STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2012
v	No. 305107 Wayne Circuit Court
JAMES MICHAEL GEIERMAN, Defendant-Appellant.	LC No. 11-002420-FH

Before: CAVANAGH, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of first-degree home invasion, 750.110a(2), and felonious assault, MCL 750.82. We affirm in part, reverse in part, and remand.

According to the record evidence, Jacob Cholomdeley was asleep on a couch in his house, within feet of the door, when defendant "kicked open" the door, and came into the house "screaming" something about Jacob's younger brother, Joshua Kadamus. Defendant was holding "a small club or a bat or something." When asked to describe the item, Jacob testified: "See, I couldn't real - - it was a smaller. Like if it was a bat, it wasn't a full size bat. It was a smaller object from what I'm remembering. It was a while ago." But, according to Jacob, defendant "was brandishing it the entire time as if about to swing with it at any moment." Jacob knew defendant because he was a family acquaintance and Joshua had lived with defendant and his wife for some period of time. Apparently hearing the noise, Joshua entered the room, took the object away from defendant, struck him with it, and then threw it back at defendant. Jacob did not see defendant strike Joshua and Joshua did not testify at the trial. After that, Jacob testified, defendant "had gone from John Wayne to very apologetic." Defendant then exited the house and left in his vehicle.

Jacob and Joshua's sister, who lived upstairs, testified that she was sleeping when she heard "a big boom and then heard yelling and screaming." By the time she opened her door to stand on the stairs, defendant was leaving the house with a "wooden something." She did not know if it was a bat or a stick, but it was light colored wood about a couple feet long and was smaller than a full-sized bat. She noticed that the door was broken and the paneling to the door was broken off. The police also noticed what appeared to be "fresh" damage to the door. A piece of molding was broken and the doorjamb looked split. Two police officers who responded to the scene testified that they saw Joshua, who said he was injured, and they noticed "a red

mark" on his back. When asked what it looked like, one officer responded: "It was long. Probably three or four inches long." His sister also testified that Joshua's "back was red." Thereafter, defendant was charged with first-degree home invasion and felonious assault, and he was convicted. This appeal follows.

Defendant first argues that the evidence was insufficient to prove beyond a reasonable doubt that he was guilty of first-degree home invasion and felonious assault. We agree, in part.

This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial. *People v Lanzo Const Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). On review, we consider "the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012) (citation omitted). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citation omitted). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

The elements of first-degree home invasion, as relevant here, include: (1) entering into a dwelling without permission, (2) when another person was lawfully inside the dwelling, and (3) committing an assault while inside the dwelling. MCL 750.110a(2); *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010). According to the felony complaint and information, defendant was accused of entering the residence without permission and committing an assault while "Joshua Kadamus was lawfully present." The evidence was sufficient to support this conviction.

Jacob testified that defendant kicked open the door to the house. Jacob also testified about the resulting damage to the door, as did his sister and the responding police officers who characterized the damage as "fresh." It is undisputed that several people were in the house at the time defendant kicked open the door, including Joshua. And there was sufficient evidence of assault, which can be established by showing either "an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). Jacob testified that defendant entered the house screaming and carrying "a small club or a bat or something" that he was waving around in a menacing manner, as "if about to swing with it at any moment." And there was testimony about Joshua's claimed injury – a red mark on his back. In light of this evidence, the trial court's conclusion that the elements of first-degree home invasion were proved beyond a reasonable doubt is affirmed.

To establish felonious assault, the prosecutor must prove an assault, with a dangerous weapon, and with the intent to injure or place the victim in reasonable apprehension of an immediate battery. MCL 750.82; *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007). According to the felony complaint and information, defendant was accused of felonious assault because he made "an assault upon Joshua Kadamus with a dangerous weapon, to-wit: a baseball bat, but without intending to commit the crime of murder or to inflict great bodily harm less than the crime of murder." The evidence, even viewed in the light most favorable to the

prosecution, did not support this conviction. *Reese*, 491 Mich at 139. In particular, the evidence did not establish that defendant used a dangerous weapon.

MCL 750.82 prohibits assaults with "a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon." Contrary to the prosecutor's allegation, according to the evidence, defendant did not assault Joshua with a baseball bat. Jacob testified that he saw defendant holding "a small club or a bat or something." When asked to describe the item, Jacob testified: "See, I couldn't real - - it was a smaller. Like if it was a bat, it wasn't a full size bat. It was a smaller object from what I'm remembering. It was a while ago." Jacob's sister testified that defendant had a "wooden something" that was a couple feet long, but smaller than a full-sized bat.

Although not produced, it appears that the object was not of the type typically considered a "dangerous weapon." For example, it does not appear to have been an "object specifically designed or customarily carried or possessed for use as a weapon" or an object "likely to cause death or bodily injury when used as a weapon." See MCL 750.110a(1)(b)(*ii*) and (*iii*). Our conclusion is supported by the evidence that Joshua, apparently without hesitation, immediately took the object away from defendant, struck him with it, and then threw it back at him. Joshua's sister saw defendant leave the house with the object. It is unrealistic to conclude that Joshua would have reacted as he did if defendant had a "dangerous weapon." That is, it is unlikely that Joshua would have immediately attempted to disarm defendant of a "dangerous weapon." And it is even more unlikely that Joshua would have given a "dangerous weapon" back to defendant. Thus, the evidence and reasonable inferences arising from that evidence did not constitute satisfactory proof of the dangerous weapon element of the felonious assault charge. See *Carines*, 460 Mich at 757. Accordingly, defendant's conviction on this charge is reversed.

Next, defendant argues that the prosecutor had an affirmative duty to produce at trial all res gestae witnesses and failed to produce, or show due diligence with regard to producing, Joshua, a res gestae witness; thus, his convictions must be reversed. After review of this unpreserved claim for plain error, we disagree. See *Carines*, 460 Mich at 763; *People v Jackson*, 178 Mich App 62, 66; 443 NW2d 423 (1989).

MCL 767.40a(1) requires the disclosure of "all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers." And, upon request, they must provide reasonable assistance "as may be necessary to locate and serve process upon a witness." MCL 767.40a(5). The prosecutor no longer has an affirmative duty to produce all res gestae witnesses and defendant's reliance on *People v Unsworth*, 43 Mich App 741, 743; 204 NW2d 759 (1972) in support of his argument is misplaced. Before MCL 767.40 was amended in 1986, the statute "was interpreted to require the prosecutor to use due diligence to endorse and produce all res gestae witnesses." *People v Burwick*, 450 Mich 281, 287; 537 NW2d 813 (1995). By amendment, however, "[t]he prosecutor's duty to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *Id*. at 289. Accordingly, defendant has failed to establish plain error and this claim is without merit.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. The felonious assault conviction is vacated. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Pat M. Donofrio