STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ARTHUR FUDGE,

Defendant-Appellant.

UNPUBLISHED
December 17, 1999

No. 213594
Kent Circuit Court
LC No. 97-007408 FH

Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of home invasion in the first degree, MCL 750.110a(2); MSA 28.305(a)(2). Defendant was sentenced to life imprisonment as a fourth felony offender, MCL 769.12; MSA 28.1084. We affirm.

Defendant first contends that the evidence presented at trial was insufficient to support his conviction. We disagree. In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecutor and determine 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, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994).

A person is guilty of home invasion in the first degree if he or she "breaks and enters a dwelling with intent to commit a felony or a larceny in the dwelling." MCL 750.110a(2); MSA 28.305(a)(2). Defendant's argument is that the evidence presented at trial was insufficient to prove the existence of felonious intent. Defendant has thus impliedly conceded that all other elements of the crime of home invasion in the first degree, including the element of identity, were proven at trial. Defendant relies on the case of *People v Palmer*, 42 Mich App 549; 202 NW2d 536 (1972), in which we stated that "a presumption of an intent to steal does not arise solely from the proof of breaking and entering." *Id.* at 552. Defendant concludes that this statement not only applies to the presumption of an intent to steal, but also to the presumption of an intent to commit criminal sexual conduct. While this conclusion may be reasonable, it is irrelevant in this case. There was sufficient circumstantial evidence presented at trial,

apart from the finding that defendant committed a breaking and entering, to sustain the jury's conclusion that defendant entertained the requisite felonious intent.

Because felonious intent in a breaking and entering is "difficult, if not impossible, to prove by direct evidence," it may be established by inferences from circumstantial evidence. *People v Riemersma*, 104 Mich App 773, 780; 306 NW2d 340 (1981). Furthermore, a jury does not have to unanimously agree on the specific felony a defendant intended to commit following his breaking and entering, so long as all jurors agree that some felony was intended. See *People v Ferguson*, 208 Mich App 508, 511-512; 528 NW2d 825 (1995). In *People v Hughes*, 27 Mich App 221, 222; 183 NW2d 383 (1970), we stated that a defendant's felonious intent may be inferred from the "nature, time, and place" of his acts. Thus, we concluded in that case that the defendant's intent to commit larceny could reasonably be inferred from proof that the defendant, under the mistaken impression that the victim was not home, attempted to break into the victim's home at night. *Id.* In the present case, defendant's felonious intent can reasonably be inferred from proof that defendant, knowing that the victim husband's truck had been gone all day, broke into the home under cover of night while the victim wife was in bed.

The specific findings of fact that support the inference of felonious intent in the present case are: (1) defendant rented garage space to the victim husband for his truck; (2) the truck was taken out of defendant's garage on the morning of March 1, 1997; (3) the truck had not been returned as of midnight, March 2, 1998; (4) at around that time, defendant broke and entered the victims' home. From these findings, which are uncontested in this appeal, the jury could have reasonably concluded that defendant mistakenly believed that the entire family had gone in the truck, and therefore intended to commit larceny when he broke and entered their home. The jury could also have reasonably concluded that defendant knew that only the husband had gone in the truck, leaving his wife alone at home, and that therefore defendant's intent was to commit an act of criminal sexual conduct. Neither of these inferences of felonious intent are supported solely by the fact that defendant committed a breaking and entering. Rather, they are also supported by the findings that the breaking and entering took place at night, and that defendant was acting with the knowledge that either the entire family, or just the husband, was not at home at the time.

Our holding in *Palmer, supra,* is distinguished by the fact that the defendant in *Palmer* was attempting to break and enter a home at noontime, and because there was no evidence presented that the defendant was acting under the impression that the home was unoccupied. *Id.* at 551-552. Pursuant to our holdings in *Riemersma, supra,* and *Hughes, supra,* the evidence presented in this case adequately supports a finding that defendant acted with felonious intent. Therefore, there is sufficient evidence in the record to support defendant's conviction for home invasion in the first degree.

Defendant's next argument is that the trial court erred by instructing the jury on the charge of first-degree home invasion. We find this argument to be without merit. This Court reviews claims of instructional error for an abuse of discretion. *RCO Engineering, Inc v ACR Industries, Inc,* 235 Mich App 48, 65; 597 NW2d 534 (1999). Defendant does not argue that the court's instructions regarding the charge of home invasion in the first degree were substantively flawed in such a way that they were prejudicial to his case. Rather, defendant's contention that the court committed error by instructing the

jury on this offense is based on his claim that there was insufficient evidence to support the charge. We have concluded that there was sufficient evidence to support defendant's conviction for the crime of home invasion in the first degree. Therefore, the trial court did not commit error by instructing the jury on that charge.

Defendant next contends that notwithstanding the fact that he was sentenced as an habitual offender, by virtue of which the guidelines were inapplicable, resentencing is still warranted because the trial court failed to calculate sentencing guidelines for the underlying felony of first-degree home invasion. We disagree. The Michigan Sentencing Guidelines do not apply to the crime of home invasion. *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998); *People v Edgett*, 220 Mich App 686, 690; 560 NW2d 360 (1996). The absence of a guidelines calculation presents no error.

Defendant also argues that his sentence violates the principle of proportionality because the court employed improper considerations. We disagree. Provided permissible factors are considered, appellate review is limited to whether the sentencing court abused its discretion. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality, which requires the court to consider the circumstances surrounding the offense and the offender. *Id.*; *People v Crawford*, 232 Mich App 608, 621; 581 NW2d 669 (1998). The record in the present case indicates that the court's sentence was appropriately based entirely on consideration of these two factors.

First-degree home invasion is punishable by imprisonment for 20 years. MCL 750.110a(4); MSA 28.305a(4). As a fourth habitual offender, defendant's sentence for this offense was subject to enhancement to a life term. MCL 769.12; MSA 28.1084. At the sentencing hearing, the court first considered the severity of the crime and the circumstances surrounding its perpetration. The court stated:

> This was a very, very serious burglary. It wasn't merely breaking into a home where people had a sense of privacy but, fortunately, weren't there, it was breaking into a home while a resident was there alone, a resident whom [sic], it was apparent from testifying here, because of a language barrier and other things, has a fear of being alone, and that was taken advantage of. I'm also satisfied, having listened to the proofs here, that it's more and more likely that, indeed, she was the intended victim of exactly what happened.

Defendant contends that the court improperly inferred that defendant intended to rape the victim wife, and that this inference led to a sentence that was disproportionate to the crime. This inference was not improper. As explained above, there is sufficient record evidence to support the finding that defendant knew the victim husband was not home when he broke into the residence on the night of March 2, 1997. Given this finding, the sentencing court, as well as the jury, could have reasonably inferred that the victim wife was defendant's intended victim. Furthermore, a sentencing court may consider facts not initially admissible at trial, such as defendant's prior convictions. *People v Potrafka*, 140 Mich App 749, 752; 366 NW2d 35 (1985). Defendant had previously been convicted of first-degree criminal

sexual conduct. This fact gives further support to the court's possible belief that defendant intended to commit an act of criminal sexual conduct when he broke and entered the victims' home.

Including the criminal sexual conduct conviction, defendant has five previous felony convictions. The felonies include armed robbery (two convictions), kidnapping, and voluntary manslaughter. The sentencing court noted that defendant had pleaded guilty to voluntary manslaughter after being charged with murder. The court stated that defendant's record was "not long, as some go here, but in terms of severity, as bad as it gets." A sentence must be proportionate to the crime committed and to defendant's prior record. *Milbourn, supra* at 635-636. Given defendant's previous convictions, and the seriousness of the crime in question, defendant's life sentence does not violate the rule of proportionality.

Defendant also contends that the court improperly considered the "will of the people" when determining defendant's sentence. Defendant's argument is apparently based on the following statement by the court:

> I've come to the conclusion that the people of this community are simply entitled to no longer have to look over their shoulder to see what you're going to do next and whether you're going to hurt somebody the next time. The habitual offender statute was written with you in mind, not you as an individual but with your history in mind. To put it bluntly, society deserves to be rid of you and the risks you pose.

The sentencing court made the above-quoted statement after addressing the severity of the crime and defendant's previous record, and just before imposing the sentence. In that context it is clear that the statement represents commentary by the court, meant to condemn the behavior of defendant. We have stated that because sentencing is the time for comments against felonious, antisocial behavior, the language used by a court when imposing sentence need not be tepid. *People v Antoine*, 194 Mich App 189, 191; 486 NW2d 92 (1992). Further protection of society is a proper consideration in imposing sentence. See *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). This claim presents no error.

Defendant's final contention is that his sentence constitutes cruel and unusual punishment. Defendant contends that because his life sentence violates the principle of proportionality, it is also a violation of the Eighth Amendment ban on cruel and unusual punishment. We have concluded that defendant has failed to show that his sentence violates the principle of proportionality. Consequently, defendant has also failed to show that the sentence represents cruel and unusual punishment.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Janet T. Neff