

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAIME CHARLES PRUITT,

Defendant-Appellant.

UNPUBLISHED

September 30, 2008

No. 278345

Antrim Circuit Court

LC No. 07-004055-FH

Before: Saad, C.J., and Sawyer and Beckering, JJ.

PER CURIAM.

A jury convicted defendant of first-degree home invasion, MCL 750.110a(2), second-degree home invasion, MCL 750.110a(3), receiving or concealing a stolen firearm, MCL 750.535b(2), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him as a habitual offender, second offense, MCL 769.10, to concurrent prison terms of 87 to 360 months for the first-degree home invasion conviction, 5 to 22-1/2 years for the second-degree home invasion conviction, 5 to 15 years for the receiving or concealing conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. For the reasons set forth below, we vacate defendant's first-degree home invasion conviction and remand for entry of a conviction on the necessarily included lesser offense of second-degree home invasion and resentencing on that offense. In all other respects, we affirm.

Defendant's convictions arise from a series of home break-ins in Antrim County in September 2006. Defendant participated in the offenses with his girlfriend, Kay Blackledge, and another friend, Carl Michayluk. Blackledge testified against defendant pursuant to a plea agreement. The evidence indicated that Michayluk stole a 12-gauge shotgun from one of the homes. Defendant, Blackledge, and Michayluk were all arrested approximately two weeks after the offenses. After his arrest, defendant spoke to two different law enforcement officers and gave statements describing a number of the stolen items and the location of at least one of the break-ins.

I. Sufficiency of the Evidence

Defendant argues that the prosecutor presented insufficient evidence to support his convictions of first-degree home invasion, receiving or concealing a stolen firearm, and felony-firearm.¹

A. First-degree Home Invasion

Defendant does not dispute that the prosecution presented sufficient evidence to show that he committed a home invasion. MCL 750.110a. He argues, however, that he is guilty, at most, of second-degree home invasion, not first-degree home invasion.

Under MCL 750.110a(2)(a), a person who commits a home invasion is guilty of first-degree home invasion if that person, while entering, present in, or exiting the dwelling, is armed with a dangerous weapon. Here, the dangerous weapon element was factually premised on the 12-gauge shotgun that was stolen from one of the homes. Because a home invasion is a continuing offense, not necessarily completed until the person is leaving, the theft of a firearm during the commission of the crime is enough to support a conviction of first-degree home invasion. *People v Shipley*, 256 Mich App 367, 376-377; 662 NW2d 856 (2003). Here, however, the evidence showed that codefendant Michayluk stole the shotgun from the home, and the prosecutor conceded below that no evidence showed that the gun was ever “actually physically” in defendant’s hands.

The prosecutor argues that defendant did not have to hold the gun to convict him of first-degree home invasion because he could be convicted of that offense as an aider or abettor. We agree with this general statement of law. Under MCL 767.39, “every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.” Under this statute, a defendant is criminally liable for both offenses he intends to aid or abet, and any crimes that are the natural and probable consequences of the intended offense. *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). Thus, defendant properly could be convicted of first-degree home invasion if he aided or abetted codefendant Michayluk’s commission of a home invasion while Michayluk was armed with a dangerous weapon, in this case a 12-gauge shotgun, or if first-degree home invasion was a natural and probable consequence of the intended offense.

For reasons that are not clear, however, the parties specifically agreed, and the jury was specifically instructed, that an aiding or abetting theory applied only to the felony-firearm count. When the jury requested clarification of which counts it could consider aiding or abetting, the trial court informed the parties that it intended to instruct the jury that “aiding and abetting deals

¹ We review a challenge to the sufficiency of the evidence de novo by reviewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). In doing so, we must draw all reasonable inferences and make credibility choices in support of the jury’s verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

only with felony firearm,” and asked the parties if that was acceptable. The prosecutor responded, “Yes, your honor.” The court thereafter instructed the jury that “aiding and abetting only applies to the felony firearm count.” In light of this record, it would be improper for us to evaluate the sufficiency of the evidence for the first-degree home invasion count under an aiding or abetting theory. Because the jury was specifically instructed, with the prosecutor’s consent, that it was not to consider defendant’s potential guilt under an aiding or abetting theory, we will not do so here.

In light of evidence that Michayluk stole the shotgun from the home, and the prosecutor’s concession that there is insufficient evidence that defendant was armed with the gun during the home invasion, and because the question of defendant’s potential guilt under an aiding or abetting theory was removed from the jury’s consideration, we must conclude that the prosecutor did not satisfy the element distinguishing first-degree home invasion from second-degree home invasion (i.e., that the offender was armed with a dangerous weapon). As defendant concedes, however, inherent in the jury’s verdict is that defendant was guilty of the necessarily included lesser offense of second-degree home invasion. Accordingly, we vacate defendant’s conviction of first-degree home invasion and remand for entry of conviction on the necessarily included lesser offense of second-degree home invasion, *People v Randolph*, 466 Mich 532, 552; 648 NW2d 164 (2002), and for resentencing on that offense.

B. Felony-Firearm

A person is guilty of felony-firearm if he carries or has in his possession a firearm when he commits or attempts to commit a felony. MCL 750.227b. A person can be convicted of felony-firearm whether he directly commits the act, or aids or abets in its commission. MCL 767.39; *People v Moore*, 470 Mich 56, 62-63; 679 NW2d 41 (2004). Conviction under an aiding or abetting theory is proper if a defendant “procures, counsels, aids, or abets” the principal in carrying or having possession of a firearm during the commission of a felony. *Id.* at 70.

A home invasion that involves the theft of a weapon may support a felony-firearm conviction. *Shipley, supra* at 377. Unlike the first-degree home invasion charge, the trial court permitted the jury to consider defendant’s potential guilt of felony-firearm under an aiding or abetting theory. The evidence showed that defendant drove codefendant Michayluk to a secluded home with the intention of breaking into it and stealing items of value. Defendant and Michayluk both entered the home and stole items from inside, after which they loaded the property into defendant’s car. One of the items taken by Michayluk was the shotgun, the theft of which was a natural and probable consequence of the intended home invasion offense. This evidence is sufficient to enable the jury to find beyond a reasonable doubt that defendant aided and abetted codefendant Michayluk’s possession of a firearm during the commission of the home invasion.

C. Receiving or Concealing a Stolen Firearm

To be convicted of receiving or concealing a stolen firearm, the prosecutor must prove “that defendant (1) received, concealed, stored, bartered, sold, disposed of, pledged, or accepted as security for a loan (2) a stolen firearm or stolen ammunition (3) knowing that the firearm or ammunition was stolen.” *People v Nott*, 469 Mich 565, 593; 677 NW2d 1 (2004).

The evidence showed that after Michayluk stole the shotgun, it was loaded into defendant's car. Shortly thereafter, defendant, Michayluk, and Blackledge drove to a secluded location to inspect the stolen property and, according to Blackledge, the gun case was opened there. Defendant and Michayluk thereafter showed the gun to Steve Klersy and offered to sell it. According to Klersy, defendant offered to sell Klersy the gun for \$250. Viewed in a light most favorable to the prosecution, this evidence was sufficient to prove beyond a reasonable doubt that defendant received and stored the shotgun, knowing it had been stolen.²

II. Jury Instructions

Defendant raises two claims of instructional error. This Court reviews jury instructions as a whole to determine if there is error requiring reversal. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Jury instructions must include all elements of the charged crimes and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "There is no error requiring reversal if, on balance, the instructions fairly present the issues to be tried and sufficiently protect the defendant's rights." *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

A. Aiding and Abetting Instruction

Defendant argues that the trial court's aiding or abetting instruction was deficient because it failed to inform the jury that he could be liable for unintended offenses committed by a principal only if the unintended offense was a natural and probable consequence of the intended offense. Because defendant did not object to the court's aiding or abetting instruction, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights.³ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

In *Robinson*, *supra* at 15, our Supreme Court stated:

We hold that a defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for the offenses that defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the

² As with the first-degree home invasion charge, the court instructed the jury that an aiding and abetting theory did not apply to the receiving or concealing a stolen firearm charge. Unlike the first-degree home invasion charge, however, the evidence supported defendant's conviction of receiving or concealing a stolen firearm as a principal.

³ We disagree with the prosecutor's argument that defendant waived this issue by affirmatively approving the trial court's aiding or abetting instruction. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Defendant only approved the trial court's decision to limit the offenses to which the aiding or abetting instruction applied. Counsel did not affirmatively approve the substance of the instruction. Thus, there was no waiver.

commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense.

Here, the trial court instructed the jury that in order to be guilty as an aider or abettor, “Defendant must have intended the commission of the crime alleged or must have known that the other person, Mr. Michayluk, intended its commission at the time of giving the assistance.” As defendant correctly observes, the court did not instruct on the alternative test that would have allowed the jury to also convict him if the charged offense, although not intended, was a natural and probable consequence of the commission of the intended offense. This error, however, inured to defendant’s benefit. It left the jury with one less option for finding defendant guilty. Thus, defendant’s substantial rights were not affected and appellate relief is not warranted.

B. Addict-Informant Instruction

Defendant, in propria persona, argues that the trial court erred by denying his request for a cautionary instruction on reviewing the testimony of an addict-informant, CJI2d 5.7, in relation to Blackledge’s testimony.

An addict-informant instruction is appropriate when the testimony of an addict is the only evidence linking the accused with the alleged offense. *People v McKenzie*, 206 Mich App 425, 432; 522 NW2d 661 (1994). Here, apart from Blackledge’s testimony, defendant was linked to the offenses by his own statements to the police, and also by Steve Klersy’s testimony that defendant attempted to sell him the shotgun, which had been stolen from one of the houses. Further, the purpose of the addict-informant instruction is to advise the jury that an addict’s testimony should be examined carefully and with scrutiny. Here, the trial court gave the accomplice instruction, CJI2d 5.6, in relation to Blackledge’s testimony. Like the addict-informer instruction, this instruction fairly informed the jury that it should examine Blackledge’s testimony closely and with special scrutiny, and was sufficient to protect defendant’s rights. For these reasons, we reject this claim of error.

III. Scoring of Offense Variable 14

Defendant argues that the trial court erred in scoring ten points for offense variable (OV) 14 (leader in a multiple offender situation) of the sentencing guidelines. We review the trial court’s scoring decisions for an abuse of discretion to determine whether there is evidence to adequately support a particular score. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

Offense variable 14, MCL 777.44(1)(a), addresses the offender’s role in a crime. The trial court should score ten points if the defendant “was a leader in a multiple offender situation.” MCL 777.44(1). When three or more people are involved, there can be more than one leader. MCL 777.44(2)(b). The court must consider the “entire criminal episode” when scoring OV 14. MCL 777.44(2)(a); *Apgar*, *supra* at 330.

Evidence showed that after committing one break-in with Blackledge, defendant engaged Michayluk to commit additional break-ins, and it was defendant who drove to the locations

where they committed the offenses. Blackledge principally looked to defendant for guidance throughout the criminal transactions. Although defendant asserts that it was Michayluk who stole a gun from one of the locations, the evidence showed that defendant assumed a lead role in attempting to sell the gun afterward. The evidence supports the trial court's ten-point score for OV 14.

IV. Suppression of Defendant's Police Statements

Defendant argues, in propria persona, that the trial court erred in denying his motion to suppress his statements to police. At trial, defendant moved to suppress the statements on the ground that they were the product of an illegal arrest. The trial court rejected this argument because evidence showed that defendant's vehicle was properly stopped for speeding, defendant was unable to produce a driver's license, and defendant gave a false name for which there was an outstanding warrant.

On appeal, defendant challenges the admissibility of his statements on a different ground, that they were involuntary. Because defendant did not challenge the voluntariness of his statements in the trial court, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763.

The record does not support defendant's claim that his statements were involuntary. According to the testimony at trial, defendant spoke to Deputy Lowe several times after his arrest. Defendant was arrested on September 28, 2006, and subsequently informed Deputy Lowe that he believed he was going through withdrawal. Defendant received medical treatment for his withdrawal symptoms on September 30, 2006. Deputy Lowe did not interview defendant until October 3, after defendant asked to speak to Deputy Lowe. According to Deputy Lowe, defendant seemed "pretty much normal" at this time. Defendant thereafter initiated an interview with Detective Woodhouse, the officer in charge of the case. On this record, there is no basis for concluding that defendant's statements were not voluntarily given. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). Defendant has failed to establish a plain error.

Defendant also argues that the trial court erred by failing to conduct a *Walker*⁴ hearing on the issue of voluntariness. Because defendant never challenged the voluntariness of his statements, the failure to hold a *Walker* hearing was not plain error.

V. Failure to Preserve Impeachment Evidence

Defendant complains, in propria persona, that the prosecutor did not disclose evidence and that this violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In order to establish a *Brady* violation, a defendant must show "(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v*

⁴ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Schumacher, 276 Mich App 165, 177; 740 NW2d 534 (2007). The defendant must prove that the missing evidence was exculpatory. *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007).

The evidence at issue is a series of photographs that were taken by a hidden camera at the location of one of the break-ins. Defendant argues that the photos were exculpatory because none contained images of himself or Michayluk. However, this was not contested at trial. The owner explained that the camera was intended to take photos of deer and was aimed away from the cabin door. The testimony established that none of the photos depicted defendant or anyone else entering the cabin on the day of the break-in. On this record, there is no basis for concluding that the prosecutor suppressed favorable evidence or that, if the photos had been produced, a reasonable probability exists that the outcome of the proceedings would have been different.

VI. Effective Assistance of Counsel

Defendant argues, through both appellate counsel and in propria persona, that he was denied the ineffective assistance of counsel. Because defendant failed to raise this issue in a motion for a new trial or request for a *Ginther*⁵ hearing, our review is limited to mistakes apparent from the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Defendant contends that his trial attorney was ineffective for failing to object to the trial court’s aiding or abetting instruction. However, defendant has not overcome the presumption that counsel engaged in sound trial strategy by not objecting to the instruction. First, the trial court’s decision to limit the applicability of the aiding and abetting instruction to the felony-firearm offense favored defendant because it eliminated the possibility that he could be convicted of the other offenses as an aider or abettor. Second, the trial court’s failure to instruct the jury on an alternative basis for finding guilt under an aiding or abetting theory also was not prejudicial because it left the jury with one less option for finding defendant guilty. The fact that counsel’s strategy may not have worked does not constitute ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant also claims, in propria persona, that trial counsel was ineffective for failing to bring a pretrial motion to challenge the voluntariness of his statements, and for not requesting a *Brady* hearing in connection with the failure to preserve the photographic evidence. As explained previously, however, the record lacks factual support for both of these claims. Accordingly, counsel was not ineffective for failing to bring a futile motion.

⁵ *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

VII. Conclusion

For the reasons stated, we vacate defendant's first-degree home invasion conviction and remand for entry of a conviction on the necessarily included lesser offense of second-degree home invasion and for resentencing on that offense. We affirm in all other respects.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Jane M. Beckering