

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT DAVID BISKNER,

Defendant-Appellant.

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UNPUBLISHED

July 8, 2008

No. 278006

Tuscola Circuit Court

LC No. 06-010026-FH

Before: Owens, P.J., O’Connell and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree home invasion, MCL 750.110a(2)(b). We affirm.

Defendant’s conviction arose out of an altercation that occurred when defendant was picking up his daughter from her friend’s home. An argument erupted between the friend’s father and defendant, culminating in defendant breaking the father’s orbital bones, fracturing his jaw, and knocking him unconscious. The prosecutor charged defendant with assault with intent to cause great bodily harm as well as home invasion. The jury acquitted defendant of the assault charge.

Defendant first claims that the evidence was insufficient to convict him of first-degree home invasion. Specifically, defendant contends that the jury could not rationally acquit him on the assault charge yet convict him on the home invasion charge. Our Supreme Court rejected an analogous contention in *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). Under *Vaughn*, inconsistent verdicts do not require reversal. We have reviewed the record de novo, and we conclude that the evidence was sufficient to allow a reasonable juror to find defendant guilty of first-degree home invasion. See *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). There was testimony to establish that the victim was in his own garage, that defendant entered the garage without permission, and that defendant assaulted the victim in the garage. Accordingly, we reject defendant’s challenge to the sufficiency of the evidence.

Defendant next argues that his trial counsel was ineffective for failing to request a jury instruction on a lesser-included offense, and for failing to object to improper conduct by the prosecutor. Defendant did not present these issues to the trial court, so this Court’s review is limited to mistakes that are apparent from the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). To prevail, defendant must demonstrate that the alleged errors by his

counsel's failure were so serious as to render the outcome of the trial unreliable. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

This Court recently reiterated that “[d]efense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases.” *People v Unger*, 278 Mich App 210, \_\_\_; \_\_\_ NW2d \_\_\_ (2008). Here, we conclude that counsel's decision not to offer an instruction on misdemeanor home invasion was a reasonable trial strategy because the instruction could have reduced defendant's chance for an acquittal on the home invasion charge. See *People v Robinson*, 154 Mich App 92, 94; 397 NW2d 229 (1986). In part, defense counsel argued that defendant should be acquitted of the home invasion charge because he had permission to enter the garage.<sup>1</sup> To have offered a jury instruction on the offense of misdemeanor home invasion would have contradicted defendant's theory that he had permission to enter the garage. We will not second-guess counsel's trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Similarly, we find no error requiring reversal with regard to counsel's lack of objection to the prosecutor's conduct. As plaintiff acknowledges on appeal, the questioning and closing argument was improper to the extent that the prosecutor sought to have witnesses testify regarding other witnesses' credibility. *People v Ackerman*, 274 Mich App 434, 449; 669 NW2d 818 (2003). While we do not condone the prosecutor's technique, we find that the questioning addressed primarily tangential matters and was in part a response to defense counsel's cross-examination of the victim. On balance, defendant has not shown that the outcome of the trial would have been different absent the prosecutor's improper conduct. See *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

Lastly, defendant argues that the trial court erred in assessing points against him under offense variables (OVs) 4, 7, and 10, MCL 777.34, MCL 777.37, and MCL 777.40. We review the trial court's decision for abuse of discretion, examining whether the record evidence adequately supports the OV scores. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). We find that the record supports defendant's scores on OVs 7 and 10. On OV 7, the trial court properly found that defendant was very aggressive and that the degree of the victim's injuries indicated excessive brutality by defendant. See MCL 777.37(1)(a). As for OV 10, the record indicates that defendant outweighed the victim by 65 pounds, that the victim was intoxicated, and that defendant believed the victim had acted belligerently toward defendant's daughter. From this evidence, the trial court could conclude that defendant exploited the victim's vulnerability for defendant's unethical purposes. See MCL 777.40(3). See also *People v Cannon*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2008).

We find, however, that the record does not support the score on OV 4, MCL 777.34. To assess points under OV 4, the trial court must find that the victim sustained serious psychological injury. The record presented to this Court contains no evidence to support such a finding. Although the prosecutor referred to a victim's impact statement describing some emotional injury, the statement does not appear to have been presented to the trial court. Absent some

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<sup>1</sup> Defendant also raised a self-defense claim.

proof of psychological injury, the trial court erred in assessing points under OV 4. Accord, *People v Hicks*, 259 Mich App 518, 535; 675 NW2d 599 (2003).

Nevertheless, no resentencing is required. Defendant acknowledges that the ten-point reduction in his total OV score does not alter his sentence, because the reduction does not change the applicable sentencing range.

Affirmed.

/s/ Donald S. Owens  
/s/ Peter D. O'Connell  
/s/ Alton T. Davis