

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNARD FISHER,

Defendant-Appellant.

UNPUBLISHED

January 29, 2004

No. 242213

Wayne Circuit Court

LC No. 01-005108-01

Before: Fitzgerald, P.J., and Neff and White, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I agree that there was sufficient evidence to support defendant's convictions. I dissent, nevertheless, from the affirmance of the home-invasion conviction because the trial court's statements indicate that it may not have found as a fact that defendant actually entered the home without permission, as required by the statute. I would remand.

Defendant was charged with first-degree home invasion, MCL 750.110a(2), and felonious assault in connection with an incident involving his former girlfriend.

In rendering its decision the court stated:

I indicated that I'll give him the benefit of the doubt that the sister might have let him in the house, but the Court finds that on March 7, 2001, . . . [the complainant] told the defendant to leave, so at that point he didn't have permission to be in that dwelling.

Thus, the court did not make a clear finding that defendant actually entered without permission, and may have erroneously concluded that the actual entry without permission was not required.

The context of the court's comments makes it unclear whether the court concluded that the prosecution failed to prove beyond a reasonable doubt that defendant entered without permission, or whether the court allowed that the sister might have let him in for the sake of argument, in order to reach what the court perceived as the controlling fact that whether the sister extended permission or not, the complainant later told him to leave, so that at that point he was present without permission. I would remand for further fact-finding to clarify this issue and would instruct that if the court finds beyond a reasonable doubt that defendant did not enter with

the sister's permission, then the verdict would stand, and that otherwise, the court should find defendant not guilty of the home invasion charge.

/s/ Helene N. White