

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REINALDO CLAUDIO,

Defendant-Appellant.

UNPUBLISHED

December 18, 2007

No. 273007

Kent Circuit Court

LC No. 06-001272-FH

Before: Bandstra, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, and first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent terms of nine to 30 years' imprisonment for first-degree home invasion and five to 15 years' imprisonment for assault with intent to do great bodily harm less than murder. We affirm.

Defendant first argues that the prosecutor failed to present sufficient evidence from which a rational jury could have found beyond a reasonable doubt that defendant committed assault with intent to do great bodily harm less than murder. We review challenges to the sufficiency of the evidence de novo and, in doing so, "view the evidence in a light most favorable to the prosecution to determine whether the [trier of fact] could have found that the essential elements of the crime were proved beyond a reasonable doubt." See *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). Circumstantial evidence and the reasonable inferences that arise therefrom can constitute sufficient proof of the elements of a crime. *People v Lugo*, 214 Mich 699, 710; 542 NW2d 921 (1995). A conviction of assault with intent to do great bodily harm less than murder requires proof of: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). A defendant's intent may be inferred from all the facts and circumstances surrounding the crime. See *Lugo, supra* at 709-710. The intent to do great bodily harm less than murder "has been defined as an intent to do serious injury of an aggravated nature." *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

Defendant argues that the prosecutor failed to produce evidence showing that defendant intended to inflict great bodily harm on the victim, because the injuries were not serious. Although defendant testified that he did not possess a knife, the victim testified that defendant

took his knife and stabbed him in the stomach with it. The physicians who treated the victim observed a “puncture wound” in his stomach. This Court has previously determined that the intent to do physical harm can be inferred from the fact that a defendant used a dangerous weapon. *People v Crane*, 27 Mich App 201, 204; 183 NW2d 307 (1970). Furthermore, the victim’s girlfriend testified that, shortly before the assault occurred, codefendant Donnell Williams informed her during a telephone conversation that “it was curtains for” the victim, because Williams and his roommate, defendant, “were going to jump him” because of some stolen drugs. A reviewing court must make credibility choices in support of the jury’s verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Given the difficulty of proving state of mind, minimal circumstantial evidence is sufficient to prove that an actor had the requisite intent. *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985). The evidence presented at trial supported the jury’s verdict that defendant had the requisite intent to do great bodily harm less than murder.

Defendant next argues that the prosecutor failed to present sufficient evidence from which a rational jury could have found beyond a reasonable doubt that defendant committed first-degree home invasion. 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).

On appeal, defendant solely asserts that the prosecutor failed to present sufficient evidence to prove the element of entry without permission. “Without permission” means “without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling.” MCL 750.110a(1)(c). Defendant argues that the evidence at trial showed that codefendant Williams generally had permission to enter the victim’s apartment, and that, on the night of the incident, the victim’s girlfriend implicitly allowed defendant and Williams to enter her apartment when she instructed codefendant Williams to discuss his accusations against the victim directly. However, at trial, the victim’s girlfriend denied that she granted Williams or defendant permission to enter her apartment during a telephone conversation and denied that they had permission to enter her apartment “unannounced.” A victim’s testimony alone may be sufficient evidence to support the elements of a crime. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). It is the jury’s duty to determine the credibility of the witnesses, and this Court will not interfere with that determination. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). This Court resolves all conflicts regarding the credibility of witnesses in support of the jury’s verdict, *Nowack, supra* at 400, and not in the light most favorable to defendant. We reject defendant’s sufficiency of the evidence argument.¹

¹ In the context of his sufficiency of the evidence arguments, defendant makes additional arguments concerning the submission of an armed robbery charge to the jury and concerning a particular jury instruction. We decline to address these arguments because they were not properly submitted as separate issues or properly raised in the statement of questions presented (continued...)

Defendant next argues, in propria persona, that he was denied his due process right to a fair trial by prosecutorial misconduct. We disagree. Generally, this Court reviews claims of prosecutorial misconduct on a case-by-case basis, examining the prosecutor's remarks in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). However, because the alleged errors were not preserved by contemporaneous objections and requests for a curative instruction, appellate review is for plain error. *Id.* To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error must have occurred; (2) the error must have been clear or obvious; and (3) the error must have affected the defendant's substantial rights, which generally requires the defendant to show that the error affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 763; 597 NW2d 130 (1999). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764. Further, no error requiring reversal will be found if a curative instruction could have prevented any prejudicial effect. *Watson*, *supra* at 586.

Defendant first argues that the prosecutor committed misconduct by bringing multiple charges against him for one criminal transaction. "A prosecutor has broad discretion when charging defendants, and it is generally permissible [for a prosecutor] to charge in a single information all offenses which do arise out of a single criminal transaction or occurrence." *People v Goold*, 241 Mich App 333, 342; 615 NW2d 794 (2000) (internal citations and quotation marks omitted); see also *People v Venticinqe*, 459 Mich 90, 100-101; 586 NW2d 732 (1998). A prosecutor is prohibited from artificially dividing a single major offense into an unreasonable number of related components, because the division is likely to have a coercive effect on the jury. *People v Wells*, 102 Mich App 122, 132; 302 NW2d 196 (1980). However, this Court will not find that a prosecutor abused the power of charging where there is evidence to support each charged crime. See, generally, *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004).

The evidence presented at trial supported each of the charged counts, and those counts were distinct. Our Legislature intended to allow multiple punishments if a defendant commits first-degree home invasion and another crime in the same incident. *People v Conley*, 270 Mich App 301, 311-312; 715 NW2d 377 (2006). Under the circumstances, where defendant was charged only with the home invasion and distinct crimes that occurred in the same incident, the prosecutor did not abuse his power in issuing the charges. See *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996) (discussing prosecutorial discretion).

Defendant next argues that the prosecutor committed misconduct by bolstering the testimony of the victim when, during his opening statement, the prosecutor discussed his theory regarding the use of the knife. Improper bolstering of the credibility of a prosecution witness may constitute prosecutorial misconduct. *People v Malone*, 180 Mich App 347, 361; 447 NW2d 157 (1989). Defendant has not shown that any alleged bolstering occurred during the prosecutor's opening statement. The opening statement fulfilled its purpose, to inform the jury

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for appeal. See *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999); see also MCR 7.212(C)(5).

of the facts the prosecutor intended to elicit. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). Contrary to defendant's argument, the prosecutor's opening statement did not contain a suggestive, misleading statement involving a pocketknife's being connected to the case when it was not. The testimony of the victim indicated that the knife was used in the crime.

Next, defendant argues that the prosecutor committed misconduct by introducing false testimony by the victim. The prosecution has a constitutional duty to report the false testimony of its witnesses and may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Absent proof that the prosecution knew that the trial testimony was false, however, there is no due process violation. *People v Herndon*, 246 Mich App 371, 417-418; 633 NW2d 376 (2001). Defendant does not establish that any of the victim's testimony was false or that the prosecutor knowingly used false testimony. Furthermore, this Court has previously determined that the mere fact that a witness's testimony conflicts with earlier statements does not establish that a prosecutor knowingly presented perjured testimony. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998).

Next, defendant argues on appeal that his right to be free from multiple punishments for the same offense was infringed upon by his conviction for both first-degree home invasion and assault with intent to do great bodily harm. Because defendant failed to properly preserve this issue, this Court reviews for plain error, which affected defendant's substantial rights. *People v Barber*, 255 Mich App 288, 291; 659 NW2d 674 (2003). Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15.

The Double Jeopardy Clause affords individuals three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. The first two protections are generally understood as the "successive prosecutions" strand of double jeopardy, while the third protection is commonly understood as the "multiple punishments" strand. [*People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007) (internal citation and quotation marks omitted).]

The first-degree home invasion statute provides that the imposition of a penalty for home invasion "does not bar imposition of a penalty under any other applicable law." MCL 750.110a(9). This Court already determined that the Legislature clearly intended, by that language, to impose multiple punishments. *Conley, supra* at 311-312; *People v Shipley*, 256 Mich App 367, 378; 662 NW2d 856 (2003). Thus, defendant's sentences for first-degree home invasion and assault with intent to do great bodily harm did not violate defendant's right to be free from multiple punishments for the same offense.

Defendant next argues that the trial court committed plain error in scoring defendant's sentencing guidelines. Defendant first argues that prior record variable (PRV) 1, MCL 777.51, was scored inaccurately because the trial court based its decision to score 25 points on an armed robbery conviction that occurred in 1992, which was more than ten years before the instant crime, in violation of MCL 777.50. Defendant received 25 points for PRV 1, which reflects that defendant had one prior high severity conviction. MCL 777.51(1)(c).

The presentence investigation report (PSIR) indicates that, on April 23, 1993, defendant was convicted of one count of armed robbery and one count of burglary, in Illinois. For the count of armed robbery, defendant was sentenced to seven years' imprisonment. Significantly, the pertinent ten-year period runs from defendant's date of discharge of that conviction. MCL 777.50. Defendant has failed to establish that his discharge occurred outside of the ten-year period. Defendant has not established the existence of plain error.

Defendant next argues that the trial court erred in scoring 25 points for offense variable (OV) 1, MCL 777.31, involving aggravated use of a weapon. However, the trial court sustained defendant's objection to the scoring of 25 points for OV 1 at the sentencing hearing and instead scored ten points for OV 1. MCL 777.31 provides that a trial court should score ten points for OV 1 if "[t]he victim was touched by any other type of weapon." There was evidence that defendant received a puncture wound in his stomach when defendant thrust a knife at him during the assault. There was also evidence that defendant used a chair to strike the victim. A trial court's scoring decision will be upheld if there is any evidence in the record to support it, as there is here. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

Defendant also argues that the trial court erred in scoring five points for OV 2, MCL 777.32. OV 2 is to be assessed at five points if "[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon." MCL 777.32(1)(d). As mentioned above, there was evidence that the victim received a puncture wound in his stomach when defendant thrust a knife at him during the assault. Again, a trial court's scoring decision will be upheld if there is any evidence in the record to support it, as there is here. *Kegler, supra* at 190.

Defendant next argues that the trial court erred in scoring ten points for OV 3, MCL 777.33, which provides that a trial court is required to score ten points if the victim suffered bodily injury requiring medical treatment. MCL 777.33(1)(d). While defendant argued that the injuries suffered by Jaworowicz did not require medical treatment, the evidence produced at trial showed that somebody telephoned emergency services after the assault to request treatment and that Jaworowicz was kept in the hospital for 24 hours after the assault. Thus, there was evidence in the record to support the trial court's scoring determination, and we therefore affirm it. *Kegler, supra* at 190.

Defendant next argues that the complaint should have been quashed, because the victim did not personally sign the complaint. However, the complaint contained the substance of the accusations against defendant and the name and statutory citation for the charged offenses, which is all that is required. MCL 764.1d; MCR 6.101(A). Furthermore, the complaint was signed by the complaining witness, Detective Les Smith. Personal knowledge of the complaining officer is not necessary if the officer's testimony comes from information and belief. MCL 764.1a(3). Therefore, defendant's argument is without merit.

Defendant finally argues that he was denied the effective assistance of counsel. We disagree. The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel, defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of defendant's trial would have been different, and (3) the proceedings were fundamentally unfair

or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant asserts that his trial counsel was ineffective for failing to object to the alleged prosecutorial misconduct, for failing to move for a mistrial based on the alleged double jeopardy violations, for failing to move the trial court to rule, as a matter of law, that the victim’s puncture wound was caused by the leg of a chair, for challenging the trial court’s scoring of defendant’s guidelines, and for failing to move to quash the complaint. As mentioned above, those claims lack merit. Therefore, any objection would have been futile. Defendant’s trial counsel will not be deemed ineffective for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Affirmed.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter
/s/ Jane M. Beckering