STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 25, 2014
v	No. 315913 Kent Circuit Court
DEMETRICE DONTEA COATES, Defendant-Appellant.	LC No. 12-003769-FH

Before: SHAPIRO, P.J., and WHITBECK and STEPHENS, JJ.

PER CURIAM.

Defendant Demetrice Dontea Coates appeals as of right his jury trial convictions for first-degree home invasion, MCL 750.110a, interfering with an electronic communication, MCL 750.540, larceny in a building, MCL 750.360, and domestic assault, MCL 750.81. Because defendant has not established error warranting relief, we affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support his convictions for larceny in a building, interference with an electronic communication, and first-degree home invasion.[1] When determining whether the evidence was sufficient to support a conviction, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

A. LARCENY IN A BUILDING

To convict a defendant of larceny in a building, the prosecution must prove, beyond a reasonable doubt, the following elements:

[1] Whether a verdict is supported by sufficient evidence is a question of law subject to review de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

> [1] an actual or constructive taking of goods or property; [2] a carrying away or asportation; [3] the carrying away must be with a felonious intent; [4] the goods or property must be the personal property of another; [5] the taking must be without the consent and against the will of the owner; and [6] the taking must occur within the confines of the building. [*People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1998); see also MCL 750.360.]

The felonious intent required for larceny is an intent to permanently deprive the owner of his property. *People v Pratt*, 254 Mich App 425, 427-428; 656 NW2d 866 (2002). "A factfinder can infer a defendant's intent from his words or from the act, means, or the manner employed to commit the offense." *Hawkins*, 245 Mich App at 458.

The victim and defendant were in a dating relationship that began in late December 2011 or January 2012 and ended sometime in February 2012. On the evening of March 18, 2012, defendant came to the victim's apartment and she permitted him to enter. When she subsequently refused to talk to defendant, he took two cellular telephones that did not belong to him, despite the fact that she requested that he leave the telephones on her table. Defendant left her apartment with both telephones. The victim called 911 and told the responding officer that defendant had stolen two cellular telephones from her.

Defendant returned to the victim's apartment in the early morning hours of March 19, 2012. This time, the victim refused to allow defendant into her apartment. He then broke the victim's door frame, entered the apartment, and proceeded to choke the victim and pull her hair. While defendant was assaulting the victim, she attempted to call 911 on a third cellular telephone. However, defendant took this telephone away from her and left her apartment. The victim contacted the police from a friend's apartment and told the responding officers that defendant had broken down her door, assaulted her, and stolen her cellular telephone. The victim confirmed that defendant had not purchased any of the telephones that he took, that he was not a party to the service contracts for any of the telephones, and that she has not seen any of the three telephones since defendant took them. In addition, the victim testified that defendant was not a party to her lease and did not live at her apartment.

This testimony alone was sufficient to establish all of the elements of larceny from a building with regard to any of the three telephones. *Sykes*, 229 Mich App at 278. Moreover, the victim's credibility was supported by the testimony of the police officers who responded to the victim's two 911 calls and the testimony of the victim's friend. Accordingly, there was sufficient evidence from which a jury could conclude, beyond a reasonable doubt, that defendant committed the crime of larceny in a building.

B. INTERFERENCE WITH ELECTRONIC COMMUNICATION

Pursuant to MCL 750.540(4) an individual shall not "willfully and maliciously prevent, obstruct, or delay by any means the sending, conveyance, or delivery of any authorized communication, by or through any telegraph or telephone line, cable, wire, or any electronic medium of communication." "[T]he phrase 'wilfully and maliciously' means that the defendant (1) committed the act, (2) while knowing it to be wrong, (3) without just cause or excuse, and (4)

did it intentionally or (5) with a conscious disregard of known risks to the property of another." *People v Culp*, 108 Mich App 452, 456; 310 NW2d 421 (1981) (citation omitted).

The victim's testimony, as previously recounted, was sufficient to support a finding that the victim possessed three cellular telephones and that defendant willfully and maliciously prevented, obstructed, or delayed the victim's ability to send or convey an authorized communication to the police through these telephones. Accordingly, there was sufficient evidence from which a jury could conclude, beyond a reasonable doubt, that defendant committed the crime of unlawfully interfering with an electronic communication.

C. FIRST-DEGREE HOME INVASION

In *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010), our Supreme Court summarized the elements of first-degree home invasion as follows: (1) the defendant must either break and enter a dwelling, or enter a dwelling without permission; (2) the defendant must either intend when entering to commit a felony, larceny, or assault in the dwelling, or at any time while entering, present in, or exiting the dwelling commit a felony, larceny, or assault; and (3) while the defendant is entering, present in, or exiting the dwelling, either the defendant must be armed with a dangerous weapon, or another person must be lawfully present in the dwelling. See also MCL 750.110a(2).

Defendant only challenges the sufficiency of the evidence with regard to the first element of this offense. Pursuant to MCL 750.110a, " '[w]ithout permission' means 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." Further, "any amount of force used to open a door or window to enter the building, no matter how slight, is sufficient to constitute a breaking" for the purposes of breaking and entering into a building. *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998).

In the present case, the victim's testimony was sufficient to support a finding that defendant either broke and entered into the victim's apartment, or entered the victim's apartment without permission, on the morning of March 19, 2012. Moreover, the victim's testimony that defendant broke and entered into the victim's apartment, or entered the apartment without permission, was supported by the testimony of the police officers who responded to her 911 calls and the testimony of her friend. The victim's testimony was also corroborated by evidence of damage to the victim's apartment door. The fact that the victim and defendant previously had a dating relationship did not entitle defendant to be present in the victim's home at will. See *People v Dunigan*, 299 Mich App 579, 583; 831 NW2d 243 (2013). Likewise, the fact that the victim invited defendant into her apartment on the evening before the home invasion does not preclude defendant's conviction for home invasion because the record indicates that defendant had no right to be in the home at the time of the home invasion and that he entered by breaking down the door. *Id*. Accordingly, there was sufficient evidence from which a jury could conclude, beyond a reasonable doubt, that defendant committed the crime of first-degree home invasion.

II. STANDARD 4 BRIEF

In defendant's Standard 4 brief, he claims that he was denied the effective assistance of trial counsel, that he received inadequate notice of uncharged offenses, that the trial court improperly instructed the jury on an uncharged offense, and that he is entitled to a new trial based on newly discovered evidence.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

The right to the effective assistance of counsel is guaranteed by the United States and Michigan constitutions. 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); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *Swain*, 288 Mich App at 643. "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Id.*[2]

Defendant argues that his trial counsel: (1) failed to conduct a reasonable investigation with regard to documents that would allegedly show he owned the cellular telephones at issue and with regard to text messages that would have shown that the victim was lying about her communications with defendant before the offense; (2) failed to object to the victim's false testimony regarding her communication with defendant before the offense; (3) failed to impeach the victim regarding these false statements; and (4) failed to produce documents that would allegedly show he owned the telephones at issue. The success of these claims relies on the premise that evidence existed to show that defendant owned the telephones at issue or that evidence existed that defendant and the victim communicated before the offense. However, there is no evidence in the record to support either of these claims by defendant. Because defendant has not established a factual predicate for any of his claims of ineffective assistance of counsel, he is not entitled to relief. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

B. NOTICE OF CHARGED OFFENSES

Defendant claims that he received inadequate notice of uncharged offenses because the evidence presented at the preliminary examination and contained in the information was only sufficient to put him on notice that he was being charged with larceny in a building with regard

[2] "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

to the telephone taken on March 19, but the jury was permitted to deliberate on this charge based on the evidence with regard to all three telephones.[3]

At the preliminary examination, the victim testified that defendant stole two cellular telephones from her apartment on the evening of March 18, 2012 and that on the morning of March 19, 2012, defendant broke into her apartment, assaulted her, and stole a third cellular telephone from her. Further, defendant cross-examined the victim regarding all three telephones. There was sufficient evidence presented at the preliminary examination to bind defendant over on the charge of larceny in a building with regard to any of the three telephones and defendant's statutory right to a preliminary examination on the charged offenses was not violated. *People v Plunkett*, 485 Mich 50, 57; 780 NW2d 280 (2010); MCL 767.42(1). Further, any error in the bindover process with regard to the charge of larceny in a building is harmless because, as discussed, there was sufficient evidence presented at trial to convict defendant of this crime with regard to any of the three telephones. *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010). Likewise, the amended information, coupled with the preliminary examination, was constitutionally sufficient to put defendant on notice of the charges against which he was required to defend. *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001). Therefore, we conclude that defendant was provided with sufficient notice that he would be defending against the charge of larceny in a building with regard to any of the three cellular telephones taken from the victim's apartment.

C. NEWLY DISCOVERED EVIDENCE

Defendant argues that bank statements, text messages, and a police report all constitute newly discovered evidence and that this evidence makes a different result probable on retrial because it would prove that he owned the cellular telephones at issue. To justify a new trial on the basis of newly discovered evidence, defendant must show that: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012).

Nothing in the record supports defendant's claim that the relevant documents exist, and defendant bears the burden of furnishing this Court with a record to verify the factual basis of any argument on which reversal is sought. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Further, even if these documents existed, defendant admits that he knew about the documents before trial and claims that he told his trial counsel about these documents before trial. Because "Michigan caselaw makes clear that evidence is not newly discovered if the defendant or defense counsel was aware of the evidence at the time of trial," these documents cannot constitute newly discovered evidence on which to base a new trial. *Rao*, 491 Mich at 281. Further, defendant's only explanation as to why this evidence was not presented at trial is

[3] Defendant's unpreserved claim that he received insufficient notice of the charges against him is reviewed for plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

that defense counsel chose not to pursue this evidence or use this evidence at trial. However, evidence is not newly discovered simply because trial strategy prevented a defendant from producing the evidence at trial. *Id.* at 282. Moreover, defendant does not address why he could not, using reasonable diligence, have produced these documents at trial. *Id*. at 279. Again, defendant admits that he knew about these documents before trial. Therefore, defendant is not entitled to a new trial on the basis that any of the challenged information was newly discovered evidence.

Affirmed.

/s/ Douglas B. Shapiro
/s/ William C. Whitbeck
/s/ Cynthia Diane Stephens