

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ROBERT GUTT,

Defendant-Appellant.

UNPUBLISHED

August 8, 1997

No. 191807

Recorder's Court

LC No. 94-012815 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ROBERT GUTT,

Defendant-Appellant.

No. 191868

Recorder's Court

LC No. 95-007671 FH

Before: Jansen, P.J., and Wahls and P.R. Joslyn*, JJ.

MEMORANDUM.

Defendant appeals by right his conviction, following a bench trial, of second degree home invasion (Docket No. 191868), and his contemporaneous adjudication of probation violation (Docket No. 191807). This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first claims that the evidence was insufficient to sustain his conviction for second degree home invasion in Docket No. 191868. The corpus delicti of the crime was amply proved. However, the only evidence identifying defendant as the burglar was a tool belt taken from the garage of the victim's home during the burglary, found in defendant's possession when defendant was arrested the

* Circuit judge, sitting on the Court of Appeals by assignment.

day after the burglary. Where this much time has elapsed, *cf. People v Benevides*, 71 Mich App 168, 174-175; 247 NW2d 341 (1976), mere proof of possession of personalty recently stolen in a burglary is insufficient to sustain a conviction for burglary, but is merely prima facie evidence of larceny. *People v McDonald*, 163 Mich 552, 555-556; 128 NW 737 (1910); *People v McDonald*, 13 Mich App 226, 236-237; 163 NW2d 796 (1968).

Here, inasmuch as the complaining witness testified at trial that the tool belt was defendant's property, defendant cannot be found guilty either of stealing his own property or receiving and concealing property belonging to himself. *People v Pohl*, 202 Mich App 203, 205-206; 507 NW2d 819 (1993), *rev'd in part on other gds* 445 Mich 918; 519 NW2d 899 (1994). Accordingly, defendant's conviction is reversed and, as to that charge, defendant is ordered discharged.

Inasmuch as defendant's adjudication of probation violation is linked to his conviction for second degree home invasion, the probation violation adjudication must also be vacated. Here, it must be recognized that conviction of the substantive offense is reversed because of failure to adduce sufficient proof to establish defendant's guilt of second degree home invasion beyond a reasonable doubt; defendant's probation may be deemed violated, however, on the basis of a preponderance of the evidence. MCR 6.445(E)(1). As a new probation violation hearing must therefore be conducted, any issue concerning the nature or scope of those charges or the propriety of the trial court's allowance of an amendment thereto is moot for present purposes.

Conviction reversed; probation violation adjudication vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Myron H. Wahls

/s/ Patrick R. Joslyn