

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELIJAH HURN,

Defendant-Appellant.

UNPUBLISHED

October 5, 2010

No. 294232

Wayne Circuit Court

LC No. 09-012376-FC

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), and assault with intent to rob while armed, MCL 750.89. He was sentenced to 12 to 20 years' imprisonment for his home invasion conviction and 12 to 40 years' imprisonment for his assault conviction. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to support his convictions. We disagree. We review de novo a challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We must view all the evidence in a light most favorable to the prosecution to determine "whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *Id.* (citation and quotation marks omitted). "All conflicts with regard to the evidence must be resolved in favor of the prosecution. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005) (internal citations omitted).

Defendant was charged with the crimes underlying his conviction on an aiding and abetting theory. "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may . . . be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39. The elements of aiding and abetting are: "(1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." *People v Carines*, 460 Mich 750, 768;

597 NW2d 130 (1999) (citation omitted). Further, the elements of assault with intent to rob while armed are: (1) an assault with force and violence, (2) an intent to rob or steal, and (3) while being armed with a dangerous weapon, “or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon.” MCL 750.89; *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. *People v Sands*, 261 Mich App 158, 161-162; 680 NW2d 500 (2004); MCL 750.110a(2).

The evidence presented at trial showed that on the afternoon or early evening of September 26, 2008, defendant and his friends, Tara Cronk, Leonard Hudson, and an individual named “Lopez,” traveled in Cronk’s car to the victims’ home in Detroit. Hudson told Cronk that the plan was to take money from the victims and he ordered her to approach the victims’ house and ask the victims if she could use their phone. According to Cronk, once she entered the house, Lopez was to follow and let Hudson and defendant into the house through its back door.

Cronk did as Hudson asked and gained entry into the victim’s home by telling the occupants that her car had broken down. Soon after, Lopez entered the house brandishing a handgun. The victims were shoved down onto the living room floor, one of them receiving several kicks to his face and body, while Lopez attempted to unlock the back door several times. In the interim, when Lopez was in the back of the house, one of the victims escaped through the front door and called for help. While the victim was seeking help, she glanced back at her house and saw Cronk and Lopez, as well as another individual, standing on her front porch. The three took off running down the street. The victim also saw defendant, standing in the back alley of her house, just as he was beginning to flee.

Subsequently, defendant was arrested in connection with these events. At trial, his police interview was read to the jury. In that interview, defendant admitted that he, Hudson, Cronk, and Lopez had created a plan to gain entry into the victims’ home and to take money from them. Defendant indicated that he was to remain in the back alley of the house, where Lopez and Hudson would throw money “over the fence in suitcases.” Defendant also admitted that he knew Lopez had a gun before Lopez entered the victims’ home.

In this case, the facts, first, establish that Lopez committed first-degree home invasion when he entered the home without permission and committed an assault while inside the dwelling, by pushing the occupants onto the floor and by brandishing a gun, while the occupants were lawfully inside the home. MCL 750.110a(2). Lopez also committed assault with intent to rob while armed when he pushed the victims to the floor, kicked one of them repeatedly, and brandished a gun for the joint purpose of stealing money from the home. MCL 750.89. The fact that defendant did not directly commit these offenses himself is irrelevant. MCL 767.39. Second, there was sufficient evidence that defendant assisted and encouraged the commission of these crimes by taking part in the planning of the break-in and by waiting outside the home to receive the stolen goods. Third, there is also sufficient evidence that defendant intended Lopez to break into the home for the purpose of stealing money. Further, defendant’s knowledge that Lopez had a gun shows that defendant was aware of the possibility that the occupants would be

home and could resist, and thus he contemplated that it might be necessary to commit the crimes of first-degree home invasion and assault with intent to rob while armed. Accordingly, the evidence, when viewed in a light most favorable to the prosecution, supports defendant's convictions beyond a reasonable doubt. Defendant's sufficiency of the evidence argument fails.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that counsel was ineffective for failing to object to certain alleged misconduct of the prosecutor. Specifically, defendant asserts that the prosecutor improperly vouched for a witness's credibility. We disagree. Because defendant did not raise this claim below, our review is for mistakes apparent on the record. *People v Powell*, 278 Mich App 318, 324; 750 NW2d 607 (2008). To prevail on this claim, a defendant must show "(1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

It is true that counsel may not vouch for the credibility of witnesses to the effect that the prosecutor has some special knowledge of the witness's truthfulness. *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009). However, a review of the record reveals that the prosecutor did not engage in the allegedly impermissible conduct of which defendant complains. After the prosecutor presented the testimony of Cronk, he asked Cronk whether she had been charged in connection with the incident and whether she had received the benefit of a plea agreement. Cronk indicated that she had been charged and that she had entered into such an agreement for her own benefit. The prosecutor then asked, "Now, when you pled guilty to home invasion first degree, what were the terms of the agreement?" In response, Cronk stated:

Okay. I have to graduate from high—get my GED or my diploma; I got three years' probation; 30 days of work force; full time in school or a full time job; no contact with my codefendants or the families or the victims; and appear in any like courts to testify truthfully and honestly in any case like this.

Defense counsel did not object and Cronk's plea agreement was admitted into evidence.

While the agreement did indicate that Cronk was to testify truthfully as part of her plea agreement, the prosecutor did not use it to suggest that the government had some special information as to Cronk's veracity or to convey a message that the prosecution had some special knowledge of facts suggesting Cronk's truthfulness. The plea agreement standing alone cannot be said to communicate such a meaning. See *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). Accordingly, we cannot conclude that Cronk's statement was admitted in error. See *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Because the statement was not erroneously admitted, any objection by defense counsel would have been futile. Counsel cannot be ineffective for failing to raise a futile objection. *People v Payne*, 285 Mich App 181, 191; 774 NW2d 714 (2009). Thus, defendant's claim of ineffective assistance fails.\

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly