

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DWAYNE ABERNATHY,

Defendant-Appellant.

UNPUBLISHED
February 26, 2004

No. 243745
Macomb Circuit Court
LC No. 2001-003613-FH

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and aggravated assault, MCL 750.81a. He was sentenced to concurrent prison terms of five to twenty years for the home invasion conviction and 329 days for the assault conviction. He appeals as of right. We affirm defendant's convictions, but remand for resentencing.

Defendant argues that there was insufficient evidence to convict him of first-degree home invasion. A challenge to the sufficiency of the evidence at a bench trial is reviewed de novo on appeal. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39; 642 NW2d 339 (2002). This Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001).

Defendant does not dispute that he entered the home of the complainant, his former wife, without her permission. Rather, he argues that the evidence was insufficient to establish his intent when he entered. We disagree. The State charged that defendant assaulted the complainant "while entering, present in, or exiting" her home and that the complainant was "lawfully present." Therefore, the prosecution was not required to prove defendant's intent at the time of entry, but that an assault occurred while defendant was present in the home of the complainant.

The evidence sufficiently established that defendant assaulted the complainant while present inside her residence. The plain language of MCL 750.110a sets forth the following elements: (1) that the defendant broke and entered into a dwelling or entered a dwelling without permission; (2) that when the defendant did so, he either intended to commit a felony, larceny, or

assault *or* actually committed a felony, larceny, or assault while entering, exiting, *or present in* the dwelling; and (3) that when the defendant entered, was present in, or was leaving the dwelling, either he was armed with a dangerous weapon or another person was lawfully present in the dwelling. (Emphasis added). In the instant case, the prosecution charged that defendant assaulted the complainant “while entering, present in, or exiting” her home and that the complainant was “lawfully present.” Therefore, the prosecution was not required to prove defendant’s intent at the time of entry.

At trial, the complainant’s testimony established that defendant entered her residence, while she was present, and without her permission. Her testimony also established that, while defendant was inside, he assaulted her. An assault is “either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.” *People v Reeves*, 458 Mich 236, 240; 580 NW2d 433 (1998). According to the complainant, after defendant entered her residence without her permission, he dragged her up the stairs by her hair, threw her on the bed, and pinned her there with his body. He then bit her on her lip, causing injury. The complainant further testified that she feared that defendant would rape or kill her, which was not unreasonable, given defendant’s conduct. The evidence was sufficient to establish that defendant assaulted the complainant.

Because the evidence sufficiently established that defendant entered the complainant’s residence without her permission, that he then assaulted her while present in the residence, and that the complainant was lawfully present in her own residence, there was more than sufficient evidence to support defendant’s conviction of first-degree home invasion.

Defendant next asserts that the trial court’s verdict is logically inconsistent. In addition to first-degree home invasion, defendant was also charged with assault with intent to maim. The court determined, however, that the evidence did not establish that defendant assaulted the complainant with the specific intent to maim and convicted defendant of the lesser offense of aggravated assault. Defendant maintains that aggravated assault is a general intent misdemeanor that cannot serve as the basis for a conviction of first-degree home invasion. However, defendant’s argument rests on the faulty assumption that, for purposes of first-degree home invasion, the intent to commit an assault must exist at the time of entry. As previously noted, the plain language of the home invasion statute, MCL 750.110a, does not require only that a defendant enter a dwelling with the specific intent to commit a felony, larceny, or assault therein. Rather, the actual commission of a felony, larceny, or assault while present in the dwelling may suffice to establish first-degree home invasion. Further, the statute does not require that an assault for purposes of first-degree home invasion be a felony. Instead, it specifically differentiates between the commission of an assault and the commission of a felony or larceny. The Legislature is presumed to have intended the meaning it plainly expressed. *People v Petty*, 469 Mich 108, 114; 665 NW2d 443 (2003). Therefore, we reject defendant’s argument that there is a logical inconsistency in the trial court’s verdict, finding defendant guilty of first-degree home invasion and a misdemeanor assault.

Defendant also challenges the trial court’s statement that “[h]e did enter the dwelling without permission with the intent to commit an assault.” Although the home invasion statute does not necessarily require a specific intent upon entering the dwelling, and while the prosecution’s view of the case was that, after defendant entered the complainant’s residence without her permission and while she was lawfully present, he committed an assault while

present therein, the trial court could still reasonably infer from the evidence that defendant intended to assault the complainant. The evidence showed that defendant forced his way inside the residence and “started fighting” with the complainant; shortly thereafter he dragged her upstairs by the hair while cursing at her. According to the complainant, the entire incident lasted between ten and fifteen minutes. Although the prosecutor suggests that the trial court misspoke in stating that defendant entered the complainant’s residence with the intent to assault her, the statement is not clearly in error, given the immediacy of defendant’s conduct upon entry into the home of the complainant. Ultimately defendant’s argument fails because it is immaterial whether the trial court misspoke. Defendant’s argument fails to take into consideration the fact that the trial court additionally found that defendant actually assaulted the complainant while she was lawfully present inside her dwelling, which alone is sufficient to establish first-degree home invasion.

Finally, defendant argues that the sentencing guidelines were scored incorrectly, resulting in a sentence that exceeded the properly scored sentencing guidelines range. In particular, he challenges the scoring of twenty-five points for Prior Record Variable (PRV) 1 (prior high severity felony convictions), contending that this variable should have been scored at zero points rather than twenty-five, that PRV 2 (prior low severity felony convictions) should have been scored at ten points rather than five, and that PRV 5 (prior misdemeanor convictions) was correctly scored at ten points. If scored in this manner, defendant would have fallen in PRV level C, rather than D, and the resulting guidelines range would have been thirty to fifty months, rather than fifty-one to eight-five months as scored at sentencing. Thus, defendant maintains that his minimum sentence of five years (sixty months) exceeds the properly scored guidelines range.

To preserve an issue challenging the scoring of the sentencing guidelines for appellate review, a party must raise the issue at or before sentencing or demonstrate that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. MCR 6.429(C); *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999). Defendant did not challenge the scoring of PRV 1 at or before sentencing, and his attorney stated that he had reviewed the sentencing guidelines, found that they were accurately scored, and had no objections. Defendant also has not demonstrated that he brought this scoring challenge as soon as the alleged inaccuracy could reasonably have been discovered. Therefore, defendant has not preserved the scoring challenge for appeal. MCR 6.429(C); *Cain*, *supra* at 129.

Nonetheless, this Court may review an unpreserved sentencing guidelines issue for plain error affecting substantial rights. *People v Kimble*, 252 Mich App 269, 275-276; 651 NW2d 798 (2002), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The defendant bears the burden of establishing both plain error and prejudice, and reversal is not warranted unless the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Kimble*, *supra* at 277-278, citing *Carines*, *supra* at 763.

Defendant’s presentence investigation report (PSIR) indicates that defendant has two prior felony convictions, both in the state of Texas: (1) a 1995 conviction for attempt to commit robbery; and (2) a 1997 conviction for burglary of a building. Defendant correctly argues that his 1995 attempt to commit robbery conviction does not constitute a high severity conviction for purposes of PRV 1. A “‘prior high severity felony conviction’ means a conviction for a crime listed in offense class M2, A, B, C or D, or for a felony under a law of the United States or another state corresponding to a crime listed in offense class M2, A, B, C, or D, if the conviction

was entered before the sentencing offense was committed.” MCL 777.51(2). An attempt to commit a class A, B, C, or D offense is classified as a class E offense. MCL 777.19(3)(a); Michigan Sentencing Guidelines Manual, 1999 Ed, p 142. A prior conviction for a class E offense is considered a “prior low severity felony conviction” and, therefore, should be scored under PRV 2. MCL 777.52. Thus, because armed robbery is a class A offense and unarmed robbery is a class C offense, attempted robbery, whether armed or unarmed, would be a class E offense and, therefore, is to be scored under PRV 2, not PRV 1.

The prosecutor argues that PRV 1 was properly scored at twenty-five points because of defendant’s prior Texas conviction for burglary of a building, which the prosecutor asserts is analogous to Michigan’s breaking and entering statute, MCL 750.110, a class D offense under the guidelines. But the record indicates that the burglary conviction was determined to be a low severity conviction and was scored under PRV 2. This is reflected in the PSIR, wherein the burglary of a building conviction is listed as a “Property/G” offense, while the attempt to commit robbery conviction is listed as a “Person/D” offense. The prosecutor did not challenge the designations for these prior convictions at sentencing. Thus, it is apparent that the twenty-five point score for PRV 1 was based solely on the attempted robbery conviction.

We find that plain error, in the sense of “clear or obvious” error, *Carines, supra* at 763, occurred at sentencing. The error in scoring defendant’s attempted robbery conviction as a high severity offense is plain. As in *Kimble, supra* at 276, the trial court, defense counsel, and the prosecutor each failed to notice or challenge the error when calculating the guidelines. Further, defendant’s substantial rights were affected because the scoring error affects the minimum sentence range under the guidelines, and the sentence that defendant received exceeds the properly scored guidelines range.¹ Additionally, where a defendant receives a longer sentence than legislatively mandated because of a plain scoring error, we believe that the fairness and integrity of the judicial proceedings against him have been seriously affected. *Kimble, supra* at 277-278. Therefore, we vacate defendant’s sentence for first-degree home invasion and remand for resentencing.

Defendant also argues that his attorney was ineffective for failing to challenge the scoring of PRV 1 before the trial court. Having concluded that defendant is entitled to resentencing, we need not address this issue.

Defendant’s convictions are affirmed and the matter is remanded for resentencing. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski

¹ At sentencing, the trial court stated, “The sentence I’m going to impose falls right within the guidelines.”