

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY RUSSELL MARSHALL,

Defendant-Appellant.

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UNPUBLISHED

October 19, 2006

No. 262996

Oakland Circuit Court

LC No. 2005-200850-FH

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree home invasion, MCL 750.110a(3), and possession of a stolen motor vehicle, MCL 750.535(7). He was sentenced as a fourth-felony habitual offender, MCL 769.12, to concurrent prison terms of 10 to 20 years for the home invasion conviction and 5 to 20 years for the possession of a stolen vehicle conviction, and was ordered to pay restitution in the amount of \$74,050. He appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to support his convictions, and that the trial court therefore erred in denying his motion for a directed verdict of acquittal. We disagree. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

Defendant was convicted of violating MCL 750.110a(3), which states:

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.

Defendant was also convicted of violating MCL 750.535(7), which states, in relevant part, “A person shall not buy, receive, possess, conceal, or aid in the concealment of a stolen motor vehicle knowing that the motor vehicle is stolen, embezzled, or converted.”

Viewed in a light most favorable to the prosecution, the evidence indicated that the victims traveled to Florida for the winter and locked their house before they left. While they were still in Florida, a neighbor observed a person, whom he identified as defendant, entering the victims’ home and leaving in a truck full of furniture. The truck’s license plate was covered, and defendant and the driver pulled their hoods over their heads when they saw the neighbor looking at them. The police found signs of forced entry into the home, and the home was ransacked and most of the belongings were missing.

Defendant was also observed by two neighbors in possession of a black Bonneville. Defendant poured a gas and oil mixture, intended for a lawnmower, into the Bonneville’s gas tank. The victims’ black Bonneville car was later found abandoned near the area where defendant was seen with the car. The car would not run properly because “bad gas” had been poured into the gas tank. This evidence, together with the reasonable inferences arising from it, *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991), was sufficient to enable the jury to find beyond a reasonable doubt that defendant intentionally entered the victims’ home without permission, stole the victims’ furniture and belongings, and later possessed the victims’ stolen motor vehicle. The credibility disputes and factual questions raised by defendant were for the jury to resolve and may not be resolved anew by this Court. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Therefore, the trial court did not err in denying defendant’s motion for a directed verdict.

Defendant next argues that his right to due process was violated because the police failed to videotape or record his police interview, but defendant’s police statement was never introduced at trial so there is no merit to this issue.

Defendant also argues that the trial court deprived him of due process by determining the amount of restitution without conducting an evidentiary hearing. We disagree. At trial, one of the victims testified that several hundred items were stolen from the house, including televisions, VCRs, stereo equipment, clothing, furniture, a lawn mower, a barbeque grill, tools, silverware, and pots and pans. The front door was broken into and the home was ransacked. The victims’ Bonneville automobile was also stolen. Although the car was recovered, it was damaged and in poor condition. The presentence report identified the amount of restitution as \$74,050. At sentencing, defendant stated that there were “no factual corrections to the presentence report” and did not contest the amount of restitution. Because defendant was afforded an opportunity to challenge the restitution amount at sentencing, his right to due process was not violated. Additionally, because defendant did not challenge the restitution amount identified in the presentence report, the information is presumed accurate, and there was no need for an evidentiary hearing. MCL 780.767; *People v Gahan*, 456 Mich 264, 276-277 n 17; 571 NW2d 503 (1997).

Defendant also raises several issues in a supplemental brief, filed in propria persona. We find no merit to these issues. Defendant first argues that the trial court erred by permitting the

prosecutor to impeach Kim Mills with Bonnie Mills's prior statement without calling Bonnie to testify. We disagree.

The record does not support defendant's claim that Kim Mills was impeached with Bonnie Mills's statement. The record discloses that Kim Mills was unable to write, so Bonnie Mills wrote down Kim's statements to the police word for word, and Kim thereafter signed the statement. Therefore, the statements were Kim's own statements and could be used to impeach Kim's testimony at trial without calling Bonnie to testify or showing that Bonnie was unavailable. Further, because Kim Mills testified at trial, was available for cross-examination concerning the prior statements, and the prior statement was used for impeachment, not its truth, defendant's constitutional right of confrontation was not violated. See *Crawford v Washington*, 541 US 36, 59 n 9; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant also argues that the trial court erroneously admitted Kim's prior statements as substantive evidence under MRE 801(d)(1)(A). We disagree. At defendant's request, the court instructed the jury that Mills' prior statements could only be used to evaluate her credibility, so this issue lacks merit. Furthermore, the trial court did not inconsistently sustain a prosecutor's objection in a similar situation. Defense counsel first confirmed from one of the neighbor witnesses that he had recognized defendant from the neighborhood. Defense counsel then asked the neighbor if he would be surprised to hear that a police officer had testified that, during a police interview, he stated that he did not recognize defendant. The question was not objectionable as a prior inconsistent statement, but as an improper comment on earlier testimony. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

We also disagree with defendant's argument that the prosecutor improperly used Mills's prior statements as substantive evidence in his closing argument. The prosecutor argued:

There was only one witness who lied to you in this case, and that was the only witness that really had a bias or a reason to lie. That's Kim Mills. Kim Mills came in here and completely fabricated her testimony, because she didn't want to get her boyfriend in trouble. The story she told you today was the polar opposite of what she told Detective Martin and her mother that day in the house.

I think you can safely disregard just about everything she said with the exception of she gave you her correct address and she told you the defendant is her boyfriend. I think we can agree that much is true. The rest, all lies.

This argument is clearly directed at Mills' credibility, so it was permissible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Defendant next argues that defense counsel was ineffective by failing to appropriately respond to juror misconduct or object to the trial court's handling of this situation. We disagree. Because defendant did not raise the issue in the trial court or seek a *Ginther*<sup>1</sup> hearing, we limit

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

our review of defendant's claims to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. [*Id.* at 140, citations omitted.]

At the outset, we note that defendant's claim that two jurors deliberately concealed information during voir dire is not supported by the record. At most, the record discloses that there was a misunderstanding with regard to when the jurors were expected to raise concerns involving a potential scheduling conflict. Because of the misunderstanding, the jurors did not disclose until after they were sworn in that they had exams scheduled for the following day. Defendant has failed to show that there was any deliberate concealment of information.

The parties later stipulated that juror number one should be excused for cause because she stated that she did not care about the verdict and was willing to compromise for the sake of expediency. Defendant now argues that defense counsel should have instead moved for a mistrial, asked the court to also excuse juror number eight as well, or should have asked the court to question the remaining jurors. However, counsel's choice of response was a matter of trial strategy. *Id.* Although defendant argues that juror number eight may have been willing to compromise his beliefs for the sake of expediency like juror number one, this claim is based only on speculation and lacks any support in the record.

Defendant also complains that defense counsel should have requested a mistrial on the basis of juror number one's comments. To obtain a mistrial, counsel would have had to demonstrate "an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial . . . ." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted). While juror number one's comments amounted to misconduct and were a violation of the court's order not to discuss the case, she was in fact excused. Therefore, her removal from the jury reinforced the court's instructions to evaluate the case carefully and fairly, and the record does not demonstrate that the improper comments had any effect on the verdict. Because the record does not disclose that grounds for a mistrial existed, defense counsel was not ineffective for failing to make a futile motion for mistrial. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

The record also fails to support defendant's claim that the trial court coerced a verdict by insisting that the trial be conducted in one day. The record discloses that the parties themselves expected the trial to be completed in one day, and the trial court reinforced that it would not tolerate unnecessary delays. Unlike *People v Malone*, 180 Mich App 347, 350-353; 447 NW2d 157 (1989), which involved confusing and potentially coercive comments made during deliberations, the court's comments here were made well before closing arguments and jury instructions and before juror number one was excused. The court did not threaten to discharge the jury if it did not reach a verdict quickly, or imply that jurors would fail in their duty if they

did not quickly agree upon a verdict. *Id.* In fact, some of the comments challenged by defendant were made outside the jury's presence and, therefore, could not have had any effect on its verdict. While deliberations were short, this was not a complicated case or one with many factual disputes. Because the record does not support defendant's claim that the trial court's comments were coercive, defense counsel was not ineffective for failing to move for a mistrial on this basis.

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood