

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 23, 2014

v

DONALD MARCUS MOSHER,
Defendant-Appellant.

No. 312996
Oakland Circuit Court
LC No. 2012-240118-FH

Before: METER, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of first-degree home invasion, MCL 750.110a(2), and felonious assault, MCL 750.82. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent prison terms of 7 to 30 years for the home invasion conviction and 1 to 6 years for the felonious assault conviction. We affirm.

Defendant raises three issues on appeal. First, defendant argues that the prosecution did not present sufficient evidence to support his conviction of first-degree home invasion. Second, defendant argues that his trial counsel was ineffective. Finally, defendant argues that the trial court erroneously scored prior record variable (PRV) 2 and offense variable (OV) 13. We address each of these arguments in turn.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecution did not present sufficient evidence to prove that he committed a “breaking” within the meaning of MCL 750.110a(2). The basis of defendant’s argument is that, because a home and its attached garage are one “dwelling” within the meaning of MCL 750.110a, once the victim granted permission to defendant to enter her attached garage, defendant obtained permission to enter the entire dwelling. Because defendant believes he obtained permission to enter the entire dwelling, he asserts that he did not commit a breaking when he forced open the victim’s locked storm door and entered the living area of the victim’s home. We disagree.

Challenges to the sufficiency of the evidence are reviewed de novo to determine if any rational trier of fact could have concluded that the essential elements of the crime were proven beyond a reasonable doubt. *People v Lockett*, 295 Mich App 165, 180; 814 NW2d 295 (2012). All conflicts in the evidence are resolved in favor of the prosecution. *Id.* “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). “This Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

MCL 750.110a(2) provides:

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 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.

Thus, to be found guilty of first-degree home invasion, one must first (1) “break[] and enter[] a dwelling,” or (2) “enter[] a dwelling without permission.” MCL 750.110a(2); see also *People v Baker*, 288 Mich App 378, 384; 792 NW2d 420 (2010). MCL 750.110a(1)(a) defines a dwelling as “a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter.” Thus, under the home invasion statute, an attached garage is part of the dwelling to which it is attached. “A breaking is any use of force, however slight, to access whatever the defendant is entering.” *People v Heft*, 299 Mich App 69, 76; 829 NW2d 266 (2012). However, “[t]here is no breaking if the defendant had the right to enter the building.” *Id.*, quoting *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998). “Thus, a breaking only exists if the defendant entered *without permission*[.]” *Heft*, 299 Mich App at 76 (emphasis in original).

We acknowledge that defendant performed no action that would amount to a “breaking” of the garage itself, as defendant used no force to open the garage door. Indeed, the victim’s testimony demonstrates that she opened the garage door specifically for the purpose of allowing defendant to enter her garage, thereby giving him permission to do so.¹ Thus, defendant did not

¹ Although the prosecutor disputes whether defendant had permission to enter the victim’s garage, the only rational view of the victim’s testimony leads to a conclusion that the victim granted defendant permission to do so. After hearing defendant ring her front doorbell, the victim recognized defendant through the glass panels of her front door. The victim then opened her garage door, and defendant entered. The victim testified that she opened her garage door for defendant. The victim even agreed that she made a conscious choice to open her garage door for defendant. The only rational inference to be drawn from this sequence of events and the victim’s testimony is that the victim granted defendant permission to enter her attached garage.

violate the home invasion statute when he entered the victim's garage, as he did nothing that would amount to a breaking in order to gain entry.

However, this Court has previously held that, where a defendant gains access to a building without breaking, but has no right to enter an inner portion of that building, the defendant's use of force to gain entry into that inner portion is a breaking. See *Toole*, 227 Mich App at 659 (although the building was open to the public, giving the defendant a right to enter the building, the defendant's act of opening an unlocked storage-room door and entering the storage room was a breaking and entering when "keep out" signs were posted on the storage-room door); see also *People v Clark*, 88 Mich App 88, 91-92; 276 NW2d 527 (1979) (even if an exterior door was open at the time the defendant entered the building, that the defendant broke through an interior wall to access another room constituted a breaking for the purposes of burglary statute). As *Toole* and *Clark* make clear, the fact that defendant was permitted to enter one portion of the victim's dwelling does not end our analysis.

Even though the garage and living area of the victim's home constituted one "dwelling" within the meaning of MCL 750.110a, defendant committed a breaking and entering when he used force to open the storm door and entered the living area of the victim's home. Defendant had no right to enter the interior living area. Defendant had never lived in the victim's home and the victim testified that she never gave defendant permission to enter her home in the past. On the night of the incident, the victim specifically told defendant that he was not to enter the living area of her home. Despite the victim's demands, defendant forced open a locked storm door, thereby gaining access to the interior of the home. In doing so, defendant damaged the storm door's lock mechanism. Defendant then entered the victim's home and assaulted her. The element of "breaking and entering a dwelling" under MCL 750.110a(2) was proven by the evidence establishing that defendant used force to open the storm door separating the garage from the living area and entered the interior of the dwelling without the victim's permission. *Heft*, 299 Mich App at 76; see also *Toole*, 227 Mich App at 659; *Clark*, 88 Mich App at 91-92.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial attorney was ineffective because counsel did not move to quash the information, did not move for a directed verdict at the close of the prosecutor's case, waived his opening statement, did not request an instruction regarding the victim's consent to enter the dwelling, and did not request a proper response to a question posed by the jury during its deliberations. We disagree.

A claim of ineffective assistance of counsel presents a mixed question of law and fact. We review the trial court's findings of fact, if any, for clear error, and review de novo the ultimate constitutional issue arising from the ineffective assistance claim. *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011).

Michigan follows the standard established by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), to determine if a defendant has received ineffective assistance of counsel. See *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). "Under this test, counsel is presumed effective . . ." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). To establish ineffective assistance of counsel, a

defendant 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 was reasonably probable. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). "A defendant pressing an ineffective assistance claim must overcome a strong presumption that counsel's tactics constituted sound trial strategy." *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

In his brief, defendant argues that trial counsel was ineffective for failing to file a pretrial motion to quash the information, failing to move for a directed verdict, and failing to request an instruction regarding consent to enter the dwelling. However, defendant does nothing more than state these allegations. Defendant does not explain how trial counsel's performance was unreasonable or how the outcome of the trial would have been different had counsel performed these actions. It is not enough for an appellant to simply announce a position or assert a claim of error and then leave it up to this Court to discover and rationalize the basis for his claims. *People v Waclawski*, 286 Mich App 634, 679; 780 NW2d 321 (2009).

Further, as sufficient evidence was presented to support defendant's home invasion conviction, any motion to quash or for a directed verdict or would have been futile. When a defendant has received a fair trial, review of a motion to quash the information is coextensive with review of a motion for a directed verdict. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). A directed verdict is appropriate only if "the prosecutor's evidence, viewed in the light most favorable to the prosecution, could [not] persuade a rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt." *People v Martin*, 271 Mich App 280, 319-320; 721 NW2d 815 (2006). As discussed, the prosecutor presented sufficient evidence to support defendant's home invasion conviction. Thus, either a motion to quash the information or a motion for a directed verdict would have been without merit. See *id.* As trial counsel is not ineffective for failing to raise meritless motions, defendant has not demonstrated that he is entitled to relief on the basis of these alleged errors. *Ericksen*, 288 Mich App at 201.

Defendant does not explain how a request for an instruction regarding consent would have changed the outcome of his trial, nor does he provide this Court with his proposed instruction. Thus, defendant has not met his burden of showing that, had his trial counsel requested an instruction regarding consent, the outcome of the trial would have been different. See *Armstrong*, 490 Mich at 290.

Defendant also argues that trial counsel was ineffective for failing to adequately present a defense, specifically citing counsel's failure to make an opening statement. This Court has previously noted that "the waiver of an opening statement involves 'a subjective judgment on the part of trial counsel which can rarely, if ever, be the basis for a successful claim of ineffective assistance of counsel.'" *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), quoting *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). Although trial counsel initially reserved, and eventually waived, his opening statement, trial counsel presented his theory in a closing argument. In that argument, counsel pursued the exact theory defendant offers on appeal—that defendant had permission to enter the victim's garage, and therefore had

permission to enter the victim's entire dwelling. Defendant has not demonstrated how trial counsel's decision to forgo an opening statement was not sound trial strategy, or how a different course of action would have led to a different result.

Finally, defendant takes issue with counsel's failure to request a different answer to a question posed by the jury during deliberations. While deliberating, the jury asked the trial court, "[I]s it still considered breaking and entering if someone forces or breaks a door once inside a home?" On appeal, defendant argues that the correct answer to this question would have been "no," and such an answer would have led to an acquittal. However, as previously discussed, defendant's proposed answer to the jury's question would have been an incorrect statement of the law. As already noted, trial counsel is not ineffective for failing to present a futile argument. *Ericksen*, 288 Mich App at 201. We perceive no ineffective assistance of counsel in this case.

III. SENTENCING ISSUE

Defendant argues that the trial court erroneously scored PRV 2 (prior low-severity felony convictions) and OV 13 (continuing pattern of criminal behavior). In scoring both variables, the trial court included defendant's previous conviction, listed on his presentence investigation report (PSIR) as "Att PO Aslt/Resist/Obs," as a prior felony conviction. Defendant argues that this conviction should have been considered a misdemeanor conviction, requiring rescoring of PRV 2 and OV 13. We disagree.

Our Supreme Court recently clarified the standard of review applicable to a defendant's challenge to the trial court's sentencing guidelines determinations in *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013):

Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.

Defendant's PSIR does not provide a statutory citation for his December 15, 2006, conviction. However, defendant argues that the conviction must have been for an attempted violation of MCL 750.479. Although MCL 750.479 provides varying maximum sentences depending upon the severity of any injuries suffered by the victim of the crime, the lowest possible penalty for a violation of MCL 750.479 is found in MCL 750.479(2), which provides a maximum penalty of two years' imprisonment. A violation of MCL 750.479(2) is a crime against a person, classified as a class G felony. MCL 777.16x. Thus, assuming defendant's PSIR refers to a violation of MCL 750.479, defendant attempted to commit, at a minimum, a class G felony.

The prosecutor suggests that defendant's prior conviction could also have been for an attempt to violate MCL 750.81d. Much the same as MCL 750.479, MCL 750.81d provides varying penalties depending upon the severity of any injuries suffered by the victim. See MCL 750.81d(1) through (4). However, a violation of MCL 750.81d(1), the lowest-severity violation

of MCL 750.81d, is also crime against a person, punishable by a maximum of two years' imprisonment, and is also a class G felony. MCL 777.16d.

Five points may be assessed for PRV 2 when “[t]he offender has 1 prior low severity felony conviction.” MCL 777.52(1)(d). Under MCL 777.52(2)(a), a “‘prior low severity conviction’ means a conviction for . . . [a] crime listed in offense class E, F, G, or H.” Under the sentencing guidelines, an attempt to commit a class G felony is itself a class H felony. MCL 777.19(3)(b). As defendant’s prior attempt conviction is a class H felony under the sentencing guidelines, the trial court properly considered the conviction when it assessed five points for PRV 2.

The trial court may assess 25 points for OV 13 when “[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(c). “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). As previously discussed, defendant’s prior conviction for attempted resisting and obstructing is a crime against a person, and is classified as a class H felony under the sentencing guidelines. First-degree home invasion, MCL 750.110a(2), is a crime against a person, and is classified as a class B felony. MCL 777.16f. Felonious assault, MCL 750.82(1), is a crime against a person, and is classified as a class F felony. MCL 777.16d. Defendant’s attempted resisting and obstructing offense was committed on November 24, 2006. Defendant’s home invasion and felonious assault offenses were committed on October 30, 2011. Thus, the trial court properly assessed 25 points for OV 13 because defendant committed three felonies against a person within a five-year period. MCL 777.43(1)(c) and (2)(a).

In his brief, defendant concedes that the terms of MCL 777.19 apply to the sentencing offense, but asserts that the statute is silent in regard to prior offenses. However, the language of the statute is not limited in the way defendant proposes. MCL 777.19(1) provides that “[t]his chapter applies to an attempt to commit an offense enumerated in this part if the attempted violation is a felony.” Defendant provides no authority supporting his interpretation of the statute. Indeed, our Supreme Court has looked to MCL 777.19 for the proper classification of *prior* convictions. See *People v Wright*, 483 Mich 1130 (2009) (remanding to the trial court for resentencing because the defendant’s “prior conviction” of attempted assault was a class E offense under MCL 777.19(3)). As the trial court properly scored PRV 2 and OV 13, defendant is not entitled to resentencing.

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder