

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY TROY MILLER,

Defendant-Appellant.

UNPUBLISHED

May 4, 2010

No. 287851

Kent Circuit Court

LC No. 07-010658-FH

Before: SERVITTO, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant appeals by right his conviction for first-degree home invasion, MCL 750.110(a). We affirm.

On September 13, 2007, Lisa Easter spent the early evening consuming alcohol with several friends and acquaintances, including defendant, who had previously lived in her apartment building. After becoming highly intoxicated, she somehow made it home, entered her apartment alone, and passed out on her bed. Easter woke up later to her door being kicked in by defendant. Defendant then entered Easter's apartment and engaged in a violent physical assault upon her. Easter awoke the next morning and defendant apologized for his actions and left. The police were thereafter called and defendant was charged with home invasion, among other charges. As previously indicated, defendant was convicted by a jury of first-degree home invasion. He was sentenced, as a third habitual offender (MCL 769.11), to 10-25 years in prison.

Defendant first argues that there was insufficient evidence to support the guilty verdict. We disagree.

We review challenges to the sufficiency of the evidence *de novo*, *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006), viewing the evidence in a light most favorable to the prosecution to determine "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). On review, all reasonable inferences and credibility choices are made in support of the jury verdict. *People v Moorer*, 262 Mich App 64, 76-77; 683 NW2d 736 (2004).

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, 162; 680 NW2d 500 (2004); MCL 750.110a(2). The victim in this matter, Easter, testified that she was alone in her apartment, in bed, when she heard the door crash open. She saw defendant standing inside her doorway, despite the fact that he had not been given consent to enter her apartment. Easter testified that defendant became violent with her, beating her about her head and that she tried to fight him off. Easter testified that she was highly intoxicated at the time, but recognized the intruder as defendant, as they had been friends and she had spent time earlier in the day with him. Easter's testimony was sufficient to prove all of the elements of first-degree home invasion beyond a reasonable doubt. Although defendant claims that the victim's testimony was too incredible to support the verdict, this Court will not interfere with the factfinder's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant next argues that the trial court denied him a fair trial and his due process rights when it allowed the prosecutor to present evidence of defendant's prior convictions; allowed the prosecutor to impeach him with hearsay statements allegedly made to police by a non-testifying witness; allowed a witness to testify about the victim's state of mind; and, denied his motion for a directed verdict. Defendant failed to object to the questioning in regard to his convictions for violating a personal protection order, larceny from a person, and attempted resisting and obstructing a police officer, as well as his arrest for unarmed robbery. Defendant challenged the use of some statements made by a non-testifying witness on the grounds that the statements were hearsay, but defendant did not object on the grounds that the use of the statements violated his rights under the Confrontation Clause of the Sixth Amendment. These issues, with the exception of some of the hearsay statements, are not preserved. Defendant did, however, make a timely and specific objection to the questioning of the witness about the victim's state of mind, preserving this issue for appeal. Similarly, the directed verdict issue is preserved.

Turning to the specific allegations of error, we review a trial court's decision to admit evidence for an abuse of discretion. *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). When a trial court's decision to admit evidence involves a preliminary question of law, such as whether a rule of evidence precludes admission, then the review is de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court abuses its discretion when it erroneously admits or precludes evidence as a matter of law. *Id.* When a defendant fails to object below, this Court reviews only for plain error that affects the substantial rights of the defendant. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We review a trial court's decision on a directed verdict motion de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003).

The prosecutor's questioning defendant about his convictions for violating a personal protection order and for larceny from a person does not constitute a plain error. The evidence of defendant's convictions for larceny from a person and violation of the personal protection order was admissible on cross-examination because defendant testified about the circumstances of each conviction on direct examination. A prosecutor does not exceed the bounds of cross-examination by inquiring into the circumstances of past convictions that were first raised by

defense counsel on direct examination. *People v Pauli*, 138 Mich App 530, 539; 361 NW2d 359 (1984).

There was also no plain error, based on the apartment manager's testimony about the victim's state of mind the morning that the incident took place, under MRE 803(3). The manager testified that the victim appeared to her in a badly beaten state and, when the manager wanted to call the police, the victim told her that she did not want the police called because she was afraid she would be attacked further. The statement was not offered to prove that defendant had injured or would injure the victim, but rather, to explain her state of mind in declining to have the police called. Further, the trial court's denial of the motion for a directed verdict was proper because, when viewing the evidence in a light most favorable to the prosecutor, there was sufficient evidence to prove each element of first-degree home invasion beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998).

There was, however, plain error with respect to the prosecutor questioning defendant about his conviction for attempted resisting and obstructing a police officer and his arrest for unarmed robbery. Defendant did not open the door to cross-examination concerning these two charges on direct examination. Defendant did not testify to the facts of the charge or conviction, and he did not put his character for peacefulness at issue to make the conviction admissible under MRE 404(a). The evidence was not admissible under MRE 609 because the unarmed robbery charge was not a conviction, and the attempted resisting and obstructing conviction did not contain an element of dishonesty, false statement, or theft. In addition, the prosecutor did not give defendant notice of intent to admit the evidence under MRE 404(b), and even if she had, the evidence was not offered for a proper purpose under MRE 404(b)¹. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The evidence was also not relevant to make any contested fact in the case more or less probable under MRE 401. The admission of the evidence was thus plain error. *Carines*, 460 Mich at 763. However, defendant has not met his burden of proving that the errors affected his substantial rights. *Id.*

The record shows that the prosecutor's intent in introducing evidence of defendant's conviction, while improper, was to rebut any evidence of defendant's peaceful character. If the jury believed that the evidence of defendant's arrest and conviction showed that he was a violent person and therefore likely caused Easter's injuries, defendant was not harmed because he actually admitted in this case that he caused Easter's injuries. In fact, the defense was that he was not guilty of a first-degree home invasion because he hit Easter while they were outdoors and nowhere near her apartment, not because he did not hit her at all. The evidence that was presented through the improper introduction of defendant's arrest and conviction only established the point that defendant readily conceded. Reversal is thus not required. *Carines*, 460 Mich at 763-764.

¹ "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material. . ." MRE 404(b)(1).

Error also existed with respect to hearsay statements that were allegedly made to the police by non-testifying witness, Michael Luke. “‘Hearsay’ is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). Luke’s statements to the police were clearly hearsay because the prosecutor offered them into evidence to prove the truth of the matters asserted. The use of the hearsay statements from a police report as the source of defendant’s prior inconsistent statement was a violation of defendant’s right to confront the alleged source of the information, specifically Luke. A defendant has the right to be confronted with the witnesses against him, as guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution. *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). Testimonial statements made by a witness who is not present at trial may not be admitted against a defendant unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). Testimonial statements include, “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,” *Crawford*, 541 US at 52, and statements “are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *People v Spangler*, 285 Mich App 136, 143; 774 NW2d 702 (2009), quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

The prosecutor questioned defendant about statements he allegedly made to Luke. Luke was not called to testify, and the prosecutor used Luke’s statements to police to cross-examine defendant. The prosecutor asked:

Q. Did you tell him you, quote, unquote, “fucked up with your girlfriend?”

* * *

Q. Did you tell him that it happened at the Morton House?

A. No, I did not.

Q. Do you have any explanation or any reason why he might have assumed that?

A. He knows she -- he knows she lived at the Morton House, he knows that I have stayed overnight there before. [Emphasis added.]

The statements contained in the police report and used to cross-examine defendant, specifically that Luke told police that defendant said he “fucked up with his girlfriend,” and that Luke assumed that the incident took place at Morton House, implicated hearsay from the police report and were testimonial. The police interviewed Luke for the purpose of disproving defendant’s alibi and defendant did not have an opportunity to cross-examine Luke at an earlier proceeding. Additionally, Luke was not “unavailable” to testify under MRE 804(a). Rather, the prosecutor told the trial court that she knew where Luke was, and that she would call him if she had to. The use of these obvious hearsay statements was thus in violation of defendant’s right of confrontation as guaranteed under the Sixth Amendment to the United States Constitution and

constituted plain error. *Carines*, 460 Mich at 763. Again, however, defendant has not met his burden of proving that the error affected his substantial rights. *Id.*

First, any harm that may have resulted from the first question was cured by the trial court's instruction to the jury (immediately following the line of questioning) to disregard the contents of the testimony that assumed Luke made a statement. More importantly, the errors also did not affect the outcome of defendant's trial. Easter testified that defendant kicked down the door to her apartment and beat her. Defendant's sweater was photographed on Easter's floor, and Easter's blood was on the sweater. Easter testified that she returned home to her apartment alone and uninjured that night, and the apartment manager confirmed Easter's testimony by testifying about what she observed on the security video from the apartment complex. The manager also testified that Easter's door was severely damaged on the morning in question, and that she observed an unidentified subject enter Morton House through the back door. Defendant testified that he had entered through the back door of Morton House on other occasions. The errors, although plain, did not affect defendant's substantial rights, given the strength of the testimony. Reversal of defendant's conviction is not warranted.

Defendant next claims that this repeated use of inadmissible evidence by the prosecutor amounted to misconduct and due process violations that denied him a fair trial. We disagree.

Claims of prosecutorial misconduct are generally reviewed de novo to determine if the defendant was denied a fair trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Whether defendant's due process right was violated is a question of law, which this Court reviews de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). Our review, however, is limited to plain error that affected substantial rights because defendant failed to object below. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). For the reasons stated *supra*, we find that defendant was not denied a fair trial by the prosecutor's use of inadmissible evidence because, although there were plain errors, they did not affect defendant's substantial rights. *Carines*, 460 Mich at 763. Defendant was not denied a fair trial, and therefore his right of due process was not violated.

Defendant next claims that he was denied the effective assistance of counsel. Defendant failed to move for a new trial on the grounds of ineffective assistance of counsel or move for an evidentiary hearing on the issue, so the issue is not preserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). When a defendant does not preserve an issue of ineffective assistance of counsel, an appellate court's review is limited to mistakes that are apparent on the lower court record. *Id.* "[T]o find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant alleges that his trial counsel was ineffective for failing to adequately impeach Easter and for failing to object to the prosecutor's questioning of defendant about his prior convictions for larceny from a person and attempted resisting and obstructing a police officer, as well as his arrest for unarmed robbery. Nothing on the record suggests that defense counsel's impeachment of Easter fell below an objective standard of reasonableness, and defendant's conviction for larceny from a person was admissible because defendant opened the door by

testifying about it on direct examination. However, defense counsel's failure to object to the questioning of defendant about the inadmissible conviction and arrest may be considered conduct that fell below an objective standard of reasonableness. Although a decision not to object can be sound trial strategy, the record in this case does not support that the decision was sound. *People v Delessandro*, 165 Mich App 569, 578; 419 NW2d 609 (1988). The challenged testimony undermined defendant's character, and his defense was highly dependent on his credibility.

Defendant has not, however, met his burden of proving that, but for defense counsel's errors, the outcome of his trial would have been different. *Pickens*, 446 Mich at 302-303. The evidence of defendant's guilt was strong, and the evidence of defendant's arrest and conviction, although erroneously admitted, was not outcome determinative. The evidence of his arrest and conviction was used by the prosecution in the context of showing that defendant had a violent character, which was relevant only in regard to whether defendant caused Easter's injuries. This evidence did not prejudice defendant because he admitted that he caused Easter's injuries. The evidence of Luke's statement to police was also not outcome determinative because, although damaging to defendant's testimony, it merely supported the evidence of defendant's guilt that was properly admitted. Defense counsel's failure to object to the evidence does not undermine this Court's confidence in the jury's verdict. Defendant's claim of ineffective assistance of counsel thus fails.

Defendant also raises two issues in his Standard 4 brief,² neither of which is meritorious. Defendant first argues that the trial court abused its discretion when it allowed defendant's sweater into evidence. A break in the chain of custody does not require automatic exclusion of the evidence. *People v White*, 208 Mich App 126, 133; 527 NW2d 34 (1994). "[B]reaks in the chain of custody do not require exclusion of the evidence if the prosecution shows that the article is what it is purported to be and shows that it is connected with the crime or the accused." *People v Prast*, 114 Mich App 469, 490; 319 NW2d 627 (1982). Once a proper foundation is established for a piece of evidence, issues with the chain of custody go to the weight of the evidence, not admissibility. *White*, 208 Mich App at 133. Evidence was presented to show that the evidence was exactly what it was purported to be: defendant's sweater. Defendant did not deny that at trial. Rather, the existence of defendant's sweater and the victim's DNA on the sweater corroborated defendant's testimony that he gave the victim his sweater before she walked home. The trial court did not abuse its discretion in receiving the sweater into evidence.

Defendant finally claims that he was denied the effective assistance of counsel because his trial counsel failed to move to quash the information. This claim was not preserved below, and we find that a motion to quash the information would have been meritless. There was sufficient evidence presented at the two preliminary examinations to establish probable cause that a felony was committed and that defendant committed it. Where sufficient evidence existed at the preliminary examination to support a bindover, defense counsel was not ineffective for failing to file a motion to quash or seek dismissal of the charges--such actions would be "frivolous or meritless." *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Defendant's claim is without merit.

² Administrative Order No. 2004-6, Standard 4

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering