

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DURAN RICARDO WOODS,

Defendant-Appellant.

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UNPUBLISHED

July 6, 2006

No. 261418

Wayne Circuit Court

LC No. 04-009680-02

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree home invasion, MCL 750.110a(2). We affirm.

Defendant first argues that the trial court’s jury instructions concerning aiding and abetting denied him a fair trial. However, because defense counsel expressly approved the instructions at issue here, defendant has waived the issue on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Defendant next argues that he was denied the effective assistance of counsel when defense counsel failed to object to the jury instructions concerning aiding and abetting. Because defendant failed to move for an evidentiary hearing or a new trial, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *Id.*

“A trial court is required to instruct the jury on the law applicable to the case and to present the case to the jury in a clear and understandable manner.” *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). “Jury instructions must include all the elements of the charged offense and not exclude material issues, defenses, and theories if the evidence supports them.” *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). “Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried

and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Defendant was convicted of first-degree home invasion on an aiding and abetting theory. To be convicted as an aider and abettor, a defendant must have the same intent that is necessary to convict the principal or must know that the principal possesses the requisite intent. *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001); *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995). Because first-degree home invasion<sup>1</sup> is a specific intent crime, *People v Carpenter*, 464 Mich 223, 225; 627 NW2d 276 (2001), the trial court was required to instruct the jury on this element. *Canales, supra* at 574.

During its deliberations, the jury requested clarification of the aiding and abetting instruction. The trial court responded by repeating the standard aiding and abetting instruction it had already given as well as providing illustrations to explain the concept of aiding and abetting. Specifically, the trial court gave examples of individuals who "decide to rob a bank" or an individual who provides an address "to be burglarized." Reviewing the instructions in their entirety, we find that the aiding and abetting instructions coupled with the examples given by the trial court encompassed the requisite intent element. Even though the illustrations provided by the trial court may have been somewhat imperfect, the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. Accordingly, any objection by defense counsel to these instructions would have been futile, and defense counsel is not ineffective for failing to make a futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant next argues that the following remarks<sup>2</sup> made by the prosecutor during closing and rebuttal argument denied him a fair trial:

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<sup>1</sup> MCL 750.110(a)2 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 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 first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

- (a) The person is armed with a dangerous weapon.
- (b) Another person is lawfully present in the dwelling.

<sup>2</sup> Defendant's challenge to the prosecutor's comments regarding possession of a firearm during the commission of a felony is moot because defendant was not convicted of that charge. See *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004) (an issue is moot when a reviewing court cannot fashion a remedy to the controversy).

The evidence in this case has shown beyond a reasonable doubt that [defendant] committed the crimes that [he was] charged with.

\* \* \*

The next charge is Home Invasion, First Degree. This really is close to a no-brainer. Entering someone's home without permission, with a weapon, and they certainly did that, is Home Invasion in the First Degree.

Or in the alternative, or [sic], entering someone's home without permission when people are home, that's Home Invasion in the First Degree.

We know that people were home, and we know that they knew it. Though that's not an—I don't even have to prove that they knew it, but we know they knew it [sic].

Entering someone's home to commit an armed robbery is a Home Invasion First Degree.

\* \* \*

The People have proven it beyond a reasonable doubt. I ask you again to return verdicts of guilty on all counts.

We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *Aldrich, supra* at 110. However, because defendant failed to object to the allegations of prosecutorial misconduct, our review is for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

The comments of which defendant complains do not constitute prosecutorial misconduct. In context, it is clear that the prosecutor was arguing that defendant's guilt was a reasonable inference to be made from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Regarding the charge of first-degree home invasion, the prosecutor urged the jury to focus on the principle of aiding and abetting, pointing to defendant's statement to police which indicated that he knew of the other men's intent to invade the house. Also, the prosecutor argued to the jury that the disguises the men wore over their faces created the inference that defendant knew people were in the house before he entered. Defendant also takes issue with the prosecutor's statements that defendant committed a crime or was guilty. However, the prosecutor is not required to use the blandest possible terms possible when stating inferences from the evidence. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995).

Defendant next claims that the following comments constituted improper vouching: "They weren't the greatest witnesses, I mean that's just how it was. They were certainly at times inconsistent . . . Think about [the witnesses] how you want . . . I think of them as bad." While a prosecutor may not vouch for the credibility of her witnesses by implying that she has some special knowledge of their truthfulness, "a prosecutor may comment on h[er] own witnesses' credibility during closing argument, especially when there is conflicting evidence and the

question of defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Moreover, the comments with which defendant takes issue essentially urge the jury to believe the testimony of certain prosecution witnesses despite their lack of credibility. Defendant has failed to establish that the prosecutor's comments constituted outcome-determinative plain error; accordingly, the issue is forfeited. *Id.* at 456.

Defendant also argues that defense counsel's failure to object to the prosecutor's comments constituted ineffective assistance of counsel. However, because the prosecutor's comments were proper, any objection would have been futile and counsel is not ineffective for failing to make a futile objection. *Goodin, supra* at 433.

We affirm.

/s/ Richard A. Bandstra  
/s/ Henry William Saad  
/s/ Donald S. Owens