STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 1, 2012
V	No. 301349 Berrien Circuit Court
DECARLOS DARNELL HURESKIN, Defendant-Appellant.	LC No. 2009-004051-FH

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Defendant, Decarlos Darnell Hureskin, appeals by leave granted his jury trial convictions of first-degree home invasion, MCL 750.110a(2), and domestic assault, third offense, MCL 750.81(4). The trial court sentenced defendant as a habitual offender, third offense, MCL 769.11, to 84 months to 40 years imprisonment for his first-degree home invasion conviction and to 2 to 4 years imprisonment for his domestic assault conviction. We reverse and remand for a new trial.

Defendant married his wife Kennisha in June 2007. They have two sons, one of whom was two years old and one who was nine months at the time of the instant matter. Both Kennisha and defendant testified that their marriage was stormy. Kennisha, her mother Adrieann Williams, and defendant all testified that throughout the entire relationship, defendant had a pattern of leaving the family home in Benton Harbor and returning. In late April of 2009, defendant went to stay with a cousin in Grand Rapids. Defendant testified that the family was having money issues and he went to Grand Rapids to find a job. On Saturday, May 2, 2009, defendant called and said he wanted to come to Benton Harbor to take the children to a parade. He did not arrive in time, however, and called twice, with the last time being at 2:00 a.m., still wanting to see the children. Kennisha told defendant the children were asleep and put her phone on vibrate and would not answer it.

Kennisha later heard the door to the house being kicked open. Defendant was thereafter in the house and in Kennisha's face, asking why she did not answer her phone. After she told defendant that she was going to call the police, he took her cell phone and broke it. Kennisha's mother, who had stayed the night, had woken up by then and defendant also took her cell phone. According to Kennisha and her mother, defendant then began beating and kicking Kennisha.

Williams got a steak knife and started stabbing defendant. Both women then managed to get away and ran to the neighbor's house where the police were called.

On appeal, defendant challenges the jury instructions relating to first-degree home invasion. In particular, defendant argues that the trial court erred in failing to instruct the jurors that if they concluded that defendant had the authority and permission to enter the home he could not have broken into the home, and therefore could not be convicted of home invasion. We conclude that defendant waived review of the jury instructions.

When the court was discussing what jury instructions to give, defense counsel did not ask for any regarding whether defendant could be convicted of home invasion for breaking into his own home or into a home that he otherwise had permission to enter. On the charge of first-degree home invasion, the court simply read the jury the four elements of the crime, which essentially state the prosecutor must prove that defendant broke into a dwelling, entered the dwelling, committed an assault while in the dwelling, and that another person was lawfully in the dwelling. After the instructions were read, the court asked defense counsel if he was satisfied with the instructions, to which counsel responded, "No objections." By expressly approving of the instructions as given, defendant has waived the issue of inadequate instructions on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Moreover, while it is true the jury asked for clarification regarding defendant's right to the home, it was defense counsel who asked the trial court to refrain from "editorializing" on the elements of home invasion. Instead, defense counsel insisted that "re-reading the instruction is I think the only appropriate response." After the trial court complied with defense counsel's request and re-read the elements of first-degree home invasion to the jury, defense counsel again indicated there was no objection to the instructions. Given defense counsel's express approval of both the instructions as originally read and trial court's response to the jury's question, defendant has waived the issue and there is no claim of error for this Court to review. *Id. People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000).

Next, however, defendant asserts that he was denied the effective assistance of counsel because trial counsel failed to object to the lack of instruction or request an instruction informing the jury that defendant could not "break" into a home he had the right to enter. Because defendant did not move for a new trial or an evidentiary hearing, his claim is unpreserved and review is thus limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "[A] defendant must show that, but for the error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Furthermore, the effective assistance of counsel is presumed, and "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of

hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Failure to request an instruction may be a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003).

We begin by noting that the instructions as read, taken from CJI2d 25.2a, were in keeping with the elements of proof for first-degree home invasion. Defendant argues additional clarification regarding the meaning of "breaks and enters" should have been requested because the defense theory rested on the notion that defendant had the right to enter the dwelling. Defense counsel argued as much in closing arguments, and defendant testified that he had a key to the residence, that he was not estranged from his wife, and that he left belongings in the home. The defense further asserted that defendant's force in entering the home was necessitated by the family's practice of wedging a piece of metal or some other object into the door to keep the door securely closed.

While MCL 750.110a does not define the phrase "breaks and enters," this Court has held that "[t]here is no breaking if the defendant had the right to enter the building." *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998); see also *People v Brownfield*, 216 Mich App 429, 432; 548 NW2d 248 (1996) ("[E]ven if a defendant enters a building and commits a larceny, he has not committed a burglary when he has the right to enter the building."). Moreover, "[w]hile it is clear only a minimum amount of force is necessary to establish a breaking, it is equally clear that some *unauthorized* force must be exerted." *People v Rider*, 411 Mich 496, 497-498; 307 NW2d 690 (1981)(emphasis added) (citations omitted). And, where, one is given a key with no qualifications on its use, any subsequent use of the key is not considered a breaking. *People v Rider*, 411 Mich 496, 498; 307 NW2d 690 (1981).

Given defendant's claimed defense and proffered evidence, we cannot conceive of any sound trial strategy that would include failing to request an instruction informing the jury that they should find defendant not guilty if the jury determined that defendant had the authority to enter the home. *Rockey*, 237 Mich App 74, 76-77; *Strickland*, 466 US at 688, 694. That defense counsel's performance was objectively unreasonable does not end our inquiry, however, because to establish ineffective assistance of counsel defendant must also establish that there is a reasonable probability that but for counsel's unprofessional error the result of the proceeding would have been different. *Grant*, 470 Mich at 485-486; 684 NW2d 686 (2004).

Defendant's argument that the outcome would have been different relies heavily upon a question posed by the jury during deliberations in which the jury asked:

> Re: a home invasion. The prosecution seemed to make a point of showing the defendant was not a resident of the home so does that mean if the four criteria are met, does it matter if it's the defendant's home or not?

The very fact that the jury sent the question out is strong indication that there is a reasonable probability that the outcome on the home invasion charge would have been different. The jury specifically looked for guidance on the issue of whether, if the home was defendant's, a home invasion could be committed, i.e., can one break into his or her own home? The jury questioning the role that ownership of the home played with respect to home invasion leads to an inescapable conclusion that they were grappling with the question of defendant's possible ownership of or

right to be in the home. The fact that the jury did not get an answer to its question in terms indicated by the ruling in *Rider*, 411 Mich at 498, is also an indication that the result was unreliable.

This is not the type of situation presented in *People v Meissner*, 294 Mich App 438; ___ NW2d __ (2011), where counsel was found to be effective despite not having requested a jury instruction regarding permission to enter in a home invasion case because the record indicated that defense counsel had researched the issue and stated he was satisfied, and there was no jury question concerning whether the home was the defendant's residence. Here, given the jury's question, there is simply no way of knowing whether the jury believed that defendant had a key and attempted to use it or not.

It is true that defendant admitted that some amount of force was used to enter the house. He testified that he tried to use the key, but that he applied force because the door was jammed by the piece of metal put there by his mother-in law. There was also evidence regarding whether his entry was authorized. There was certainly no evidence that Kennisha authorized defendant to kick in the door, but there was evidence that it was still defendant's home as well as Kennisha's.

Kennisha, her mother, and defendant all testified that defendant had a pattern of leaving and then returning. Kennisha also testified that because of defendant's pattern of behavior, it was not unexpected that defendant would show up at the home. There was also evidence that defendant had a set of keys. There was also testimony that defendant left many of his personal belongings in the home when he left for Grand Rapids, and that he went to Grand Rapids only to find a job so he could move his family out of Benton Harbor. Further, Kennisha testified (without objection) that approximately a week before the incident, she attempted to file for a personal protection order against defendant but that the judge denied the request indicating that "he wasn't going to put [defendant] out of his own home." From that, a jury could reasonably conclude that the home he entered was defendant's own home.

There was also evidence from which the jury could have reasonably concluded that defendant had permission to enter the house even if it was no longer his residence. Kennisha testified that when defendant first said he was coming to Benton Harbor to take the children to the parade, she told him that the children were at home with her mother, thus implying that defendant was free to go to the house and pick them up. Williams testified that defendant and Kennisha were not fighting when defendant went to Grand Rapids, thus implying that defendant did not leave because of some argument with Kennisha. Williams also testified that when defendant would return to Benton Harbor, he would get into the home with his own key or Williams or Kennisha would let him in. And, there was no evidence that Kennisha had placed any qualifications or restrictions on defendant's use of the key. In short, considering the totality of the evidence, a reasonable jury could conclude defendant had the authority to enter the home. As a result, the verdict was fundamentally unfair and/or unreliable absent an additional instruction that the jury should find defendant not guilty of home invasion if it determined that he had the authority or permission to enter the home.

Finally, in a Standard 4 brief, defendant challenges the sufficiency of the evidence supporting his first-degree home invasion conviction. However, defendant's brief raises an issue

beyond the scope of his application for leave to appeal, MCR 7.205(D)(4), and is, therefore, not properly before this Court for review.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens