STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 16, 2013
v	No. 311029 Calhoun Circuit Court
TRAVIS JEFFREY TUDOR, Defendant-Appellant.	LC No. 2011-002937-FH

Before: FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree home invasion, MCL 750.110a(3). The trial court sentenced him as a third habitual offender to 30 to 360 months' imprisonment for each of his home invasion convictions with credit for 19 days served. The sentence also required defendant to pay $10,710.77 in restitution. Defendant appeals as of right. We affirm defendant's convictions and sentences, but we remand to the trial court for further findings regarding restitution.

Defendant entered Roger and Lisa Froehlich's house without permission on two occasions in August of 2011. The Froehlichs contacted the police after they noticed that some of their personal property was missing in early August. Approximately a week later, Roger contacted the police when he arrived at the house and discovered that a door was open and the basement window was broken. Defendant was found hiding in a swamp behind the Froehlichs' property and was taken into custody by the police. Property belonging to the Froehlichs was later discovered in defendant's home. Defendant was charged with two counts of second-degree home invasion. At trial, after the prosecution rested, defendant moved for a directed verdict of acquittal on the ground that the prosecution had presented insufficient evidence to establish that the house was a "dwelling" for purposes of the home invasion statute. The trial court denied defendant's motion, and the jury convicted defendant of the charged crimes.

Defendant first contests the trial court's denial of his motion for directed verdict of acquittal. In reviewing a claim from the denial of a directed verdict motion, this Court reviews the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). MCL 750.110a(3) provides, in relevant part, that "a person who enters a dwelling without permission

with intent to commit a . . . larceny . . . in the dwelling, or a person who . . . enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a . . . larceny . . . is guilty of home invasion in the second degree." On appeal, defendant only challenges that the house was a "dwelling" at the time of his offenses.

A "dwelling" means a "structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." MCL 750.110a(1)(a). The term "abode" is not defined by the statute. The general rule is, unless defined in the statute, every word should be construed according to its common and approved usage. MCL 8.3a. As a result, "[i]f a statute does not expressly define its terms, a court may consult dictionary definitions." *People v Gould*, 225 Mich App 79, 84; 570 NW2d 140 (1997). The *Random House Webster's College Dictionary* (1999) defines "abode" as "a place in which a person resides; residence; dwelling; home." Additionally, this Court has previously recognized that "the duration of any absence, or a structure's habitability will not automatically preclude a structure from being considered a dwelling for purposes of the home-invasion statute." *People v Powell*, 278 Mich App 318, 321; 750 NW2d 607 (2008). Rather, "the intent of the inhabitant to use a structure as a place of abode is the primary factor in determining whether it constitutes a dwelling for purposes of MCL 750.110a(3)." *Id.* at 321.

In this case, there was sufficient evidence to support a finding that the Froehlichs' house was a dwelling. The Froehlichs purchased the house in 2006 with the intent to renovate it and move in once the renovations were complete. They made significant changes to the house, including putting on a new roof, changing the heat source, and replacing the electrical and plumbing systems. Further, the house always had operating utilities. The Froelichs testified that the house was habitable and that they occasionally spent the night there. While there was not furniture in the house, they kept some personal items such as dishes and sporting equipment there. At the time defendant broke into the house, food and wine were also kept there. Additionally, after the first break in, Roger barricaded all but two of the doors and stayed overnight at the house to protect his property. Further, at the time of trial, the Froehlichs had completely moved into the home with their children. The fact that the Froehlichs did not permanently reside at the house at the time of defendant's offenses did not preclude it from being a dwelling. *Powell*, 278 Mich App at 321. We conclude that the record evidence, when viewed in a light most favorable to the prosecution, was sufficient for a rational fact-finder to conclude that the house was a dwelling for purposes of the home invasion statute. *Schultz*, 246 Mich at 702. Accordingly, the trial court properly denied defendant's motion for directed verdict of acquittal. *Id.*

Next, defendant argues that the trial court erroneously instructed the jury concerning the definition of "dwelling." After finding no standard instruction on the definition of "dwelling," the trial court drafted its own jury instruction. Before the instructions were read, defendant objected to a portion of the instruction that allowed the jury to consider the purpose for which the dwelling was built. The trial court gave the instruction as drafted despite defendant's objection. On appeal, defendant argues that the instruction misled the jury because it permitted the jury to decide that the structure was a dwelling simply because it appeared to be a house and was built as a house. We review preserved claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Jury instructions are to be read as a whole, rather than extracted piecemeal, to establish error. *Id*. Even if imperfect, reversal is not required if the jury

instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Here, we find that the instruction, when read as a whole, did not mislead the jury; instead, it properly instructed the jury of the law and the evidence that it could consider in this case. Further, the trial court instructed the jury that it "could" consider the purpose for which the structure was built, as well as how the structure was being used at the time the crime was committed. Because juries are presumed to follow the trial court's instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), we conclude that this instruction did not confuse the jury. Therefore, defendant's argument is without merit.

Defendant next argues that he was denied effective assistance of counsel because his trial counsel permitted him to testify that he was looking for marijuana plants on the Froehlichs' property on August 6, 2011. Defendant alleges that this was damaging to his defense. When a defendant's claim of ineffective assistance of counsel is unpreserved, this Court's review is limited to mistakes apparent on the record. *People v Davis (On Rehearing)*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To establish ineffective assistance of counsel, defendant must show that: (1) counsel's performance "fell below an objective standard of reasonableness," and (2) counsel's deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). We find that defendant has not established a claim for ineffective assistance of counsel. It is well established that this Court presumes that a defendant's decision to testify or exercise his privilege not to testify is a matter of trial strategy that is best left to an accused and his counsel. *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). We do not substitute our judgment for that of trial counsel in matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). We cannot find under the circumstances of record that defense counsel's strategy was unreasonable. Moreover, we note that defendant has not explained how a different outcome would have resulted at trial if he had not testified. As a result, defendant has failed to establish that he was prejudiced. *Carbin*, 463 Mich at 600.

Finally, defendant argues that the trial court erred when it ordered him to pay restitution in the amount of $10,710.77. While this Court generally reviews a trial court's award of restitution for an abuse of discretion, because defendant failed to object to the amount of restitution on the grounds raised on appeal, this Court's review is for plain error affecting defendant's substantial rights. *People v Byard*, 265 Mich App 510, 511; 696 NW2d 783 (2005); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A party claiming plain error must demonstrate that (1) an error occurred; (2) the error was plain; and (3) the plain error affected a substantial right of the defendant. *Carines*, 460 Mich at 763-764. Here, defendant argues that the stolen property that was returned to the victims should have been deducted from the ordered restitution.

The Crime Victims Rights Act (CVRA) requires that restitution be determined based on the fair market value of the property on the date of its loss or the date of sentencing, minus the value of any property returned; the CVRA directs that the value of the property that is returned to the victim be determined on the date of return to the victim. MCL 780.766(3). While the record and the presentence investigation report establish that some stolen property was returned to the Froehlichs, it does not appear that the trial court took this into consideration when it determined

the amount of restitution. In fact, we cannot ascertain from the record how the trial court calculated the ultimate amount of restitution. We find that the trial court's failure to comply with the CVRA in determining the proper amount of restitution amounts to plain error. *Carines*, 460 Mich at 763. Additionally, this plain error affected defendant's substantial rights because it appears that he was ordered to pay more restitution than was required under the CVRA. *Id.* Accordingly, we remand this case to the trial court so that it may determine the appropriate amount of restitution, either through holding a restitution hearing or articulating findings related to the amount of restitution. On remand, we instruct the trial court to follow the requirements of MCL 780.766(3). Because we have already determined that remand is necessary, we will not consider defendant's argument that the trial court erred by failing to hold a restitution hearing before ordering restitution.

Affirmed in part and remanded in part for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell