

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY CLAY MOORE,

Defendant-Appellant.

UNPUBLISHED
September 5, 1997

No. 191992
Oakland Circuit Court
LC No. 95-139470

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), two counts of felonious assault, MCL 750.82; MSA 28.277, four counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2), and malicious destruction of property over \$100, MCL 750.377a; MSA 28.609(1). He was sentenced to concurrent sentences of four to twenty years' imprisonment for the home invasion conviction, two to four years' imprisonment for the felonious assault convictions, and two to four years' imprisonment for the malicious destruction of property conviction, to be served consecutively to two years' imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence presented to prove that he was guilty of first-degree home invasion because at the time he broke the door and entered the home of Matt and Linda Couture, he did not intend to feloniously assault Linda Couture. Defendant claims that he only intended to take his children and his car keys. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996).

MCL 750.110a(2); MSA 28.505(a)(2) provides:

A person who breaks and enters a dwelling with intent to commit a felony or a larceny in the dwelling or a person who enters a dwelling without permission with intent to commit a felony or 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:

- (a) The person is armed with a dangerous weapon.
- (b) Another person is lawfully present in the dwelling.¹

It must be shown that defendant had intent to commit a felony at the time of the breaking and entering. *People v Uhl*, 169 Mich App 217, 221; 425 NW2d 519 (1988).² Intent to commit a felony cannot be presumed solely from proof of the breaking and entering. *Id.* at 220. However, intent may reasonably be inferred from the nature, time, and place of defendant's acts before and during the breaking and entering. *Id.* Moreover, the prosecution must charge and prove some particular felony or felonious intent. *People v Ferguson*, 208 Mich App 508, 511; 528 NW2d 825 (1995). The prosecution cannot merely assert a breaking and entering with an intent to commit some unspecified felony; rather, the particular felony the accused intended to commit must be specified. *Id.*

In this case, the prosecution asserted that defendant intended to commit felonious assault when he entered the Coutures' home. 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 a reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). While defendant claims that his only intent was to take his children and his truck, defendant's children were outside when he arrived, but he did not talk to them nor summon them to go with him. Instead, defendant went to one of the doors of the Coutures' home, kicked it, and demanded to enter the house. Linda Couture told defendant that she would not let him in with the shotgun. Defendant threatened to kill Linda and, thereafter, proceeded to fire four shots through the door, knowing that Linda was in the room where he was shooting. The third shot hit and injured Linda Couture. Eventually, defendant entered the house by breaking through a sliding glass door with the butt of his gun.

The evidence also showed that just before defendant shot into the door, Dale Couture attempted to reason with defendant, but defendant responded by pointing the gun at Couture and "screaming" at him to leave. Based on the evidence, the jury could reasonably infer from defendant's acts that before and at the time of breaking into the house, defendant intended to commit felonious assault. *Uhl, supra*. Accordingly, viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence from which a rational trier of fact could determine beyond a reasonable doubt that defendant was guilty of first-degree home invasion. *Medlyn, supra*.

Defendant also argues that the trial court improperly denied his request to instruct the jury that, to find him guilty of home invasion, it had to determine that he specifically intended to feloniously assault Linda Couture at the time of breaking and entering. However, defendant does not point to any authority that indicates that he must have intended to feloniously assault a specific person in order to be found guilty of first-degree home invasion. As noted above, the prosecution must merely charge and prove some particular felony or felonious intent. *Ferguson, supra*. The prosecution did so by claiming that defendant's intended felony at the time of the breaking and entering was felonious assault. Therefore,

the trial court was not required to instruct the jury that defendant must have specifically intended to feloniously assault Linda Couture.

Defendant also contends that the trial court improperly instructed the jury that it could consider any and all evidence prior to defendant's breaking and entering in determining his intent. We disagree. Because intent may reasonably be inferred from the nature, time, and place of defendant's acts before and during the breaking and entering, *Uhl, supra*, the trial court's response to the jury that it could consider any and all evidence prior to defendant's breaking the door was proper. Accordingly, the trial court's jury instructions were proper and do not require reversal.

Defendant next argues that the admission of a photograph depicting his appearance at the time of his arrest was irrelevant and substantially more prejudicial than probative. A trial court's decision to admit evidence will not be reversed absent an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The standard for reviewing an abuse of discretion is narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id.*

We conclude that the trial court did not abuse its discretion in admitting the photograph depicting defendant's appearance at the time of his arrest. The picture was relevant because it showed marks and minor bleeding on defendant's face, thereby indicating that a struggle occurred between defendant and Matt and Linda Couture. The picture negated defendant's assertion at trial that he voluntarily relinquished the gun once he was inside the Coutures' home. Because defendant claimed that he did not intend to commit a felonious assault at the time he entered the home, the picture depicting marks on defendant's face had the tendency to show that he intended to feloniously assault the occupants of the house. If defendant had no such intent, then he would have been less likely to engage in a struggle and confrontation with Linda and Matt Couture. The photograph was also not substantially more prejudicial than probative. MRE 403. The photograph merely displayed marks on defendant's face and was not a depiction of damage that defendant had done. There is no indication that this was a situation presenting a danger that marginally probative evidence would be given undue or preemptive weight by the jury, and where it would have been inequitable to allow the proponent of the evidence to use it. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), modified and remanded 450 Mich 1212, 539 NW2d 504 (1995).

Defendant further contends that the trial court abused its discretion in admitting photographs of Linda Couture's injuries. We disagree. Linda Couture's credibility regarding her testimony that defendant threatened her, shot at her, and struggled with her, was directly relevant to the elements of felonious assault and first-degree home invasion. The photographs were relevant to show that Linda testified truthfully with regard to the injuries she sustained from defendant. *Id.* at 72. The fact that she testified truthfully to her injuries had the tendency to show that her other testimony was also truthful. Furthermore, the photographs were not substantially more prejudicial than probative because there was no indication that they were given undue or preemptive weight by the jury, or that it was inequitable to allow the prosecution to use the evidence. *Id.* at 75-76.

Defendant further claims that the testimony of Matt Couture, in which he opined that defendant shot Linda intentionally and that defendant's wife stayed at his home because she did not feel safe returning to her own home, was irrelevant and substantially more prejudicial than probative. However, because defendant did not object to the admission of Matt's testimony on the grounds that it was irrelevant and prejudicial, reversal is not required unless there was plain error that affected defendant's substantial rights. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994). We do not conclude that Matt's testimony was improper, more prejudicial than probative, or that it was decisive of the outcome of the proceedings. Matt's testimony was relevant to show that defendant had the intent to feloniously assault Linda at the time he broke into her home. Thus, the trial court did not abuse its discretion in admitting the testimony of Matt Couture, and reversal is not required.

Finally, defendant argues that his cumulative minimum term of six years in prison is disproportionate. The sentences imposed upon criminal defendants are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* We have reviewed the circumstances surrounding this offense and offender and conclude that defendant's four-year minimum sentence for home invasion was proportionate.

Defendant committed a serious offense and jeopardized the lives of many people. Although defendant claimed that his sole purpose in going to the Coutures' home was to retrieve his truck and children, his children and his truck were outside when he arrived, but defendant insisted on entering the house against the occupants' desires by using force. Defendant fired four shots into the Coutures' home, despite knowing that people were in the house. One of the shots hit and injured Linda Couture.

In addition, the trial court also sentenced defendant to a consecutive two-year mandatory prison term for the felony-firearm convictions. However, in determining the proportionality of an individual sentence, the cumulative effect of consecutive sentences need not be considered. *People v Clark*, 207 Mich App 500, 502; 526 NW2d 357 (1994). Accordingly, the trial court did not abuse its discretion in sentencing defendant.

We affirm.

/s/ Richard A. Bandstra

/s/ Richard Allen Griffin

/s/ E. Thomas Fitzgerald

¹ This statutory provision became effective in 1994. 1994 PA 270. Prior to its enactment, the offense of home invasion was part of the breaking and entering statute. See MCL 750.110; MSA 28.305 before and after the 1994 amendment.

² *Uhl, supra*, involves breaking and entering with the intent to commit larceny. We believe that the analysis of the requisite intent for the offense of home invasion with the intent to commit a felony is the same as that for breaking and entering with intent to commit a larceny.