STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 19, 2014
v	No. 315948 Wayne Circuit Court
YUL DAVIES, Defendant-Appellant.	LC No. 12-011951 FH

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

Yul Davies appeals as of right from his jury trial convictions of second-degree home invasion[1] and larceny in a building.[2] We affirm.

I. FACTUAL BACKGROUND

Davies and Terron Cain were seen pulling out of the back of a home in a van by a neighbor of the home's occupant. When the neighbor stopped Davies and Cain, they said that they had permission from the home's occupant to clean out the backyard. The neighbor and his daughter contacted the home occupant's son and he came to the house shortly thereafter. In the meantime, Davies and Cain went back to the house and waited. The neighbor and his daughter testified that they next saw Davies and Cain come out of the front door of the house with items in their hands. Davies and Cain left the scene when approached by the neighbor's daughter. Shortly thereafter, the home occupant's son arrived and followed the van containing Davies and Cain in his car; there was a confrontation and Cain drove to the police station. Once at the police station, Davies told police that he took scrap metal from the backyard of the house and never entered the house, which he believed was abandoned and unlivable.

II. PROSECUTORIAL MISCONDUCT

[1] MCL 750.110a(3).

[2] MCL 750.360.

On appeal, Davies first argues that the prosecution committed misconduct warranting reversal by misstating the evidence in its closing argument and rebuttal. We disagree. This Court reviews unpreserved issues of prosecutorial misconduct for plain error.[3] "A prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial[.]"[4] However, under the plain error standard of review, "[r]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings."[5]

Here, the prosecution made a statement of fact that was not supported by the evidence. Consistent with Davies's testimony that he never entered the home, Officer Walter Marida testified that Davies told him that, "We took stuff *from outside* this house and this guy followed us here."[6] Additionally, the neighbor testified that Davies told him that he had permission to "clean out the backyard." In contrast, the prosecution argued in its closing, "And Officer Marida told you that he asked [Davies] what's going on here and [Davies] said out of his own mouth we took some stuff *from this house* and this guy followed us."[7] Later during its closing argument, the prosecution additionally stated, "The People submit that if you take the testimony of [the neighbor], [the neighbor's daughter], [the home's occupant] and Officer Marida when they told you that [Davies] admitted to taking property *out of that home*, I have met my burden beyond a reasonable doubt as to Count One home invasion in the second degree."[8] Lastly, in rebuttal, the prosecution again stated:

> And when they go to the police station, [Davies] says we went *into* this house, took some things and now this guy is following us. That is what happened. That's the facts that have been provided to you during this trial.[9]

While the prosecutor misstated the evidence presented by Officer Marida, the jury was instructed that the lawyers' statements and arguments were not evidence, and "jurors are presumed to follow their instructions."[10] Additionally, two witnesses testified at trial that they saw Davies exiting the home with items in his hands and Cain was found to have the identification and prescriptions of the home's occupant on his person. Thus, this Court is not persuaded that the prosecutorial error resulted in the conviction of an "actually innocent

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[3] *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

[4] *Id*. at 241.

[5] *Id*. at 235 (quotation marks and citation omitted).

[6] Emphasis added.

[7] Emphasis added.

[8] Emphasis added.

[9] Emphasis added.

[10] *Unger*, 278 Mich App at 235.

defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings."[11] Accordingly, reversal is not warranted.

III. SUPPLEMENTAL STANDARD 4 BRIEF

In a supplemental brief filed in propria persona pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4, Davies raises several additional issues.

A. SUFFICIENCY OF THE EVIDENCE

Davies first argues that the evidence was insufficient to support his convictions because the prosecution did not establish that the house was a dwelling or that the home's occupant had a legal right to the home. We disagree. This Court reviews claims regarding the sufficiency of the evidence de novo.[12] The evidence is reviewed "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."[13]

Davies was convicted of second-degree home invasion[14] and larceny in a building.[15] MCL 750.110a(3) provides:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.

MCL 750.360 provides:

> Any person who shall commit the crime of larceny by stealing in any dwelling house, house trailer, office, store, gasoline service station, shop, warehouse, mill, factory, hotel, school, barn, granary, ship, boat, vessel, church, house of worship, locker room or any building used by the public shall be guilty of a felony.

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[11] *Id*. (quotation marks and citation omitted).

[12] *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

[13] *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012) (quotation marks and citation omitted).

[14] MCL 750.110a(3).

[15] MCL 750.360.

Regarding Davies's assertion that the prosecution did not establish that the house was a dwelling, a dwelling is defined by law as "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."[16] Although Davies argues on appeal that the house had no utilities and the occupant no longer lived in the home, the home's occupant testified at trial that she lived in the home, but had been gone for four or five days. The evidence presented at trial also established that the home's occupant had possessions in the home, including furniture, an exercise bike, and a television. Accordingly, viewing the evidence in a light most favorable to the prosecution, a trier of fact could find that it was established beyond a reasonable doubt that the house was a dwelling.[17]

Davies also contends that the home occupant's testimony at the preliminary examination established that she was a squatter with no rights to the home. He asserts that because the occupant did not own the home or have a legal right to the home, he did not enter "without permission." "Without permission" is defined as "without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling."[18] At trial, the occupant testified that she did not give Davies permission to enter the home and that she lived in the home and was not "losing" the house. Although the occupant's testimony from the preliminary examination regarding her legal right to the house may have called into question her legal right to control the home, viewing the *trial* evidence in a light most favorable to the prosecution, a trier of fact could find that it was established beyond a reasonable doubt that the occupant was lawfully in possession of the house and Davies entered without permission.[19]

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Davies next argues that his trial counsel was ineffective for several reasons. We find his arguments to be meritless. Where the issue of ineffective assistance of counsel is unpreserved, this Court's review is limited to errors apparent on the record.[20] "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different."[21] "In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy."[22]

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[16] MCL 750.110a(1)(a).

[17] *Reese*, 491 Mich at 139.

[18] MCL 750.110a(1)(c).

[19] *Reese*, 491 Mich at 139.

[20] *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011).

[21] *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

[22] *Id*. at 52.

Davies claims that trial counsel was ineffective for failing to attend court proceedings until 19 days before trial. Trial counsel represented Davies at a preliminary examination held on December 27, 2012, but then did not attend a calendar conference/arraignment, and two pretrial conferences, during which counsel for Cain served as a substitute. Trial counsel, however, did attend a pretrial conference held on March 8, 2013, and the trial which began on March 25, 2013. While defense counsel did not appear at three pretrial conferences, Davies has not established that trial counsel arranging for substitute counsel fell below an objective standard of reasonableness, or that had counsel appeared at the pretrial conferences Davies would have been acquitted.[23]

Davies also argues that trial counsel was ineffective for failing to object to an amendment to the felony information and for only informing him at trial of the amendment. On December 27, 2012, at the preliminary examination, the prosecution moved to amend the information after Davies brought to the court's attention that the address of the house where the crime was alleged to have occurred was wrong on the information. Trial counsel did object to the amendment, but the trial court found that there was no prejudice to Davies where the discovery referenced the correct address and allowed the amendment. An amended information was filed on February 21, 2013, to reflect the correct "place of offense" only. Davies was present at the preliminary examination and, therefore, he had notice of the amendment. Thus, the record does not support that trial counsel's performance fell below an objective standard of reasonableness.[24]

Davies next contends that his trial counsel was ineffective for failing to investigate the ownership of the house and the lack of utilities at the house and for failing to raise the issue of the occupant's ownership of the house. Trial counsel's failure to investigate "can constitute ineffective assistance of counsel."[25] It is not, however, apparent from the record that trial counsel's decision to focus on Davies not entering the home rather than on whether the building was a dwelling and owned by the occupant was not sound trial strategy.[26]

Davies further asserts that his counsel was ineffective for failing to object to Davies's convictions for both second-degree home invasion and larceny in a building as, he argues, this constituted double jeopardy. As discussed below, Davies's convictions were not a double jeopardy violation. Thus, counsel's failure to raise a futile objection cannot constitute ineffective assistance of counsel.[27]

Lastly, Davies argues that his counsel was ineffective for failing to object to the testimony of Officer Marida that Cain was searched upon arrest and found to have the home

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[23] *Id*. at 51.

[24] *Id*.

[25] *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

[26] *Trakhtenberg*, 493 Mich at 52; *Davis*, 250 Mich App at 368.

[27] *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

occupant's identification card and her prescription medication. Davies, however, makes no legal argument regarding why the evidence was inadmissible and should have been objected to.

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority to sustain or reject his position.[28]

Accordingly, Davies has not demonstrated that a new trial is warranted.

C. DOUBLE JEOPARDY

Davies contends that his double jeopardy rights were violated because his convictions for larceny in a building and second-degree home invasion arose from the same transaction and displayed a common goal. We disagree. This Court reviews a double jeopardy challenge de novo on appeal.[29] The Double Jeopardy clauses of the federal and state constitutions prohibit "multiple punishments for the same offense."[30] It is well-settled that "[i]f each offense requires proof of elements that the other does not . . . no double jeopardy violation is involved."[31]

In comparing the elements of the two crimes, larceny in a building involves stealing in a building and has no requirement that the building be a dwelling.[32] Second-degree home invasion, on the other hand, requires that the building be a dwelling, as well as the intent to commit a felony, larceny, or assault therein, or the actual commission of a felony, larceny, or assault therein.[33] Second-degree home invasion does not require the commission of a theft offense (as the crime actually committed in the dwelling or intended to be committed in the dwelling could be assault or arson, for example).[34] Therefore, Davies's double jeopardy rights were not violated by his convictions.[35]

D. JURY INSTRUCTIONS

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[28] *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (citation and quotation marks omitted).

[29] *People v Gibbs*, 299 Mich App 473, 488; 830 NW2d 821 (2013).

[30] *Id*. at 488-489, citing US Const, Am V; Const 1963, art 1, § 15; *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004).

[31] *Gibbs*, 299 Mich App at 489 (citation and quotation marks omitted).

[32] MCL 750.360.

[33] MCL 750.110a(3).

[34] *Id*.

[35] *Gibbs*, 299 Mich App at 489.

Finally, Davies argues that there was an error in the jury instructions because the two crimes constituted double jeopardy. As it was found that the two crimes that Davies was convicted of did not violate his double jeopardy rights, this argument lacks merit.

Affirmed.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Michael J. Talbot