STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2006
v	No. 260163 Wayne Circuit Court
STEVEN DUSHION SANDERS, Defendant-Appellant.	LC No. 04-007640-01

Before: Jansen, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a(2), and sentenced to a prison term of 15 to 30 years. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion to suppress. Defendant contends that the police improperly seized a set of keys from his pants pocket, which were then used to connect him to a car that was found at the crime scene. Defendant maintains that the search and seizure of the keys, without a warrant, violated his Fourth Amendment rights. We disagree.

"A trial court's findings of fact in a suppression hearing are reviewed for clear error; but its ultimate decision on a motion to suppress is reviewed de novo." *People v Dunbar*, 264 Mich App 240, 243; 690 NW2d 476 (2004). Thus, this Court reviews de novo whether the Fourth Amendment was violated and if an exclusionary rule applies. *People v Fletcher,* 260 Mich App 531, 546; 679 NW2d 127 (2004).

Defendant argues that the seizure was not justified under the plain view exception. We agree with the prosecution that the applicability of the plain view exception was not squarely raised below. However, once a warrantless search has been shown, the burden is on the state to show that the search was justified by a recognized exception to the warrant requirement. *People v Mayes (After Remand),* 202 Mich App 181, 184; 508 NW2d 161 (1993); *People v Castle,* 126 Mich App 203, 207; 337 NW2d 48 (1983). In this case, the prosecution argued below that the search was primarily justified pursuant to *Terry v Ohio,* 392 US 1, 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968), and neither party squarely raised the plain view exception below. But because the plain view (or more appropriately, the plain feel) exception is so closely related to the validity of the limited *Terry* search in this case, and because all the necessary facts have been presented, we

properly may review this issue as a question of law. *People v Houston*, 237 Mich App 707, 712; 604 NW2d 706 (1999).

The parties do not dispute that defendant properly was stopped by the police officer. Pursuant to *Terry*, the officer had a reasonable and articulable suspicion that defendant may have been involved in the recent home invasion based on his clothing, physical appearance, and proximity to the crime scene at approximately 2:30 a.m. Accordingly, the officer had a right to detain defendant and investigate. *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993).

In addition, there appears to be no dispute that, upon detaining defendant, the officer was permitted to conduct a patdown search to check defendant for weapons. Under *Terry*, the police may conduct "a limited patdown search for weapons if the officer has a reasonable suspicion that the individual is armed, and thus poses a danger to the officer or to other persons." *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001). Here, the officer was working alone, at approximately 2:30 a.m., was investigating defendant because he fit the description of a suspect in a recent home invasion, and it was the officer's experience that people who commit home invasions are sometimes armed. This was sufficient to justify a limited patdown search of defendant under *Terry*.

It was during the patdown search that the officer discovered the keys in defendant's pants pocket. He initially placed the keys back in defendant's pocket after removing them. Shortly thereafter, the officer received information that a car was left near the crime scene. The officer's suspicions were also heightened when defendant gave a questionable explanation for his presence in the area. The officer then again removed the keys from defendant's pocket and gave them to another officer to determine if they would start the car that was left at the scene.

The plain view exception allows the police to seize, without a warrant, an item that is in plain view if the incriminating nature of the item is immediately apparent and the officer is in a position from which he could lawfully view the item, but the police may not search the item before seizing it. *People v Champion*, 452 Mich 92, 101 -102; 549 NW2d 849 (1996). Related to the plain view exception is the plain feel exception, which allows the warrantless seizure of an item felt during a legitimate patdown search for weapons when the identity of the object is immediately apparent and the officer has probable cause to believe that the object's incriminating character is immediately apparent. *Custer*, *supra* at 331. "Patdown searches are designed to discover weapons or other instruments that might injure an officer." *Id*.

In *Minnesota v Dickerson*, 508 US 366, 378; 113 S Ct 2130; 124 L Ed 2d 334 (1993), the Court held that an officer who was justified in conducting a *Terry* search for weapons could not continue to search a suspect's pocket after determining that it did not contain a weapon. In *Dickerson*, the officer felt a lump in the defendant's pocket while conducting a *Terry* search, but the incriminating nature of the lump (a lump of crack cocaine in cellophane) was not immediately apparent upon patting the defendant down. Instead, an officer must have probable cause to believe that an item is contraband or a weapon before seizing it. *Id.* at 376.

In this case, the officer was justified in initially removing the keys from defendant's pocket during the patdown search because it was immediately apparent that they consisted of some metal that possibly could be used against the officer.[1] However, after determining that the item was a set of keys, the officer returned the keys to defendant's pocket. It was not until after the officer learned a short time later that a suspicious vehicle was found at the crime scene that the keys were removed from defendant's pocket and given to another officer to test them to see if they would start the vehicle. Because the officer already knew of the keys' existence pursuant to the *Terry* patdown search, he properly could remove the keys a second time for further investigation. In *Dickerson, supra* at 377, when discussing a seizure made during a patdown search, the Court noted that "[t]he seizure of an item whose identity is already known occasions no further invasion of privacy." A search for purposes of the Fourth Amendment occurs when the government intrudes on an individual's reasonable, or justifiable, expectation of privacy. *People v Paul Taylor,* 253 Mich App 399, 404; 655 NW2d 291 (2002). Because the police had justification for invading defendant's right to privacy regarding the keys during the patdown search, seizing the keys a short time later when the officer learned that the keys may be evidence linking defendant to the crime was not another search of defendant's pocket or the keys. For this reason, defendant's reliance on *Arizona v Hicks,* 480 US 321; 107 S Ct 1149; 94 L Ed 2d 347 (1987), is misplaced. In *Hicks*, the Court held that the plain view exception does not allow the police to seize an item and then further investigate the item's parts that are not in plain view. *Id.* at 324-325. In this case, the officer initially seized the keys to confirm that they were not a weapon, and he did not need to conduct a further search of the keys to justify removing them a second time once he learned that the keys were possible evidence of defendant's involvement in the crime.

The trial court generally upheld this search under *Terry* because the police officers removed the keys and quickly tested them in the car at the crime scene to determine if they could connect defendant to the home invasion. In *United States v Place,* 462 US 696; 103 S Ct 2637; 77 L Ed 2d 110 (1983), the Court addressed the scope of an investigative seizure under *Terry*. Although warrantless seizures of property are typically unreasonable per se under the Fourth Amendment, the Court was asked to decide if the principles applicable to *Terry* stops allowed the police to seize luggage on the basis of a reasonable, articulable suspicion, on objective facts, that the luggage contained contraband or evidence of a crime. *Id*. at 701-702.

> In sum, we conclude that when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope. [*Id.* at 706.]

The Court further observed that because the police only subjected the luggage to a canine sniff and did not rummage through its contents, the investigation was much less intrusive than a typical search. Because of the limited nature of the investigation, the Court held that it was not a

[1] When renewing his motion to suppress on the day of trial, defense counsel described the key chain as a "massive key chain."

"search" within the meaning of the Fourth Amendment. *Id*. at 707. Ultimately, however, the Court held that the officer's seizure of the luggage exceeded the scope of a seizure permitted by *Terry* because the police did not act promptly, but rather took approximately 90 minutes to investigate the matter. *Id.* at 709-710.

In this case, we agree with the trial court that the police properly could seize defendant's keys to conduct a prompt investigation to determine whether the keys fit the automobile left at the crime scene. The evidence did not indicate that the police unreasonably delayed in checking the keys, but rather proceeded promptly to decide whether defendant should be arrested or released. There is also no evidence that the police conducted any further investigation of an intrusive nature, but only used the keys to determine if they started the car. For these reasons, the trial court properly denied defendant's motion to suppress.

Next, defendant argues that the trial court erred in denying his requests to instruct the jury on the necessarily included lesser offenses of third-degree home invasion, MCL 750.110a(4), and entering without permission, MCL 750.115(1). This Court reviews de novo a trial court's decision whether to instruct on a necessarily included lesser offense. *People v Tommy Brown*, 267 Mich App 141, 145; 703 NW2d 230 (2005).

In *People v Cornell*, 466 Mich 335, 353-359; 646 NW2d 127 (2002), our Supreme Court held that MCL 768.32 only permits a jury to consider necessarily included lesser offenses. See also *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002); *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). "[A] requested instruction on a necessarily included lesser offense is proper 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." *Cornell, supra* at 357. Assuming, without deciding, that MCL 750.110a(4)(a) is a necessarily included lesser offense of MCL 750.110a(2), we agree with the trial court that a rational view of the evidence did not support an instruction on third-degree home invasion.

First-degree home invasion requires proof that the defendant was either (1) armed with a dangerous weapon, or (2) was in the house when another person was lawfully present in the dwelling. MCL 750.110a(2)(a), (b). In this case, there was no factual dispute that the homeowner was lawfully present in the house while defendant was also inside. Because the presence of the homeowner is an element of the greater offense of first-degree home invasion, but is not part of the lesser included offense of third-degree home invasion, MCL 750.110a(4)(a), and there was no factual dispute concerning this element, the trial court did not err in refusing to instruct on third-degree home invasion. *Cornell, supra.*

Nor did the trial court err when it refused to instruct the jury on entering without permission. Breaking and entering without permission, MCL 750.115(1), is a necessarily included lesser offense of first-degree home invasion. *Silver, supra* at 392. However, the instruction was not supported by a rational view of the evidence, because the only plausible interpretation of the evidence was that the perpetrator committed the offense with an intent to commit a larceny. Moreover, the principal issue at trial was defendant's identity as the perpetrator. Accordingly, we reject this claim of error.

In a pro se supplemental brief, defendant challenges his in-court identification by Jimmy McFerran, who identified defendant as the person McFerran discovered inside his house.

Defendant argues that McFerran's in-court identification was tainted by an unduly suggestive identification procedure at the preliminary examination. Because defendant did not challenge McFerran's identification testimony in the trial court, this issue is not preserved and our review is limited plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Kevin Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). To show a due process violation, the "defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *Id.*, quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

A preliminary examination can involve an impermissively suggestive identification procedure. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998). Because this issue was not developed in the trial court, the record does not provide a basis for concluding that the circumstances of the preliminary examination were unduly suggestive. Also, even if an unduly suggestive identification procedure took place, it is not apparent that McFerran lacked an independent basis for his in-court identification. *People v Kachar*, 400 Mich 78, 83; 252 NW2d 807 (1977); *People v Thomas Davis*, 241 Mich App 697, 702; 617 NW2d 381 (2000).

Furthermore, defendant has not shown that there is a likelihood that McFerran was mistaken in his identification, that he is actually innocent, or that any error seriously affected the fairness, integrity or public reputation of this trial. *Carines, supra*. McFerran provided the police with a description of the suspect and defendant was stopped a short time later in the vicinity of the crime scene because he matched that description. A tracking dog followed a scent from McFerran's home to the location where defendant was stopped.[2] In addition, defendant had possession of some car keys for a car that was discovered immediately in front of McFerran's house. For these reasons, this unpreserved issue does not warrant appellate relief.

Defendant next argues that his trial attorney was ineffective for not properly presenting a defense based on misidentification. Because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App

[2] We note that, although not raised by the parties, a police bulletin advising officers of the commission of a felony and providing a description of the perpetrator can provide probable cause for a warrantless arrest of a person matching the description who was found along a possible escape route shortly after the crime. *People v Coward*, 111 Mich App 55, 61; 315 NW2d 144 (1981).

14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr,* 451 Mich 115, 124; 545 NW2d 637 (1996).

The defense theory at trial was that McFerran misidentified defendant. Defendant argues that defense counsel should have requested a lineup and called an expert witness to testify about the problems associated with eyewitness identifications. "A right to a lineup arises when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve." *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000), remanded on other grounds 465 Mich 884 (2001).

Irrespective of the propriety of requesting a lineup in this case, defendant has not overcome the presumption of trial strategy. Counsel may have intentionally decided not to request a lineup because of the possibility that McFerran would identify defendant, thereby bolstering McFerran's identification testimony at trial. Furthermore, in light of the evidence that the police discovered defendant in the vicinity of the crime scene, that a tracking dog traced a path from McFerran's house to the location where defendant was found by the police, and that defendant had possession of some car keys that belonged to a vehicle found immediately in front of McFerran's house, defendant has not shown that his attorney's failure to move for a lineup prejudiced him such that he was denied the right to a fair trial, *Pickens*, *supra*, or that, but for counsel's alleged error, there is a reasonable probability that the result of the proceeding would have been different. *Johnson*, *supra*. For these same reasons, the record does not support defendant's claim that counsel was ineffective for failing to call an expert witness on eyewitness testimony.

Affirmed.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Karen M. Fort Hood