STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2008
v	No. 276148 Wayne Circuit Court
MARIO VINCENT ESTES, Defendant-Appellant.	LC No. 06-004920-01

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

Defendant pleaded guilty to second-degree home invasion, MCL 750.110a(3), and was sentenced to 2 to 15 years in prison. He appeals by delayed leave granted the trial court's order denying his post-judgment motion to withdraw his guilty plea. We remand for entry of an order vacating defendant's plea and plea-based conviction. This appeal is being decided without oral argument. MCR 7.214(E).

Defendant argues that the trial court abused its discretion in denying his motion to withdraw his guilty plea because a factual basis for the plea was not established. We agree.

We review a denial of a post-judgment motion to withdraw a guilty plea for an abuse of discretion. *People v Davidovich*, 238 Mich App 422, 425; 606 NW2d 387 (1999). "In reviewing the adequacy of the factual basis for a plea, this Court examines whether the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding." *People v Brownfield (After Remand)*, 216 Mich App 429, 431; 548 NW2d 248 (1996).

The trial court engaged in the following colloquy to establish the factual basis for defendant's plea:

> *THE COURT:* What did you do on April 13th, 2006, in the city of Detroit, that makes you guilty of home invasion second degree?
>
> *DEFENDANT:* Your Honor, I kicked open the door at Joanne's house?
>
> *THE COURT:* Joanne lives at . . . .
>
> *DEFENDANT:* Yes.

THE COURT: You kicked open the door of her house with intent to commit larceny?

DEFENDANT: No.

THE COURT: With intent to commit a felony?

DEFENDANT: It wasn't intent to commit a felony. All I was going in to do was get my clothes out of there, that had been – this – it wasn't never to commit a felony.

THE COURT: This is a house of someone who did not give you permission to be in their house, or take anything from in their house; is that correct?

DEFENDANT: Yes.

THE COURT: And that, in itself, makes it intent to commit a larceny. Because this is their house. Anything you took out is without their permission? Yes?

* * *

THE COURT: You attempted to commit a larceny in there?

DEFENDANT: Yes, your Honor.

Second-degree home invasion occurs when a person breaks and enters a dwelling or enters a dwelling without permission with the intent to commit a felony, larceny, or assault in the dwelling, or when a person breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault. MCL 750.110a(3).

The elements of larceny are:

> "(1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner." [*People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999), quoting *People v Anderson*, 7 Mich App 513, 516; 152 NW2d 40 (1967).]

Thus, larceny requires both the taking of goods or property without the consent of the owner, and that the goods or property in question belong to another.

The intent to commit larceny "cannot be presumed solely from proof of the breaking and entering," but may reasonably be inferred from the nature, time, and place of defendant's acts before and during the breaking and entering. *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). Defendant admitted that he kicked open the door of an individual's home, but only with the intent to take his own possessions. Defendant's admissions do not establish his intent to commit larceny, and there were no other admissions from which an intent to commit larceny

could be inferred. The facts elicited by the trial court were insufficient to convict defendant of second-degree home invasion.

In denying defendant's motion to withdraw the plea, the trial court focused on defendant's admission that he "attempted to commit a larceny." The court explained:

> The defendant at one point earlier than that, had said that this was his clothing, but then at that time, the court did not accept the plea, after he said that. But asked specific questions about whether he intended to commit a larceny therein, and entered into the home without permission. The defendant did make those admissions.

We acknowledge that defendant ultimately agreed that he "attempted to commit a larceny." However, it is clear that he did so only as a result of the trial court's leading question and inaccurate explanation of the elements of larceny. The facts elicited by the court during the plea proceeding did not establish that defendant had the intent to commit a larceny. Accordingly, those facts were necessarily insufficient to establish the elements of second-degree home invasion.

Where the factual basis established at a plea proceeding is inadequate, the appropriate remedy is generally to allow the prosecutor to present further or additional evidence in support of the guilty plea. See *People v Mitchell*, 431 Mich 744, 750; 432 NW2d 715 (1988). However, in response to the filing of defendant's post-judgment motion in this case, the prosecution presented no new or additional facts to establish a sufficient factual basis for defendant's guilty plea. The trial court therefore should have set aside defendant's plea and plea-based conviction, *Brownfield*, *supra* at 434, and we conclude that the court abused its discretion by not doing so, *Davidovich*, *supra* at 425. We remand this matter to the trial court for entry of an order vacating defendant's plea and plea-based conviction. *Brownfield*, *supra* at 434.

Remanded for entry of an order vacating defendant's plea and plea-based conviction. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Alton T. Davis