarding his alleged attempted automobile larcenies after the alleged home invasion denied him a fair trial because the testimony was propensity evidence and was more prejudicial than probative. Defendant also argues that defense counsel was ineffective for failing to object to the testimony during trial.

Because no objection to the admission of the testimony was made during trial, we review defendant's claim of error for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763. Moreover, even when the defendant shows all three plain error requirements, this Court must still exercise its discretion in deciding whether to reverse the trial court. *Id*. "Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

No evidentiary hearing was held in regard to defendant's claims of ineffective assistance of counsel; accordingly, our review of defendant's claims is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

On appeal, the prosecution concedes that the disputed testimony constituted propensity evidence typically barred by MRE 404(b), but argues that it was admissible as res gestae evidence. Defendant argues that the evidence was inadmissible under MRE 404(b) and that it did not fall into the res gestae exception. Because no objection to the evidence was made during trial, no justification for the admission of the evidence was presented. Evidence of a defendant's other bad acts is inadmissible if relevant only for a propensity purpose; meaning, that "the proponent's only theory of relevance is that the other act shows defendant's inclination to wrongdoing in general to prove that the defendant committed the conduct in question." *People v*

VanderVliet, 444 Mich 52, 63; 508 NW2d 114 (1993). However, such evidence can be admitted if it is relevant for a permissible purpose, and in this case the two possible theories for admission of the evidence regarding defendant's conduct after the home invasion are that the evidence constituted res gestae evidence or that the evidence was admissible pursuant to MRE 404(b)(1).

At the outset, we reject the prosecution's argument that the evidence constituted res gestae evidence. "Res gestae are the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character." *People v Kayne*, 268 Mich 186, 191; 255 NW 758 (1934) (quotation marks and citation omitted). "[I]ncluded in the res gestae are facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect." *Id.* at 192. In this case, defendant's alleged attempts to open car doors and eventual entry into an unlocked vehicle did not grow out of defendant's alleged home invasion. The witnesses testified that defendant was trying to open car doors an hour and a half after the alleged home invasion in an area about a half-mile away from the victim's home. Defendant's later conduct was clearly not linked to the home invasion—it was not part of the same transaction and it did not "grow out of" the alleged earlier home invasion. It was disconnected in time and place, and it involved the attempted invasion of automobiles not homes. Further, there was no evidence that defendant actually stole any items from the vehicles. Accordingly, the testimony was not part of the res gestae of the charged home invasion.

The other possible theory on which the evidence could have been properly admitted is pursuant to MRE 404(b)(1), which permits evidence of other crimes, wrongs, or acts for specified purposes. MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

This Court has held that MRE 404(b)(1) is a rule of inclusion, and that as a result, other acts evidence should be admitted as long as the admission is not being offered solely to demonstrate criminal propensity. *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002). In *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000), the Court explained the approach to the admissibility of other acts evidence:

> First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403.

> Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. (Quotation and citation omitted).

While no theory of relevance was offered during trial in this case, it is plain from the evidence itself and the arguments below and on appeal that the evidence was offered to rebut defendant's position that he entered the victim's home to attend a party and did not possess any intent to steal. Thus, the evidence of defendant's subsequent actions regarding parked vehicles was offered to illustrate defendant's intent; specifically, that defendant was out that night committing crimes of opportunity and was not out to attend a party. Further, the prosecution never made a propensity argument during the trial. Thus, the first prong of the admissibility test is satisfied because the evidence was offered for the proper purpose of demonstrating intent and "system in doing an act." MRE 404(b)(1).

The second prong of the test for admissibility requires the evidence to be relevant under MRE 402, as enforced through MRE 104(b). *Sabin*, 463 Mich at 55-56. Whether evidence is relevant for the proffered proper purpose requires a finding that there is "a relationship between the evidence and a material fact at issue" that can be demonstrated "by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). Evidence is relevant if it is both material and probative. *Id.* at 388. "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in this case." *Id.* at 389. Evidence is material so long as it is offered to prove a proposition that is at issue in the case. *Id.* "[A]ll elements of criminal offense are 'in issue' when a defendant enters a plea of not guilty;" therefore, defendant's mental state, i.e. his intent, was at issue. *Id.*

Whether evidence is probative depends on "whether the proffered evidence tends 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." *Id.* at 389-390. Thus, in the context of MRE 404(b), the proffered evidence must "truly be probative of something *other* than the defendant's propensity to commit the crime." *Id.* at 390 (emphasis in original). In this case, the evidence is probative to show defendant's intentions on the night of the crime and that defendant likely did not act innocently; thus, it tends to show defendant did not enter the victim's home because he believed a party was going on.

The third factor for admissibility under MRE 404(b) is whether the proposed evidence carries a danger of unfair prejudice under Rule 403.[1] *Sabin*, 463 Mich at 55-56. While the fact that defendant was likely engaged in criminal activity is certainly prejudicial, all evidence introduced in a criminal trial is prejudicial to the defendant. *People v Fisher*, 449 Mich 441, 451-452; 537 NW2d 577 (1995). Evidence is unduly prejudicial, however, when it interjects considerations that are "extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy,

[1] MRE 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

anger, or shock." *Id.* at 452. Unfair prejudice also exists where "marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398.

In this case, the evidence regarding defendant's later conduct is extremely probative to demonstrate his intent to commit larcenies and not attend a party on the night of the alleged crime. The evidence did not interject considerations that were extraneous to the charged crime because it was not evidence likely to give rise to any bias, sympathy, anger or shock or be given undue or preemptive weight by the jury. Accordingly, had the evidence been challenged by defendant's attorney, it is likely that the trial court would have admitted it pursuant to MRE 404(b)(1) for the purpose of demonstrating defendant's intent, scheme, plan, or system in doing an act. Therefore, we conclude that defendant has failed to show plain error regarding the admission of the evidence because it would have been admissible pursuant to MRE 404(b)(1).

For the same reasons, we also reject defendant's ineffective assistance of counsel claim. Even assuming defense counsel's decision not to object to the testimony regarding defendant's actions after the alleged home invasion fell below an objective standard of reasonableness, defendant cannot demonstrate that he was prejudiced by defense counsel's performance because it is likely the evidence would have been admitted over any objection. *Frazier*, 478 Mich at 243.

IV. IMPROPER ADMISSION OF IRRELEVANT EVIDENCE

Next, defendant maintains that he was denied a fair trial because irrelevant and prejudicial evidence was presented to the jury. Specifically, defendant maintains that the photograph of beer bottles in the victim's yard admitted to the jury was irrelevant and more prejudicial than probative because there was nothing to connect the beer bottles to the alleged crime. Defendant also argues that the following evidence was more prejudicial than probative because it "implied a nefarious past": testimony from the police officers revealing the fact that his name was located in a database of perpetrators and victims, testimony that he gave a false name and birthday upon his arrest, testimony that his previous address was a homeless shelter, and a photograph of him in his jail cell and an intake photograph of him that were admitted to the jury.

Because no objection was made during trial to any of the evidence that defendant now argues should not have been admitted, we review defendant's claims of error for plain error affecting his substantial rights. *Carines*, 460 Mich at 752-753, 764.

First, we conclude that the evidence regarding the beer bottles was properly admitted. The evidence was relevant because the victim testified that three or four beer bottles were missing after defendant left. MRE 401. Defendant argues that the bottles were not connected to the offense because the victim did not find them in her backyard until a few months later, but the lapse in time affects only the credibility of the victim's testimony, not the relevance of the evidence. Moreover, it is the jury's responsibility to determine the weight of evidence and the credibility of testimony. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). Accordingly, defendant has not demonstrated plain error in regard to the admission of the testimony regarding the beer bottles or the photograph.

We also conclude that the testimony that defendant's name was in a police database was proper. This evidence was relevant because the officer was testifying about how she determined defendant's real name. In so doing, she described the database as containing names of witnesses, victims, and those accused of any crime. She never testified or indicated that defendant had previously been accused of crimes, and there is no reason to believe the jury assumed defendant had a "nefarious past" because he was included in such a list in light of the fact that the list also included individuals who were victims and witnesses of crimes. Accordingly, the evidence was relevant and not prejudicial. MRE 401; MRE 403. Thus, there was no plain error.

Similarly, the evidence that defendant used a false name and birthday when first questioned by police was properly admitted. This Court has held that a trial court may admit evidence that the defendant gave a false name to the police to show the defendant's consciousness of guilt. *People v Cutchall*, 200 Mich App 396, 399-401; 504 NW2d 666 (1993), overruled on other grounds, *People v Edgett*, 220 Mich App 686, 691-694; 560 NW2d 360 (1996). Accordingly, defendant has failed to demonstrate plain error.

Next, we agree with defendant that the fact that his last address was a homeless shelter was not relevant to any issue before the jury. However, the fleeting reference to this fact was revealed as part of the overall circumstances of defendant's arrest and the discovery of his true identity, and the jury is entitled to hear the complete story. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Moreover, even assuming the admission of this statement was plain error, defendant has offered no evidence to support the conclusion that the reference affected his substantial rights and we cannot conclude that the fleeting reference to the fact that defendant's last address was a homeless shelter affected the outcome of the trial. Accordingly, defendant is not entitled to reversal on that basis.

Finally, defendant asserts that the photographs of him at the police station and in his jail cell were highly prejudicial. However, defendant merely mentions the photographs in the fact section of his argument and does not address the photographs in his analysis. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). Accordingly, defendant has abandoned this issue by failing to rationalize the basis for his claim or support his claim with legal authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Defendant also argues that defense counsel was ineffective for failing to object to the admission of the allegedly irrelevant and prejudicial evidence previously discussed. We disagree. Defense counsel is not ineffective for failing to make a futile objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Moreover, to the extent that any of the evidence defendant objects to on appeal was improperly admitted, defendant has failed to demonstrate that but for the admission of the evidence, the result of the proceedings would have been different. *Frazier*, 478 Mich at 243. Accordingly, defendant cannot demonstrate that he was prejudiced by any failing of defense counsel. *Id.*

V. JURY INSTRUCTIONS

Defendant next argues that the trial court erred by not granting his requests for instructions on the lesser-included offenses of third-degree home invasion and entering without permission. We disagree.

"Questions of law, including questions of the applicability of jury instructions, are reviewed de novo." *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). However, a trial court's determination regarding whether the facts of a case support a requested jury instruction is reviewed for an abuse of discretion. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

With regard to instructing a jury, our Supreme Court has stated:

> A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction. However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction resulted in a miscarriage of justice. The defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative. [*People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002) (citations omitted).]

"A lesser included 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." *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010). It is not an error if a trial court fails to instruct a jury on a lesser-included offense if the evidence only proves the greater offense. *People v Cornell*, 466 Mich 335, 355-356; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003).

Defendant correctly asserts that third-degree home invasion is a necessarily included lesser offense of first-degree home invasion. *Wilder*, 485 Mich at 45-46. Therefore, instruction on third-degree home invasion was necessary "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.

Relevant to this case, there are only two differences between the elements of first-degree home invasion and third-degree home invasion. First-degree home invasion requires the jury to find that a person was lawfully present in the dwelling; whereas third-degree home invasion would not require such a finding. *Wilder*, 485 Mich at 43-44. The other difference is that first-degree home invasion requires intent to commit a felony, larceny or assault and third-degree home invasion requires only intent to commit a misdemeanor. *Id.* However, in *People v Sands*, 261 Mich App 158, 163; 600 NW2d 500 (2004), relying on the plain language of the third-degree and first-degree home invasion statutes, we concluded that first-degree home invasion

could be satisfied by either a felonious assault or a misdemeanor assault. Further, this Court's analysis makes clear that the same is true regarding a felonious larceny or a misdemeanor larceny. *Id.* Accordingly, when a dangerous weapon was used, or a person was lawfully present in the home, the proper instruction is first-degree home invasion if there is intent to commit a misdemeanor or felonious assault or larceny. *Id*.

Thus, when the defendant intended to commit a larceny or an assault, the only difference between first-degree home invasion and third-degree home invasion is whether a person was lawfully present in the dwelling or whether a dangerous weapon was used. *Id.* In this case, the only rational view of the evidence submitted during trial is that a person was lawfully present in the dwelling. Accordingly, on the basis of the facts of this case, an instruction on third-degree home invasion was not necessary because a rational view of the evidence would not support it. *Cornell*, 466 Mich at 357.[2]

Regarding the request for an instruction on entering without permission, the Supreme Court has held that breaking and entering without permission is a necessarily lesser-included offense of first-degree home invasion. *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002). The elements of breaking and entering without permission are (1) breaking and entering or entering (2) without permission. *Id.* "The two crimes are distinguished by the intent to commit a felony, larceny, or assault, once in the dwelling." *Id.* Thus, the greater offense of first-degree home invasion clearly requires the jury to find a disputed factual element. Accordingly, defendant was entitled to an instruction on breaking and entering if "a rational view of the evidence would support it." *Cornell*, 466 Mich at 357.

In this case, a rational view of the evidence would not support the conclusion that defendant lacked the intent to commit a larceny inside the dwelling. Defendant did not testify in this case; however, relying on the testimony of the victim, his defense was that he entered the home because he thought there was a party there. The victim testified that she was the only person home, the house was dark, and she discovered defendant in an upstairs bedroom rummaging through a dresser drawer. Defendant had a pair of her sunglasses taken from her car with him, and a bottle of vodka taken from her refrigerator. The victim acknowledged that defendant asked for "Chelsea," and that Chelsea is the name of one of her daughter's friends; however, her daughter was away at college. Thus, the only evidence that defendant was inside the victim's home to attend a party is the fact that he asked for "Chelsea." In light of the other evidence suggesting defendant's actual intent was to commit a larceny—that he entered a dark and quiet home, was upstairs rummaging through a drawer, and had already taken some of the victim's possessions—we conclude that a rational view of the evidence does not support the

[2] Because an instruction on third-degree home invasion was not required, we reject defendant's claim that defense counsel was ineffective for failing to request the instruction. See *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011) (holding defense counsel is not ineffective for failing to make a futile request). During trial, defense counsel informed the trial court that defendant wanted an instruction on third-degree home invasion for the record, but indicated that he would not request the instruction because the evidence did not support it.

lesser crime of entering without permission. Accordingly, the trial court did not abuse its discretion by declining to instruct the jury on breaking and entering without permission.

VI. CUMULATIVE EFFECT OF ERRORS

Defendant argues that even if none of the alleged errors are prejudicial enough to warrant reversal in isolation, the cumulative effect of those errors, and defense counsel's failure to raise appropriate objections to those errors, denied him a fair trial. We disagree.

We review a claim of cumulative error to determine whether the combination of errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal." *Id.* at 388. However, in order to reverse based on cumulative error, the errors "must be of consequence." *Id.* Thus, "[t]he effect of the errors must be seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

As previously discussed, defendant failed to demonstrate any plain error. Therefore, defendant's claim of cumulative error has no merit. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).

VII. SENTENCING ISSUES

Finally, defendant argues that the trial court erred by scoring offense variable (OV) 9 and OV 19 at ten points each. Because defendant did not object to the scoring at sentencing, our review is limited to determining whether there was plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

At the sentencing hearing, the prosecution noted that OV 17 was incorrectly scored and that OV 19 should be scored at ten points because defendant resisted police when he was arrested and provided the officers with a false name. Defense counsel stated that defendant "would stipulate to those changes to the guidelines" and specifically stated that defendant had no other challenges to the scoring of the sentencing guidelines

Defendant first argues that the trial court erred by scoring ten points for OV 9. We agree.

Ten points may be assessed for OV 9 if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." MCL 777.39(1)(c). If "[t]here were fewer than 2 victims who were placed in danger of physical injury or death, or fewer than 4 victims who were placed in danger of property loss," then OV 9 should be scored at zero points. MCL 777.39(1)(d). When scoring OV 9, the trial judge should "[c]ount each person who was placed in danger of physical injury or loss of life or property as a victim." MCL 777.39(2)(a). "OV 9 is scored only on the basis of the defendant's conduct during the sentencing offense." *People v Carrigan*, 297 Mich App 513, 515; 824 NW2d 283 (2012). The trial court should not "consider conduct after an offense has been completed. *Id*., citing *People v McGraw*, 484 Mich 120, 122; 771 NW2d 655 (2009).

In this case, the record demonstrates that the only person who was in danger of physical injury or property loss was the victim who was in the home at the time defendant entered. There was no evidence or claim that any other person was present at the time of the home invasion. Accordingly, OV 9 is properly scored at zero points. On appeal, the prosecution concedes that OV 9 was inappropriately scored and should have been assessed zero points. Nevertheless, defendant is not entitled to resentencing unless the scoring error altered the appropriate sentencing guidelines range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). When OV 9 is properly scored at zero, defendant's sentencing guidelines range is not altered. MCL 777.63. Accordingly, resentencing is not required. *Francisco*, 474 Mich at 89 n 8.

Defendant also argues that the trial court erred by scoring OV 19 at ten points. We disagree.

OV 19 considers interference with the administration of justice and is properly scored at ten points when "the offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49. In this case, defendant told the officers that his name was Sherwin Lee Williams and provided an incorrect date of birth. The officer could not find a match in the system, so she asked again; defendant again provided false information. Finally, the officers discovered a form in defendant's backpack bearing his true name. "Providing a false name to the police constitutes interference with the administration of justice, and OV 19 may be scored, when applicable, for this conduct." *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). Moreover, this post-offense conduct may be considered under OV 19. *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010). Accordingly, the trial court did not err by scoring OV 19 at ten points.

Defendant also argues that defense counsel was ineffective for failing to object to the scoring of OV 9 and OV 19. However, OV 19 was properly scored; accordingly, defense counsel was not ineffective for failing to object to the scoring of OV 19 because counsel is not required to make a futile objection. *Milstead*, 250 Mich App at 401. Moreover, while OV 9 was improperly scored, the scoring error did not affect defendant's sentencing guidelines range; accordingly, defense counsel's failure to object did not affect the outcome of the proceedings. Thus, defendant's ineffective assistance of counsel claim must fail. *Frazier*, 478 Mich at 243.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder