

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM ROBERT FRALEY,

Defendant-Appellant.

UNPUBLISHED

December 21, 2006

No. 262077

Livingston Circuit Court

LC No. 04-014546-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER PATRICK SNOW,

Defendant-Appellant.

No. 262078

Livingston Circuit Court

LC No. 04-014547-FH

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Following a joint trial, a single jury convicted codefendants William Fraley and Christopher Snow of first-degree home invasion, MCL 750.110a(2). The trial court sentenced Fraley as an habitual offender, third offense, MCL 769.11, to a prison term of 12 years 8 months to 40 years and sentenced Snow as an habitual offender, fourth offense, MCL 769.12, to a prison term of 15 years 8 months to 40 years. Defendants appeal as of right. We affirm.

Before trial commenced, defendants expressed their intent to be represented by the same attorney. The prosecutor and defense counsel agreed to an alternate jury selection method in which 28 potential jurors would initially be questioned. Under the jury selection method used, if a party excused a potential juror for cause or exercised a peremptory challenge the juror with the next highest seat number would then fill the excused juror's seat. Defense counsel exercised two peremptory challenges and expressed satisfaction with the jury.

The complainant testified in detail about defendants' actions before breaking into and entering a backroom in her home. The prosecutor did not present any evidence to support a

finding that defendants stole any items before abruptly leaving the complainant's home, but did present evidence that a brass candelstick was broken while being used to break into a backroom. Evidence was presented that defendants attempted to conceal the license plate on their vehicle before driving away from the scene. A police officer stopped defendants' vehicle shortly after the vehicle left the scene. Snow agreed to waive his *Miranda*¹ rights and admitted to the arresting officer that he and Fraley were at the complainant's home. Defendants' theory of the case was that defendants did not intend to commit larceny and, at most, defendants were guilty of the lesser offense of entering a building without the owner's permission.

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Relying on *Holloway v Arkansas*, 435 US 475; 98 S Ct 1173; 55 L Ed 2d 426 (1978), Fraley first argues that the trial court's failure to comply with MCR 6.005(F) requires automatic reversal because the prosecution allegedly raised the issue of a potential conflict of interest. Fraley's reliance on *Holloway* is misplaced because the prosecutor did not raise the issue of a potential conflict but, rather, merely asked the trial court to inquire whether defendants waived any potential conflict that might arise. Further, because the failure to follow MCR 6.005(F) does not, by itself, constitute reversible error, *People v Lafay*, 182 Mich App 528, 531; 452 NW2d 852 (1990), his argument is without merit.

Fraley also argues that he was denied the effective assistance of counsel by defense counsel's joint representation because an actual conflict of interest adversely affected counsel's performance. This argument is waived because Fraley requested joint representation, *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), but we will review the issue for plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The claim is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

To establish a claim of ineffective assistance of counsel, a defendant bears a heavy burden. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). When a conflict of interest exists that adversely impacts the sufficiency of an attorney's performance, prejudice is presumed. *People v Smith*, 456 Mich 543, 557; 581 NW2d 654 (1998). However, a conflict of interest is never presumed or implied. *Lafay, supra* at 530. "To warrant reversal, the prejudice shown must be actual, not merely speculative." *People v Fowlkes*, 130 Mich App 828, 836; 345 NW2d 629 (1983).

Fraley claims that an actual conflict of interest existed because defense counsel was to be paid solely by Snow's family. He asserts that this conflict of interest prejudiced him because defense counsel failed to seek a cautionary instruction that Snow's testimonial statements could only be used against Snow and failed to question the arresting officer about any bias Snow might have had in making the statements. No record evidence supports the allegation that defense counsel was to be paid solely by Snow's family. Further, defense counsel's decision to allow the testimonial statements to be introduced as substantive evidence against both defendants enabled

¹ *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

counsel to present a defense without subjecting either defendant to cross-examination. That is, defense counsel stated during his opening statement that he would not dispute that defendants “pulled their car into the driveway, honked the horn, rang the doorbell and walked back to the sunroom - - or the screened in porch.” He did, however, dispute “what happened.” That is, that defendants possessed the requisite intent for first-degree home invasion. In that regard, the statements were not prejudicial because they were consistent with defense counsel’s defense theory. It appears from the record that defendant’s decision was a matter of trial strategy. This Court will not substitute its judgment for that of trial counsel on matters involving trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Moreover, because a conflict of interest is never presumed or implied, *Lafay, supra* at 530, Fraley has failed to meet his burden.

Fraley next argues that defense counsel was ineffective by agreeing to the alternate jury selection method used. He contends that the alternative jury selection method used implicated the “struck jury method.” A so-called struck jury method, which was denounced by our Supreme Court in *People v Miller*, 411 Mich 321, 323, 326; 307 NW2d 335 (1981), necessarily involves exhaustion of all peremptory challenges before the court selects additional jurors. Here, a struck jury method is not implicated because each juror was replaced when removed and defense counsel’s peremptory challenges were not diluted as a result of the method used. See *Miller, supra* at 323-324. Indeed, defense counsel did not exhaust his peremptory challenges, having 8 peremptory challenges remaining at the time he expressed satisfaction with the jury. Upon review of the record, we are satisfied that Fraley’s rights were not infringed upon by the jury selection method employed by the trial court and that counsel was not ineffective for agreeing to the jury selection method.

Fraley next argues that OV 13, MCL 777.43, was incorrectly scored at 25 points. While this issue has been waived, see *Carter, supra* at 215, we find that no plain error occurred. Twenty-five points are properly scored for OV 13 where the offense is part of a pattern of felonious criminal activity involving three or more crimes against a person. MCL 777.43(1)(b). For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction. MCL 777.43(2)(a). Only those crimes committed during a five-year period that encompasses the sentencing offense may be considered. *People v Francisco*, 474 Mich 82, 86; 711 NW2d 44 (2006).

Fraley mistakenly relies on his sentencing date, rather than the date of the offense, when calculating the five-year period from the sentencing offense. The present offense occurred on August 25, 2004. In the five-year period prior to that date Fraley was charged with two counts of first-degree home invasion, MCL 750.110a(2),² which is an offense against a person. MCL 777.16f. The trial court properly scored OV 13 at 25 points. Because an objection to the scoring of OV 13 would have been futile, defense counsel was not ineffective for failing to raise the issue at sentencing. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

² These offenses occurred on October 11, 2000.

Fraley raises three issues in his Standard 4 brief. First, Fraley argues that Snow's statements to the police were used against Fraley in violation of his right to confrontation. This forfeited constitutional issue is reviewed for plain error affecting substantial rights. *Carines, supra* at 764.

With respect to statements made by Snow, the trial court instructed the jury:

Prosecution has introduced evidence of statements that he claims the Defendant, Christopher Snow, made. Before you may consider such out of court statements against the Defendant you must first find that the Defendant . . . actually made the statements as given to you. If you find that the Defendant did make the statements you may give this statement whatever weight you think it deserves . . .

Use of the term "defendant" in the above instruction is somewhat ambiguous. When read in context, however, it appears that the court was instructing the jury that Snow's statements could be used against Snow, given that the court identified Snow by name. Under these circumstances, no Confrontation Clause problem exists. But even assuming that the statements were used against Fraley in violation of *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), defendant fails to show that any error in the admission of the statements affected his substantial rights. In fact, the statements supported defendants' theory of the case without subjecting Fraley to cross-examination. In that regard, the statements were not prejudicial. And, even absent Snow's statements, considerable evidence, including the victim's testimony, was adduced to support Fraley's conviction, rendering any error harmless.

Fraley also contends that the following exchange between the prosecutor and a police officer was an improper substantive reference to his post-arrest silence:

Q. Okay. Did you have an occasion to talk to Mr. Fraley?

A. After the traffic stop and we had gotten Mr. Fraley and Mr. Snow out of the vehicle. I advised them that we were investigatin' a breaking and entering and they matched the description of the suspects involved. And after that Mr. Fraley at that point requested to see an attorney.

Q. Okay. And you didn't talk to him any further after that then?

A. No, I did not.

This forfeited constitutional issue is reviewed for plain error that affected substantial rights. *Carines, supra* at 764.

Contrary to defendant's assertion, the challenged testimony did not implicate defendant's right to remain silent. The prosecutor did not ask whether defendant remained silent or was nonresponsive after his invocation of the right to counsel. Rather, the prosecutor asked only whether the police officer ceased questioning after Fraley requested counsel and the officer indicated that he did. This question did not elicit evidence of defendant's post-arrest silence and

did not invade defendant's constitutional right to remain silent. Defendant has therefore failed to demonstrate plain error affecting substantial rights.

Fraley further contends that the trial court plainly erred in scoring Offense Variable 4 at 10 points. Scoring decisions for which there is any evidence in support will be upheld. *People v Hornby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A sentencing court may consider all evidence before it, including the contents of a presentence investigation report or testimony taken at a preliminary examination or trial. *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

Under MCL 777.34(1)(a), a score of 10 points is proper when “[s]erious psychological injury requiring professional treatment occurred to a victim.” Here, the victim’s impact statement provides in part that, after the incident, she has spent entire days watching out her windows for anyone who may come into her driveway and that she has become sleep-deprived and fearful, dreads being alone, and panics at the sound of a car horn or a doorbell. While she has not sought counseling, this fact is not conclusive in determining whether professional treatment is necessary. MCL 777.34(2). The record supports a finding that the victim suffered psychological injury that may require treatment as a result of the incident and, therefore, no plain error occurred in the scoring of OV 4. Additionally, Fraley’s argument that the trial court impermissibly considered facts when scoring OV 4 that were neither proven beyond a reasonable doubt at trial nor admitted by defendant is without merit. See *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006).

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Defendants next argue that the trial court erred by failing to instruct the jurors that they did not have to unanimously agree that defendants were not guilty of first-degree home invasion before considering the lesser offense of entering a building without the owner’s permission. They also argue that the trial court gave a confusing supplemental instruction in response to the jury’s inquiry, “Why is a second lesser charge offered?” Defendants also assert that defense counsel was ineffective for failing to object to the trial court’s allegedly improper instructions.

Because counsel did not object to the instructions and expressed satisfaction with the instructions, our review is limited to plain error that affected substantial rights and we will reverse only if the unpreserved error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Defendant’s claim that he was denied the effective assistance of counsel of law is subject to de novo review. *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2002).

The manner in which trial courts must instruct jurors to consider principal charges and lesser offenses was originally set forth by our Supreme Court in *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982), and is now encompassed in CJI2d 3.11(5).³ Although the trial

³ CJI2d 3.11(5) states:

(continued...)

court did not comply with our Supreme Court’s mandate in *Handley* by delivering an instruction similar to CJI2d 3.11(5), we conclude that its failure to do so does not amount to plain error in the present case. After consulting with the prosecutor and defense counsel, the trial court gave a supplemental instruction in response to the jury’s inquiry regarding the lesser offense:

Members of the jury, you’ve been instructed on two possible crimes as to each one of the Defendants. The first is home invasion first degree and the second is the lesser offense of entering a building without the owner’s permission. Each one of those two charges contains elements.

The second charge, entering a building without the owner’s permission, is called a lesser included offense of the greater charge. And what that in essence means is that all of the elements – and the elements are defined to you in the jury instructions that you have received – all of the elements in the lesser included charge are also contained within the greater charge. However, the greater charge continued – contains some additional elements. It is you sitting as the jury in this matter to be the judges of the facts as I’ve instructed. And it’s for you to find or not find whether or not the prosecutor has met their burden with reference to each of those elements.

As I’ve previously instructed, the jury instructions are to be taken as a whole and you should review them as a whole. But in essence, the lesser included offense is necessarily included in all of the elements of the lesser included offense are contained within the greater offense. Whether those elements of each have been proved to your satisfied [sic] as I’ve instructed you in the instructions is your decision to make.

The present case is distinguishable from those cases that involve an instance where the trial court instructed the jurors that they must first either acquit or fail to convict defendant of the greater offense before considering the lesser offense and does not involve an instance where the trial court either stated or implied that they must do so unanimously. See, e.g., *People v Hurst*, 396 Mich 1; 238 NW2d 6 (1976), and *People v Mays*, 407 Mich 619, 623; 288 NW2d 207 (1980). Instead, after stating that defendant was charged with first-degree home invasion and the elements of that charge, the trial court instructed the jurors that they “may also consider the lesser charge of entering a building without the owner’s permission.” The trial court’s

(...continued)

In this case, there are several different crimes that you may consider. When you discuss the case, you must consider the crime of [*name principal charge*] first. [If you all agree that the defendant is guilty of that crime, you may stop your discussions and return your verdict.] If you believe that the defendant is not guilty of [*name principal charge*] or if you cannot agree about that crime, you should consider the less serious crime of [*name less serious charge*]. [You decide how long to spend on (*name principal charge*) before discussing (*name less serious charge*). You can go back to (*name principal charge*) after discussing (*name less serious charge*) if you want to.]

instructions did not have the effect of requiring the juror's to first determine, unanimously or otherwise, that defendant was not guilty of first-degree home invasion before considering the lesser offense of entering a building without the owner's permission. Instead, despite first instructing the jury on the charged offense of first-degree home invasion, the trial court's instructions did not even expressly require the jurors to consider that charge before considering the lesser offense. Instead, the trial court's instructions, including the supplemental instruction, implied to the juror's that they could consider them equally. Defendants have failed to show that the erroneous instructions resulted in their convictions despite their actually being innocent or that they seriously affected the fairness of the trial.

In order to prevail on the claim of ineffective assistance of counsel, defendants must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error, a different outcome reasonably would have resulted. *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). The second prong, prejudice, requires that a defendant demonstrate a probability of a different outcome sufficient to undermine the confidence in the outcome that actually resulted. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

While it was objectively unreasonable for trial counsel not to object or request a proper deliberation instruction based on CJI2d 3.11, defendants have not established that there was a reasonable probability that the results would have been different. There is nothing in the record to indicate that the jury compromised its verdict or that it did not understand that it did not have to unanimously acquit defendants of the charged offense before considering the lesser offense. Prejudice is not established merely because a defendant is convicted on the greater rather than the lesser offense. Defendants cannot meet their burden of establishing they were prejudiced by defense counsel's failure to object to the omission of the instruction where there is no record evidence of jury compromise.

Defendants next argue that the evidence presented was insufficient to sustain their convictions. Whether sufficient evidence exists to support a conviction is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence, the evidence is viewed in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Questions of credibility are left to the trier of fact to resolve, *People Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999), and it is for the trier of fact to determine what inferences can be drawn from the evidence and to determine the weight to be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The elements of first-degree home invasion are: (1) that the defendant broke and entered into the dwelling; (2) that when the defendant did so, he intended to commit a larceny; and (3) that when the defendant entered, was present in, or was leaving the dwelling, another person was lawfully in the dwelling. MCL 750.110a(2). "A 'presumption of an intent to steal does not arise solely from the proof of breaking and entering.'" *People v Palmer*, 42 Mich App 549, 551-552; 202 NW2d 536 (1972) (citation omitted). But felonious intent in a breaking and entering may be established by inferences from circumstantial evidence, *People v Riemersma*, 104 Mich App 773, 780; 306 NW2d 340 (1981), including the nature, time, and place of the defendant's acts. *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988).

Here, the circumstantial evidence was sufficient to support a finding that defendants intended to steal from the complainant's home. Evidence was presented that defendants honked their horn in complainant's driveway several times before driving across the street and parking their vehicle out of site from the road. Defendants then walked up to the front door and rang the doorbell several times before proceeding to the backdoor. A backroom door was then opened, as was the adjacent pantry door. Evidence was also presented that a brass candlesnuffer was taken from a table in the sunroom and was broken while being used in an attempt to break a locked pantry door. Defendants exited the complainant's home after their attempts to open the pantry door failed. Additionally, testimony was presented that defendants attempted to conceal their identity by using a coat hanging out of the trunk to conceal the vehicle's license plate as they drove off. Although circumstantial, this evidence is sufficient to permit a rational trier of fact to infer that defendants possessed the requisite intent to commit a larceny at the time they broke and entered the dwelling.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot