STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 11, 2013
v	No. 310272 Saginaw Circuit Court
MICHAEL BENJAMIN WILLIAMS, Defendant-Appellant.	LC No. 11-036638-FH

Before: FITZGERALD, P.J., and METER and M. J. KELLY, JJ.

PER CURIAM.

Defendant Michael Benjamin Williams appeals by right his jury convictions of first-degree home invasion, MCL 750.110a(2), and larceny from a person, MCL 750.357. The trial court sentenced Williams as a habitual offender-fourth offense, MCL 769.12, to serve 51 months to 30 years in prison. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS

At approximately 12:30 a.m. on the morning at issue, Stephanie Rasco was in the kitchen of her home that she shared with her daughter, Tierra Kutsch. Rasco heard a loud noise coming from the rear of the home; when she pulled back a curtain, she saw Williams standing in her hallway. She had previously dated Williams, but she ended the relationship several months earlier. Rasco told him to leave and threatened to call the police. Williams grabbed Rasco's cell phone off the counter and the two struggled over it. Rasco testified that Williams "started throwing me around in the kitchen." Kutsch heard the noise, came downstairs, and saw Williams "manhandling [Rasco] basically, like, pushing her and stuff." After a four to five minute struggle, Williams left with Rasco's cell phone and drove away.

II. MISTRIAL

Williams argues that the trial court erred when it denied his motion for a mistrial. This Court reviews a trial court's decision on a motion for a mistrial for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). "A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. (quotation marks and citation omitted).

Before trial, and outside the presence of the jury, the trial court and the parties' lawyers agreed that the prosecution's witnesses would not be allowed to mention that Williams had been in prison, on parole, or testify about prior incidents. Despite that, Rasco mentioned Williams' parole and Kutsch referred to a prior incident. Williams argues that these references so prejudiced the jury that he was entitled to have the trial court declare a mistrial.

With the first reference, the prosecutor asked Rasco about whether she ever got her phone back:

Q. You never got that cell phone back?

A. No.

Q. But you got another cell phone—

A. Yes.

Q. —is that what you're saying?

A. And I actually spoke to his parole officer and he said—

THE COURT: Ma'am—I'll sustain the objection.

On the second occasion, the prosecutor asked Kutsch about how she felt:

Q. Was this a new experience for you?

A. No. [Williams] did it . . . once before where he just came in the house out of nowhere and it really did scare me.

MR. TIDERINGTON: I guess I would object. It's totally irrelevant.

THE COURT: Sustained.

After the trial court excused the jury, Williams' lawyer moved for a mistrial on the basis of these improper references. However, the trial court disagreed that these brief references warranted a mistrial: "The Court doesn't feel that anything was brought out intentionally. The witnesses I don't think brought any of this out. I don't think the jury is going to be misled by any of that."

After examining these remarks in context, we agree with the trial court. The remarks were isolated, unintentional, and not particularly prejudicial. The trial court also instructed the jury that it must not consider testimony that had been stricken and this instruction cured whatever minimal prejudice these remarks might have occasioned. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

We also do not agree with Williams' contention that the trial court had to hold a separate hearing to determine whether there was a manifest necessity to declare a mistrial. The manifest necessity doctrine applies to cases in which the trial court declares a mistrial and the prosecution attempts to retry the defendant. "If the trial court declares a mistrial after jeopardy has attached, the state is precluded from bringing the defendant to trial a second time, unless the defendant consented to the mistrial or the mistrial was of manifest necessity." *People v Booker*, 208 Mich App 163, 172; 527 NW2d 42 (1994). As our Supreme Court has explained, the manifest necessity doctrine has no application outside that context. *People v Nutt*, 469 Mich 565, 572 n 5; 677 NW2d 1 (2004). Here, there was no mistrial; so that doctrine does not apply.

The trial court did not abuse its discretion when it denied Williams' motion for a mistrial.

III. LESSER INCLUDED OFFENSE INSTRUCTION

Williams next argues that the trial court erred by failing to sua sponte instruct the jury on the lesser offense of third-degree home invasion and erred by failing to ask Williams' lawyer if he accepted the instructions. We review unpreserved claims such as this for plain error. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003); MCL 768.29.

"A trial court must instruct the jury with respect to necessarily included lesser offenses upon request for such instructions." *People v Reese*, 242 Mich App 626, 629; 619 NW2d 708 (2000). A defendant is entitled to an instruction on "a necessarily lesser included offense . . . if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Third-degree home invasion is a necessarily included lesser offense of first-degree home invasion. *People v Wilder*, 485 Mich 35, 47; 780 NW2d 265 (2010).

In this case, the prosecution charged Williams with first-degree home invasion under the theory that he entered Rasco's home without permission and committed a larceny or assault while Rasco or Kutsch was lawfully present. See MCL 750.110a(2). On appeal, Williams contends that the lesser instruction was warranted because the jury could have found that the phone had little value and, on that basis, find that he committed a misdemeanor rather than a larceny or assault. However, misdemeanor larceny is still larceny. MCL 750.536(5). Thus, Williams has not identified a dispute about a factual element found in the greater offense, but not in the lesser offense. *Cornell*, 466 Mich at 357. Because a rational view of the evidence did not support an instruction on third-degree home invasion, we cannot fault the trial court for failing to sua sponte instruct the jury on third-degree home invasion. *Id.*

We also decline to address Williams' claim that the trial court erred by failing to give the parties an opportunity to accept its instructions; Williams abandoned this issue on appeal by failing to cite the record or legal authority. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Last, Williams argues that his trial counsel was ineffective for failing to request a jury instruction on third-degree home invasion. Because there was no hearing before the trial court, our review is limited to errors apparent on the record. *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), vacated in part, leave denied in relevant part, ___ Mich ___; 820 NW2d 922 (2012). To establish his ineffective assistance of counsel claim, Williams must show that his lawyer's representation fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. *Id.* at 22.

Here, as we have already noted, Williams was not entitled to this instruction because a rational view of the evidence did not support giving it. Because the request was meritless, Williams' lawyer cannot be faulted for failing to make it. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Even if this instruction might have been warranted, Williams has not overcome the presumption that his lawyer's decision was a matter of trial strategy; Williams' lawyer reasonably might have concluded that, given his theory of the case, Williams stood a better chance of acquittal without the instruction. *Gioglio*, 296 at 22-23 (stating that "a reviewing court must conclude that the act or omission of the defendant's trial counsel fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission."). Consequently, Williams has not established that this decision fell below an objective standard of reasonableness under prevailing professional norms.

There were no errors warranting relief.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Michael J. Kelly