STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 28, 2000
v	No. 215668 Kent Circuit Court
MICHAEL GERALD BATES, Defendant-Appellant.	LC No. 98-003188-FH

Before: Fitzgerald, P.J., and Bandstra, C.J., and O'Connell, J.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3), and possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Defendant was sentenced as an habitual offender, third, to three to fifteen years' imprisonment. MCL 769.11; MSA 28.1083.[1] We affirm.

Defendant first challenges the sufficiency of the evidence to support his conviction for home invasion. When reviewing the sufficiency of the evidence presented at trial, we view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

A person is guilty of second-degree home invasion if he or she "breaks and enters a dwelling with intent to commit a felony or a larceny in the dwelling." MCL 750.110a(3); MSA 28.305(a)(3).[2] In this case, the prosecutor's theory was that defendant was an aider and abettor. To prove aiding and abetting, the prosecutor must show the following:

> (1) [T]he crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).]

Defendant and another man were accused of breaking into a home and stealing various items, including some stereo equipment, while the residents were gone. Defendant claimed that he merely drove the man to a place to pick up some speakers, but that he did not know that the man was committing a crime. On appeal, defendant contends that the prosecutor presented insufficient evidence to allow the jury to conclude that defendant either intended to commit a home invasion or knew that the principal intended to commit a home invasion. Specifically, defendant claims that he lacked the requisite intent to commit a larceny in the dwelling to be convicted of second-degree home invasion.

The elements of a crime may be sufficiently proved by circumstantial evidence and reasonable inferences drawn from the evidence. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Defendant's challenge hinges on the proof of his state of mind. "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *Turner*, *supra* at 568. Some permissible factors to consider are the relationship between the defendant and the principal, the degree of the defendant's participation in the planning or execution of the crime, and whether the defendant fled after the crime. *Id*. at 569. We conclude that the prosecutor presented sufficient circumstantial evidence to support an inference that defendant at least had knowledge of the principal's felonious intent at the time the home was broken into.

The prosecutor presented evidence that the back door of the house had been nearly knocked off its hinges and that causing the damage would have created much noise. Also, officers noticed several sets of footprints in the snow showing multiple trips into and out of the house. Additionally, evidence was presented that many items were stolen from the house, not just speakers. One witness even testified that she saw defendant walk from the side of the house to a car with something in his hand. Furthermore, one officer testified that defendant stated that he realized it was a "burglary" when he saw the "nosy" neighbors. From this evidence, the jury could reasonably infer that defendant heard the principal break down the back door and assisted the principal in making several trips from the house, carrying many items. Also, the jury could infer that, even after knowing a crime had taken place, defendant assisted in driving the principal from the crime scene with the stolen items. When viewed in the light most favorable to the prosecutor, this evidence was sufficient to allow the jury to convict defendant of second-degree home invasion.

Defendant next argues that the trial court improperly denied his motion for a new trial because the jury's verdict was against the great weight of the evidence. We review the trial court's decision whether to grant a motion for a new trial for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). "An abuse of discretion will be found only where the trial court's denial of the motion was manifestly against the clear weight of the evidence." *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). Defendant essentially restates his argument regarding the issue of the sufficiency of the evidence. We conclude that defendant's conviction for home invasion was not against the great weight of the evidence. Substantial evidence demonstrated that defendant knew he was assisting in the theft of various items from a home.[3]

Defendant next claims that the prosecutor improperly elicited evidence of defendant's silence at the time of his arrest. Because defendant did not object at trial, this issue is unpreserved. MRE 103(1). Therefore, to avoid forfeiture of this issue, defendant must demonstrate plain error that affected the

outcome of the proceeding. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We discern no plain error. The comments of which defendant complains were not, in fact, references to defendant's *silence*, because defendant did not remain silent.[4] Rather, he gave an explanation of the events to police officers. The testimony elicited by the prosecutor focused on the adequacy of the statements defendant made, not on the absence of a statement. Defendant attempted to explain his participation in the crime by stating that he thought he was assisting someone pick up some speakers, but did not know that a home invasion or theft was taking place. To impeach defendant's theory, the prosecutor asked various police officers during trial whether defendant explained why the principal went to the back door instead of the front door and why the back door was broken. The witnesses testified that, in defendant's statement, he did not explain why the back door was used or why it was broken. Contrary to defendant's argument, the testimony elicited by the prosecutor did not refer to defendant's silence or invocation of his right to remain silent; rather, the testimony was proper impeachment of defendant's exculpatory statement by exploring the adequacy of his explanation of events. Defendant has failed to demonstrate outcome-determinative plain error.

Defendant next argues that the trial court improperly denied his motion for a new trial based on newly discovered evidence. We review for an abuse of discretion the trial court's post-conviction ruling granting or denying a new trial based on newly discovered evidence. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). Such a motion may be granted if the defendant shows that "(1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial." *Id.*

At trial, defendant claimed that Howard Reed, not his codefendant Paul Hughes, was the principal perpetrator of the home invasion. However, Howard Reed testified that he had nothing to do with the crime. Defendant claims that the trial court erred by denying his motion for a new trial based on newly discovered evidence that contradicted the testimony of Howard Reed. Defendant presented an affidavit in which a prisoner named James Davis claimed that Reed admitted to him in jail that he committed the home invasion and that defendant did not know that the stereo equipment was stolen. Defendant argues that this evidence impeaches Reed's trial testimony that he had nothing to do with the crime. "Newly discovered evidence is not ground for a new trial where it would merely be used for impeachment purposes." *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). The newly discovered evidence defendant presents would not negate the circumstantial evidence showing that defendant knew that the principal, whoever it was, was committing a home invasion. The evidence would only cast doubt on Reed's testimony and perhaps bolster the credibility of defendant's version of events. Defendant has not demonstrated that, because of the newly discovered evidence, a different result would be probable on retrial.

Defendant next argues that his sentence of three to fifteen years' imprisonment is disproportionately harsh. Defendant was sentenced as an habitual offender, and we review a sentence imposed on an habitual offender for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). A sentence within the statutory limits does not constitute an abuse of discretion when the habitual offender's underlying felony, in the context of his or her criminal

history, demonstrates that the offender is unable to conform his or her conduct to the law. *Id*. at 326. Defendant's criminal history includes various assaultive crimes, controlled substance offenses, and probation violations, as well as a felony larceny conviction, over a ten-year period. We conclude that defendant's sentence, which is within the statutory limits,[5] does not constitute an abuse of discretion.[6]

Finally, defendant argues that the trial court's jury instructions were improper. However, defendant failed to object to the instructions given, so this issue is unpreserved. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).[7] In order to avoid forfeiture of this issue, defendant must demonstrate plain error that affected the outcome of the proceeding. *Carines*, *supra* at 763-764.

The trial court misspoke when instructing the jury regarding the presumption of innocence. The court stated as follows:

> You all know that basic to the American system of criminal justice is the presumption that a person accused of a crime *is not innocent* of that crime, unless and until it is established by evidence at a trial like this one that they are guilty. (Emphasis added).

Jury instructions must be reviewed as a whole, not piecemeal. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). Here, although the trial court mistakenly said "not innocent" instead of "not guilty," the jury instructions as a whole properly informed the jury that defendant was innocent until proved guilty beyond a reasonable doubt.[8] See *People v Foster*, 138 Mich App 734, 736; 367 NW2d 349 (1984) (court's mistaken use of word "insane" instead of "sane" was not error resulting in manifest injustice). "Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and adequately protect the defendant's rights." *Bartlett*, *supra* at 143-144. We discern no plain error that would have affected the outcome of the proceeding. We have also examined the other comments of which defendant complains, and find no plain error.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell

[1] Defendant was also sentenced to ninety days' imprisonment for the possession of cocaine conviction, but was given ninety days' credit for time already served.

[2] The statute has been amended since defendant's conviction to include breaking and entering with intent to commit an assault. 1999 PA 44.

[3] To the extent that defendant challenges the credibility of the prosecutor's witnesses, we bear in mind that in assessing a claim that a verdict was against the great weight of the evidence, issues of witness credibility are for the jury to decide, absent exceptional circumstances. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Defendant does not claim that the testimony of any witness was so

patently incredible or completely impeached that the trial court should have rejected it and granted a new trial. *Id*. at 643-646.

[4] It is generally impermissible for a prosecutor to elicit testimony regarding defendant's exercise of the privilege against self-incrimination. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

[5] Second-degree home invasion is a fifteen-year felony. MCL 750.110a; MSA 28.305(a). As an habitual offender, third, defendant faced a possibility of up to thirty years' imprisonment for that offense. MCL 769.11(1)(a); MSA 28.1083(1)(a).

[6] To the extent that defendant relies on the sentencing guidelines in his argument, we note that the judicially created sentencing guidelines do not apply to habitual offenders. *Hansford*, *supra* at 323.

[7] After the jury instructions were given, the judge told the jury to leave the room, but not to begin deliberating because the judge wanted to discuss the instructions with the attorneys to determine whether he misstated anything, so that he could correct any mistakes before deliberations began. Defense counsel noted a "concern" about one comment the judge made during instructions, but did not formally object or ask the court to correct the instruction. Moreover, the jury was in fact brought back into the courtroom to correct a mistake in the definition of home invasion. Defense counsel did not take that opportunity to request the correction of any alleged error in the instructions given. Therefore, defendant's assertion on appeal that the issue is preserved because defendant objected to the instructions is not supported by the record.

[8] We offer the following example of the remainder of the trial court's remarks concerning the presumption of innocence:

> Now there's only one way to overcome the presumption of innocence. That's by proof beyond a reasonable doubt. That is a very high burden of proof, ladies and gentlemen.