

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAQUAN CASEY DURANT,

Defendant-Appellant.

UNPUBLISHED
November 7, 2006

No. 261606
Jackson Circuit Court
LC No. 02-001746-FH

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of second-degree home invasion, MCL 750.110a(3). Because defendant received a fair trial and was not deprived of his right to effective assistance of counsel, we affirm.

Defendant was accused of aiding and abetting in the break-in of a house and the subsequent removal from that house of two television sets, a video game console, and several video games. Defendant claimed that his roommate, Derry Sims, stole a television from him and sold it to a resident at the house. He then went to the home with Sims to retrieve the television, and Sims broke into the house, removing the items while defendant and others waited in a car outside. A jury found defendant guilty of the charged offense.

Defendant's conviction was set aside by the trial court for insufficient evidence, but was later reinstated by this Court upon the prosecution's appeal. *People v Durant*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2003 (Docket No. 243023). Subsequently, defendant was sentenced as a second offense habitual offender, 769.10, to a term of 12 to 247 months in prison.

Defendant first argues that he was denied a fair trial by comments made by the prosecutor during his rebuttal closing argument. Specifically, defendant asserts that the prosecutor read from a police report that had not been admitted into evidence. Plaintiff responds, however, that this claim of error is precluded by the law of the case doctrine. We agree.

"The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker ex rel Estate of Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). Under this doctrine, the previous decision of an appellate court should be followed, even if the decision was

erroneous, in order to “‘maintain consistency and avoid reconsideration of matters once decided’” *The Meyer and Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Ctr*, 266 Mich App 39, 52; 698 NW2d 900 (2005), quoting *Bennett v Bennett*, 197 Mich App 497, 499-500; 496 NW2d 353 (1992). Whether the law of the case doctrine applies is a question of law subject to de novo review. *Ashker, supra*.

In the prior appeal, this Court concluded that “[t]here was sufficient evidence to support the conviction.” *Durant, supra*, slip op p 2. However, the Court then went on to address the issue of prosecutorial misconduct:

The dismissal was not based on prosecutorial misconduct. Defendant did not object to the prosecutor’s argument that was unsupported by the evidence. To avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction. An objection could have led to an instruction to the jury to ignore the prosecutor’s statement, and this would have cured the error. [*Id.* (citations omitted).]

While this Court’s analysis of the issue begins with a simple statement that the trial court’s dismissal was not based on a claim of prosecutorial misconduct, it then goes on to analyze the claim of misconduct under the plain error standard. It concluded that because a timely objection would have cured any error, there was no prejudicial effect (and impliedly no plain error affecting substantial rights). Accordingly, because the issue was decided, the law of the case doctrine applies.

If this issue had not been previously decided by another panel of this Court, we would feel compelled to address the prosecutor’s conduct in this matter. During his rebuttal closing argument, the prosecutor read a portion of the police report to the jury wherein it was indicated that defendant told a police officer that Sims went back into the home after recovering defendant’s television and got a second television that did not belong to him, along with the Playstation and games. The only indication that defendant was aware the second television and other property did not belong to Sims came through the prosecutor’s reading of the police report. Although the officer who generated the report testified as a witness, he made no mention of that particular statement allegedly made by defendant. Given that the prosecutor was apparently holding and reading from a document that the officer had referred to while testifying as a witness, and that his reading of the police report in rebuttal closing was the last information the jury received, we have grave concerns regarding whether the jury perceived the prosecutor’s unrefuted and improper comment as fact.

Defendant next argues that he was denied the effective assistance of counsel due to his counsel’s failure to object to the challenged comments made by the prosecutor in his rebuttal closing. We disagree.

Claims of ineffective assistance of counsel involve a mixed question of law and fact. The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). This Court reviews the trial court’s factual findings

for clear error, and the trial court's constitutional determinations are reviewed de novo. *Id.* If a claim of ineffective assistance of counsel is not preceded by an evidentiary hearing or a motion for new trial before the trial court, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was so deficient that counsel did not function as the counsel guaranteed by the Sixth Amendment, and that the deficient performance prejudiced the defense to the point where the defendant was deprived of a fair trial and a reliable result. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The defendant must also show "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.*

We believe that counsel's failure to object to the challenged argument was objectively unreasonable. We can see no reasonable trial strategy in failing to raise a timely objection to the prosecutor's comments. These comments were made in the prosecutor's rebuttal closing, so defendant did not have an opportunity to respond in argument to the jury. Further, it seems unlikely that the lack of objection was motivated by a desire not to draw attention to the matter. The prosecutor's comments were not made in a brief aside or were not obscured by other argument, so it is likely that he had the jury's full attention when quoting from the police report.

The issue of whether the requisite prejudice has been shown is more problematic. On the one hand, as Judge Cooper observed in her *Durant* dissent, "The prosecutor's unrefuted and improper comments on a disputed element of the charged crime right before the jury began deliberations[] were extremely prejudicial . . ." *Durant, supra*, slip op p 2 (Cooper, P.J., dissenting). Moreover, the trial court's instruction that the jury should return a "verdict based only on the evidence" and that "the lawyer's statements and arguments are not evidence" arguably does not cure any error because the prosecutor was quoting directly from a police report that the officer who compiled it was holding during his testimony. Arguably, the jury could have perceived the prosecutor's argument as commenting on the evidence. On the other hand, as Judge Cooper acknowledged, "the jury could arguably have inferred [from the evidence adduced] that defendant knew the additional items taken from the home were stolen . . ." *Id.* Indeed, the *Durant* majority concluded that sufficient evidence was adduced to "infer that defendant knew neither he nor his accomplice owned" the additional items taken. *Durant, supra*, slip op p 2.

Given the weight of the evidence, we conclude that despite the timing of the improper comments, defendant fails to establish a reasonable probability that the outcome would have been different but for counsel's errors. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Taking into account the circumstances in which the items were taken and the fact that they were stored at defendant's residence even though only the one television set allegedly belonged to him, the requisite knowledge can reasonably be inferred from the evidence. Accordingly, the trial court did not err in denying defendant's motion for a new trial.

Defendant next claims that several errors and omissions were made with respect to the jury instructions given by the court after the close of the proofs. Specifically, defendant objects to the court's giving a modified version of CJI2d 8.3 (separate crime within the scope of common unlawful enterprise), and its failing to sua sponte give CJI2d 7.5 (claim of right) and 8.5 (mere presence insufficient). We review jury instructions in their entirety to determine if error requiring reversal occurred. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000).

We first address plaintiff's assertion that defendant's challenge to the jury instructions has been waived. Plaintiff contends that defendant has waived this issue in its entirety by specifically stating that he had only one objection to the instructions when the trial court asked defense counsel for "comments on the instructions." In response to the trial court's query, defense counsel stated that "[t]he only thing I didn't hear . . . was a curative instruction" with respect to some improper statement made by the prosecutor in his opening statement. Following the court's answer, defense counsel did not assert any further objections.

"Waiver has been defined as 'the "intentional relinquishment or abandonment of a known right."' It differs from forfeiture, which has been explained as 'the failure to make the timely assertion of a right.'" *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citations omitted). This is an important distinction because one who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, because his waiver has extinguished any error. *Id.* Forfeiture, on the other hand, does not extinguish an error. *Id.*

In essence, plaintiff argues that defense counsel's statement, "[t]he only thing I didn't hear," implies affirmative approval of the rest of the instructions. However, such an implied, passive approval, given after being asked for "comments on the instructions," is not "consistent with the proactive description of waiver," *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996), provided for above. Rather, defense counsel's statement is more akin to saying "the only objection I have." Further, while the prosecutor was asked whether he had "[a]ny corrections, deletions, additions," defense counsel was only asked for "comments." Defense counsel was not specifically asked whether he had any objections. Contrast *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Because defendant did not affirmatively approve the court's instructions and did not voice any further objections following his request that the court give a curative instruction regarding the prosecutor's opening statement, we conclude that defendant's challenges based on CJI2d 8.3 and 7.5 have been forfeited but not waived.

However, defendant's allegation of error based on CJI2d 8.5 has been waived. During deliberations, the jury sent out the following note: "Please clarify if he had to be the driver to be aiding and abetting or just be present in the car." The court informed counsel that he would respond as follows: "Okay, my response says, quote, 'He needed to be the driver to be an aider and abettor.' . . . 'Mere presence is not enough.'" In response to being informed that this was how the court would respond to the jury's question, defense counsel stated, "Outstanding, Judge. . . . Terrific." This constitutes an affirmative waiver of the challenge. *Carter, supra*, at 215. In any event, the court's instruction encapsulates the essence of CJI2d 8.5.

Because defendant's challenges based on CJI2d 8.3 and 7.5 have been merely forfeited, we review whether the failure to give the instructions constitutes error. CJI2d 7.5 provides in relevant part as follows:

(1) To be guilty of [larceny], a person must intend to steal. In this case, there has been some evidence that the defendant took the property because [he] claimed the right to do so. If so, the defendant did not intend to steal.

(2) [A claimed right] exists if the defendant took the property honestly believing that it was legally [his] or that [he] had a legal right to have it.

(3) . . . It does not matter if the defendant was mistaken or should have known otherwise. [It also does not matter if the defendant used force or trespassed to get the property or if [he] knew that someone else claimed the property.]

(4) The defendant does not have to prove [he] claimed the right to take the property. Instead, the prosecutor must prove beyond a reasonable doubt that the defendant took the property without a good-faith claimed right to do so.

Plaintiff conceded at trial that defendant believed he was operating under the presumption that he had a legal right to retrieve his television set. "And arguably," the prosecutor acknowledged in his closing argument, "you could say from the defendant's perspective that he has no intent to steal because it's his TV. We'll give him that for the sake of argument." Rather, the prosecutor argued, "the key to this case is the second trip into the house." Thus, plaintiff's theory of the case did not encompass the first television taken (defendant's television), but the other items taken from the victim's house. Defendant never claimed to have a legal right to this property or to honestly believing it was his. Thus, because CJI2d 7.5 did not apply to the facts of the case, no error, plain or otherwise, occurred with respect to the failure to sua sponte instruct the jury on the claim of right defense.

With respect to CJI2d 8.3, defendant argues that the trial court incorrectly gave a modified version of this instruction to the jury. CJI2d 8.3 provides, in part, that "it is not sufficient for the prosecutor just to prove that the defendant intended to help another in the common unlawful activity of [common criminal enterprise]. It is necessary that the prosecutor prove beyond a reasonable doubt that the defendant intended to help someone commit the charged offense of [second-degree home invasion]." The challenged instruction is as follows:

In determining whether the Defendant intended to help someone else commit the charged offense of home invasion second degree, you may consider whether that offense was fairly within the common unlawful activity of home invasion second degree; that is whether the defendant might have expected the charged offense to happen as a part of that activity. There can be no criminal liability for any crime not fairly within common, unlawful activity.

As illustrated above, the charged crime of second-degree home invasion and the alleged unlawful common criminal enterprise are one and the same in this matter.

The use note to CJI2d 8.3 provides that “[t]his instruction is intended for use where it is claimed that the defendant is criminally liable as an aider and abettor for a crime committed during the course of a criminal enterprise.” CJI2d 8.3, use note. The use note further provides an example wherein a defendant who acted as a lookout during a breaking and entering was found liable as an aider and abettor for the nonfatal shooting of the building manager by codefendants (*People v Poplar*, 20 Mich App 132; 173 NW2d 732 (1969)). In the present matter, on the other hand, the charged crime is no different than the common criminal enterprise indicated by the trial court. Defendant is correct, then, that the instruction is inapplicable.

Nonetheless, the erroneous giving of CJI2d 8.3 did not result in error requiring reversal. Defendant argues that he was denied a fair trial because the instruction was “confusing.” However, “[e]ven if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). As given, the challenged instruction informed the jury that in determining whether defendant intended to help someone else commit second-degree home invasion, the jury could consider whether it could be reasonably expected that the other person would commit second-degree home invasion as a part of the second-degree home invasion in which defendant was participating. While this may be somewhat confusing, it did not undermine the validity of the instructions as a whole. The jury was properly instructed on the elements of the crime, that defendant ““needed to be the driver to be an aider and abettor”” and that ““[m]ere presence [in the car] is not enough,” and that “[f]acts can . . . be proven by indirect or circumstantial evidence.” In essence, the challenged instruction simply identified a circumstance that could be used to infer the requisite intent.

Lastly, defendant’s claim of ineffective assistance of counsel based upon counsel’s failure to object to the alleged errors in the jury instructions is without merit. As noted, the court’s mere presence instruction was sufficient. Further, CJI2d 7.5 was not applicable under the facts of the case and the arguments advanced by the parties. “A trial attorney need not register a meritless objection to act effectively.” *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). And while a version of CJI2d 8.3 should not have been given under the circumstances, defendant fails to establish the requisite prejudice when the instructions are viewed as a whole.

Affirmed.

/s/ David H. Sawyer
/s/ Deborah A. Servitto

I concur in result only.

/s/ Kurtis T. Wilder