STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v LEONARD JAMES HEFT, Defendant-Appellant.	FOR PUBLICATION December 20, 2012 9:10 a.m. No. 307150 Saginaw Circuit Court LC No. 11-035505-FH

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant Leonard Heft appeals as of right his convictions, following a jury trial, of entering without breaking with intent to commit a larceny (entering with intent to commit a larceny)[1] and conspiracy to commit entering with intent to commit a larceny (conspiracy).[2] We affirm.

I. FACTS

A. BACKGROUND FACTS

Jessie Chavez testified that at 1:30 a.m. on January 24, 2011, he heard pounding noises that he believed were coming from his home at 214 Cambrey. His mother called 9-1-1, and Saginaw Police Officers Mark Walker and Jeffery Madaj responded to the dispatch. Officer Walker testified that he noticed that two people in the area were running, but began walking, which he considered suspicious. Officers Walker and Madaj contacted the individuals, separated them, and took them into the patrol vehicles to investigate.

Officer Walker testified that Heft told him he was just walking around, and that he and co-defendant Adam Kinville had walked from Cronk Street. Officer Walker testified that because Cronk Street was several miles from Cambrey, it was 1:30 a.m., and the temperature was about zero degrees but Heft was breathing hard and perspiring, he "felt like something was

[1] MCL 750.111.

[2] MCL 750.157a.

not right." Officer Madaj questioned Kinville and, based on Kinville's statement and the same facts, he "didn't think [Kinville] was being truthful." Officers Walker and Madaj both testified that they found tracks in the snow and traced them back to 220 Cambrey, the house next door to 214 Cambrey. Officer Walker testified that he compared Heft's boots to the snow prints, and thought they were similar.

The house's door was broken. Inside, the officers saw fresh snow tracks and a pile of heating registers, and saw that the hot water heater was broken off from the pantry. The officers testified that they could not tell when the registers or heater were broken. Several witnesses testified that Kinville resided in 220 Cambrey at some point, but Chavez testified that the house was vacant for 4 to 6 months before January 2011. Chavez testified that he had been inside the house while it was vacant, and was able to just "walk right in."

Officer Madaj testified that Kinville later stated that he went into the house to check on it, because his grandfather owned it. Officer Walker testified that Heft stated that he walked up to the door, but did not enter the house.

Kinville eventually told Officer Madaj that his vehicle was around the corner, and the officers discovered a van parked about one block away. Heft possessed the van's keys and it was registered in his name. Officer Madaj testified that the van contained flooring tools, which a person could use to acquire scrap metal for sale.

B. JURY INSTRUCTIONS AND VERDICT

Kinville's counsel requested that the trial court instruct the jury on entering without permission[3] as a lesser included offense of entering with intent to commit a larceny, and Heft's counsel joined in the request. The trial court declined to issue the instruction. The jury found Heft guilty of entering with intent to commit a larceny and conspiracy. Heft now appeals. The jury found Kinville guilty of the same crimes, but he is not a party to this appeal.

II. NECESSARILY INCLUDED LESSER OFFENSES

A. STANDARD OF REVIEW

This Court reviews de novo questions of law, including whether an offense is a necessarily included lesser offense and whether an instructional error violated a defendant's due process rights under the Fourteenth Amendment.[4]

B. LEGAL STANDARDS

The trier of fact may find a defendant guilty of a lesser offense if the lesser offense is necessarily included in a greater offense.[5] If the trial court does not instruct the jury on a

[3] MCL 750.115.

[4] *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

necessarily included lesser offense, the error requires reversal if the evidence at trial clearly supported the instruction.[6]

However, the trier of fact may only consider offenses that are "inferior to the greater offense charged."[7] The trier of fact may *not* consider cognate lesser offenses: those offenses that contain an element not found in the greater offense.[8] To be a necessarily included lesser offense, the elements necessary for commission of the greater offense must subsume the elements necessary for commission of the lesser offense.[9] The elements of the lesser offense are subsumed when "*all* the elements of the lesser offense are included in the greater offense[.]"[10]

C. STATUTORY LANGUAGE

Under MCL 750.111, it is a crime for a person to enter a variety of locations with the intent to commit larceny:

> Any person who, without breaking, enters any dwelling, house, . . . or structure used or kept for public or private use, or any private apartment therein, with intent to commit a felony or any larceny therein, is guilty of a felony[.]

Thus, the crime has two elements: (1) entering a building or structure without breaking, and (2) the intent to commit a larceny therein.

Under MCL 750.115, it is a crime for a person to enter a variety of private locations without permission from the owner:

> Any person who breaks and enters or enters without breaking, any dwelling, house, . . . or any other structure, whether occupied or unoccupied, without first obtaining permission to enter from the owner or occupant, agent, or person having immediate control thereof, is guilty of a misdemeanor.

Thus, when the prosecution charges a person under MCL 750.115 for entering without breaking without permission, the crime has two elements: (1) entering, (2) without the owner's permission.

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[5] MCL 768.32(1); *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002); *Wilder*, 485 Mich at 41.

[6] *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002).

[7] *Cornell*, 466 Mich at 354.

[8] *Id*. at 355.

[9] *Wilder*, 485 Mich at 41.

[10] *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003) (emphasis supplied); see *People v Smith*, 478 Mich 64, 70-71; 731 NW2d 411 (2007).

D. APPLYING THE STANDARDS

We conclude that entering without permission is not a necessarily included lesser offense of entering with the intent to commit a larceny. The elements of entering with intent to commit a larceny do not entirely subsume the elements of entering without permission.

Heft argues that, because entering without permission is necessarily included in breaking and entering with intent to commit larceny,[11] entering without permission is necessarily included in entering with intent to commit larceny. We disagree. When dealing with a crime that includes alternative elements, this Court must be careful to examine *only* the specific elements necessary to the defendant's charge in our case.[12] When we consider only those elements necessary for a defendant to commit entering without breaking, we must reject Heft's argument.

In *Cornell*, the Michigan Supreme Court held that entering without permission is necessarily included in entering with intent to commit larceny.[13] We must distinguish the Court's decision in *Cornell* because it expressly concerned a situation in which the prosecution charged the defendant with "breaking and entering," not merely entering.[14] A breaking is any use of force, however slight, used to access whatever the defendant is entering.[15] As noted in *Toole*, cited in *Cornell*, "[t]here is no breaking if the defendant had the right to enter the building."[16] Thus, a breaking only exists if the defendant entered *without permission*: "breaking and entering" subsumes the "without permission" element of "entering without permission" because a person cannot commit a breaking with permission. However, simply entering does not subsume this element.

When determining whether the elements of one crime are subsumed in another, "[t]he controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense."[17] The lesser offense of entering without permission contains an additional element—the lack of permission—on which the prosecution would have to prove additional facts that are not necessary for the prosecution to prove entering with intent to commit a larceny. Indeed, the defendants' theories of this case were inconsistent with entering without permission.

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[11] See *Cornell*, 466 Mich at 360.

[12] *Wilder*, 485 Mich at 44-45.

[13] *Cornell*, 466 Mich at 360.

[14] *Id*.

[15] *People v White*, 153 Mich 617, 620; 117 NW 161 (1908); *People v Wise*, 134 Mich App 82, 88; 351 NW2d 255 (1984).

[16] *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998).

[17] *Cornell*, 466 Mich at 354, quoting *People v Torres (On Remand)*, 222 Mich App 411, 419-420; 564 NW2d 149 (1997).

Kinville's theory of the case was that, as he told officers at the scene, he was checking on his grandfather's house, he believed his grandfather owned the house, he used to live in the house, he noticed the door was open, and he went into the house to determine if everything was okay. Heft's attorney also argued in closing that there was no evidence that Heft and Kinville knew that the property was vacant before they entered it, and that Heft was aware that Kinville lived in the property because Kinville's wife is Heft's sister. The prosecution was not required to prove that Heft and Kinville did not have permission to enter the house to prove entering with intent to commit larceny, but would have been required to prove that Heft and Kinville did not have permission to enter the house to prove entering without permission.

Further, for an offense to be a necessarily included lesser offense, "proof of the element or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense."[18] Breaking and entering subsumes entering without permission because "[i]t is impossible to commit the greater offense without first committing the lesser offense."[19] Here, the opposite is true. When faced with a factual situation in which the defendant entered a home *with* permission, a jury could find a defendant guilty of entering with the intent to commit a larceny, but innocent of entering without permission.[20] Here, unlike with breaking and entering, it is not impossible to commit the greater offense without first committing the lesser offense.

Heft argues that entering without permission is a necessarily included lesser offense of home invasion, but this is also inapplicable. In *Silver*, the Michigan Supreme Court held that entering without permission is a necessarily included lesser offense of home invasion.[21] "Entering without permission" is an alternative element of any degree of home invasion, under which the trier of fact can find the defendant guilty of home invasion for entering without permission with a variety of aggravating circumstances.[22] Thus, home invasion subsumes the "without permission" element of entering without permission. As stated above, that element is not subsumed here.

We conclude that under the elements applicable to this case, the trial court did not err when it refused to instruct the jury on entering without permission because entering without permission is not a necessarily included lesser offense of entering (without breaking) with the intent to commit a larceny.

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[18] *Cornell*, 466 Mich at 352, quoting *People v Stephens*, 416 Mich 252, 263; 330 NW2d 675 (1983).

[19] *Cornell*, 466 Mich at 361; *Smith*, 478 Mich at 71, 74.

[20] See *People v St Lawrence*, unpublished per curiam opinion of the Court of Appeals (Docket No. 268639), slip op p 2, in which we concluded that the defendant was properly convicted for entering with intent to commit a larceny when the defendant entered a resort building with permission.

[21] *Silver*, 466 Mich at 392.

[22] MCL 750.110a.

III. EXCULPATORY EVIDENCE

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

A defendant must raise an issue in the trial court to preserve it for our review.[23] Heft did not challenge the prosecution's alleged failure to preserve exculpatory evidence below. Thus, this issue is unpreserved. This Court reviews unpreserved issues of constitutional error for plain error affecting a defendant's substantial rights.[24] Plain error affected the defendant's substantial rights if (1) there was an error, (2) the error was clear or obvious, and (3) the error prejudiced the defendant.[25]

B. LEGAL STANDARDS

A criminal defendant can demonstrate that the prosecution violated his or her due process rights under the Fourteenth Amendment if the prosecution, in bad faith, failed to preserve material evidence that might have exonerated the defendant.[26] However, "[t]he prosecutor's office is not required to undertake discovery on behalf of a defendant."[27] If the defendant cannot show bad faith or that the evidence was potentially exculpatory, the prosecution's failure to preserve evidence did not deny the defendant due process.[28]

C. APPLYING THE STANDARDS

Heft argues that the prosecution violated his due process rights when it failed to preserve the tread pattern of the tracks in the snow leading away from 220 Cambrey. We disagree. The defendant must show that the evidence might have exonerated him.[29] Even assuming for the purposes of argument that the prosecution maliciously failed to photograph the footprints in the snow, Heft told Officer Walker that he walked up to 220 Cambrey. Heft's footprints would have been in the snow whether he committed the charged crime or not. Thus, Heft has failed to demonstrate that the footprint evidence would have exonerated him. We conclude that Heft has not demonstrated a clear error because he has not shown that the prosecution failed to preserve exculpatory evidence.

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[23] *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010).

[24] *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

[25] *Carines*, 460 Mich at 763.

[26] *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007).

[27] *People v Leo*, 188 Mich App 417, 427; 470 NW2d 423 (1991).

[28] *Youngblood*, 488 US at 57-58.

[29] *Hanks*, 276 Mich App at 95-96.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Generally, whether a defendant did not have the effective assistance of counsel "is a mixed question of fact and constitutional law."[30] This Court reviews questions of fact for clear error, and questions of law de novo.[31] But a defendant must move the trial court for a new trial or evidentiary hearing to preserve the defendant's claim that his counsel was ineffective.[32] When a defendant did not move the trial court for a new trial or evidentiary hearing, this Court's review is limited to mistakes apparent from the record.[33]

B. LEGAL STANDARDS

A criminal defendant has the fundamental right to effective assistance of counsel.[34] However, it is the defendant's burden to prove that counsel did not provide effective assistance.[35] To prove that his defense counsel was not effective, the defendant must show that: (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness, and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant.[36] The defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.[37]

C. FAILURE TO MOVE FOR DISMISSAL

Heft argues that defense counsel was ineffective because he failed to move the trial court to dismiss the charges against him on the ground that the prosecution failed to preserve the footprint evidence. Defense counsel is not required to make meritless motions.[38] Because we have concluded that this evidence was not exculpatory, it would not provide the basis for such a motion. Thus, we reject this argument.

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[30] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[31] *Id*.

[32] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

[33] *People v Hoag*, 460 Mich 1, 7; 594 NW2d 57 (1999); *Odom*, 276 Mich App at 415.

[34] US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

[35] *Ginther*, 390 Mich at 442-443; *Odom*, 276 Mich App at 415.

[36] *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[37] *Id*. at 312.

[38] *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

D. EXPRESSION OF GUILT

Heft argues that the counsel was ineffective for failing to object when the officers improperly opined about his guilt. A witness may not opine about the defendant's guilt or innocence in a criminal case.[39] Officer Walker testified as follows:

> *Q.* Did [Heft's] explanation make sense to you of what they were doing?
>
> *A.* Not at all.
>
> *Q.* Why is that?
>
> *A.* It was about zero degrees, 1:30 in the morning. I didn't want to be out even though I had to, so it—them just walking around at 1:30 in the morning with it almost below zero just did not make sense. They were—while [Heft], I did speak with him, he was breathing hard, he was perspiring, and so that made me feel like something was afoot, something was not right.

Officer Madaj testified as follows:

> *A.* [Kinville] said that he and [Heft] were out for a walk, and they had came from, I believe it was, Cronk Street, which Cronk Street, is it's on the northwest side of the city almost to the city limits. It's—I'm just going to take a stab at it. It's probably four miles as the crow flies north, maybe a little bit less.
>
> *Q.* So that's quite a ways away?
>
> *A.* Yes.
>
> *Q.* It's zero degrees out?
>
> *A.* Yes.
>
> *Q.* It's 1:30 in the morning?
>
> *A.* Yes.
>
> *Q.* In the dead of winter?
>
> *A.* Yes.
>
> *Q.* Did that seem reasonable to you?

[39] *People v Row*, 135 Mich 505, 506-507; 98 NW 13 (1904); *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985).

A. No it did not.

Q. What did you do based on the fact he made that statement?

A. Based on his statement and the culmination of loud banging noises coming from the—the neighbor had reported, I didn't think that he was being truthful, so I had him have a seat in the rear of my vehicle.

The witnesses' testimonies here are not similar to statements that we have concluded are improper opinions about the defendant's guilt.[40] Neither officer testified about Heft's guilt in general. Thus, an objection would have been meritless because a fair reading of the officers' testimony reveals that they did not opine about Heft's guilt, but that they were explaining the steps of their investigations on the basis of their personal perceptions.[41] Defense counsel is not required to make meritless objections.[42] We conclude that defense counsel was not ineffective for failing to challenge these statements.

E. HEFT'S STATEMENT TO OFFICER WALKER

Heft argues that defense counsel was ineffective when he did not move to suppress Heft's statement to Officer Walker. We conclude that Heft has not overcome the presumption that defense counsel's decision was a sound trial strategy. We give defense counsel wide discretion in matters of trial strategy because counsel may be required to take calculated risks to win a case.[43] To show that defense counsel's performance was objectively unreasonable, the defendant must overcome the strong presumption that defense counsel's decisions constituted sound trial strategy.[44] This Court will not substitute its judgment for that of defense counsel, or review decisions with the benefit of hindsight.[45]

Officer Walker testified that Heft told him that he and Kinville walked to the area from Cronk Street, and Heft argues that this testimony damaged his case because the jury likely concluded that Heft lied to the police after Officer Walker testified that he discovered Heft's van one block away. But Heft's statement also included an exculpatory explanation for why Heft and Kinville were in the area, which defense counsel may have wanted the jury to consider since the explanation was consistent with the defense theory of the case. As stated above, the defense theory of the case was that Heft and Kinville were simply checking on a house that they believed belonged to Kinville's grandfather. This strategy would not "constitute ineffective assistance of

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[40] See *Row*, 135 Mich at 506-507; *Bragdon*, 142 Mich App at 199.

[41] See MRE 701.

[42] *Fonville*, 291 Mich App at 384.

[43] *Pickens*, 446 Mich at 325.

[44] *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *Odom*, 276 Mich App at 415.

[45] *Odom*, 276 Mich App at 415.

counsel simply because it [did] not work."[46] We conclude that Heft has not overcome the strong presumption that defense counsel's decision not to challenge this testimony constituted sound trial strategy.

Nor is there any indication that defense counsel's failure to challenge these statements prejudiced the outcome of Heft's trial. Even had the officers not testified that Heft and Kinville said they were walking from Cronk Street, the officers validly testified that they stopped Heft and Kinville at 1:30 a.m. after a neighbor reported loud banging, Heft and Kinville were observed running, they were sweaty, footprints led to the house, snow tracks were inside the house, and that Heft's van contained tools that could be used to obtain scrap metal and was parked one block away. Heft has not demonstrated that it is reasonably likely that the results of the proceedings would have been different if defense counsel challenged Officer Walker's statement. Because Heft has not overcome the presumption that defense counsel's decision not to challenge the statement constituted sound trial strategy, or that the admission of the evidence affected the outcome of his proceedings, we conclude that Heft has not shown ineffective assistance of counsel.

V. CONCLUSION

We conclude that entering without permission is not a necessarily included lesser offense of entering without breaking with the intent to commit larceny. We further conclude that Heft has not demonstrated that the prosecution failed to preserve exculpatory evidence, or that defense counsel's alleged errors were objectively unreasonable.

We affirm.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

[46] *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).