STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY EUGENE MOTLEY,

Defendant-Appellant.

UNPUBLISHED
February 9, 2010

No. 288930
Washtenaw Circuit Court
LC No. 08-000707-FH

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to six to 20 years in prison, consecutive to an earlier sentence from which defendant was on parole at the time. Defendant appeals as of right, challenging the sufficiency of the evidence in support of his conviction, and also the trial court's decision not to award jail credit. For the reasons set forth in this opinion, we affirm the denial of sentencing credit, but vacate defendant's conviction and sentence, and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At trial, defense counsel conceded that, at approximately 4:30 a.m. on April 17, 2008, defendant, drunk and homeless, opened the door of a residence and looked around inside, awakening a person sleeping in that room. Defendant had opened an unlocked side door, which entered directly into the bedroom of one of the occupants of the dwelling. The resident testified at trial that he woke up and saw defendant standing partially in his room, with one leg and about 70% of his body inside the door. Defendant looked around for approximately three to four seconds, scanning back and forth very quickly. He also testified that there was electronic equipment within defendant's reach that he did not touch and that it appeared that defendant was looking for something or someone. According to testimony elicited at trial, following his brief entry into the residence, defendant left and walked away at a normal pace, looking over his shoulder on at least one occasion. The resident testified that he did not telephone the emergency police number, but called the general police number, and shortly thereafter the police responded and stopped defendant.

Testimony elicited from the police officer who stopped defendant indicated that defendant admitted that he was intoxicated and that he would test positive for drugs. Defendant had in his possession various objects that he had picked up on the streets; including scissors,

sunglasses, shoelaces, gold earrings, gloves, among other items, none of which were removed from the residence that defendant had entered. Defendant also told the arresting officer that he was planning to sleep on the porch of the residence he had entered.

Defendant testified that he was homeless and intoxicated at the time he entered the residence. He testified that during the evening he had lost contact with a friend and had entered the residence because he believed that the person was in that dwelling. Following a jury trial, defendant was convicted of first-degree home invasion, and this appeal ensued.

I. Sufficiency of the Evidence

First-degree home invasion requires proof that the invader acted with "intent to commit a felony, larceny, or assault," or actually committed such a misdeed as part of the invasion. MCL 750.110a(2).[1] In this case, the trial court instructed the jury that, to satisfy that element, it had to conclude beyond a reasonable doubt that defendant entered the home with intent to commit a larceny.[2] Defendant argues that the prosecutor failed to present sufficient evidence to prove that element.

When reviewing the sufficiency of evidence in a criminal case, a reviewing court must view the record evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. Our review of the evidence is de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

"Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Malach*, 202 Mich App 266, 270; 507 NW2d 834 (1993). The home invasion statute does not qualify the term "larceny," and so first-degree home invasion may be predicated on the intent to commit either misdemeanor or felony larceny. See *People v Sands*, 261 Mich App 158, 163; 680 NW2d 500 (2004). Because of the difficulty in proving an actor's state of mind, circumstantial evidence may be used to establish the element of intent. *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997). "An actor's intent may be inferred from all of the facts and circumstances, and . . . minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted). Intent to commit larceny "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). However, "no presumption of intent to steal arises solely from proof of a breaking and entering." *People v Frost*, 148 Mich App 773, 776-777; 384

[1] Second-degree home invasion also includes this requirement. MCL 750.110a(3). Third-degree home invasion, in turn, requires that the intruder acted with intent to commit a misdemeanor, or actually committed one as part of the invasion, or violated an order of probation, parole, or personal protection, or a condition of pretrial release. MCL 750.110a(4).

[2] The court alternatively instructed the jury on the lesser-included offense of entering without permission, which includes no element concerning larceny or other criminal conduct. MCL 750.115(1).

NW2d 790 (1985). "While minimal circumstantial evidence is sufficient to sustain a conclusion that a defendant entertained the requisite intent, there must be *some* evidence reasonably leading to such a conclusion." *Id.* at 777 (emphasis in original).

The evidence in this case clearly indicates that defendant was guilty of entering without permission, in violation of MCL 750.115(1).[3] The question is whether there was any evidence or reasonable inferences from which the jury could have concluded that there was proof beyond a reasonable doubt of defendant's intent to commit a larceny. While the time of defendant's entry into the home, approximately 4:30 a.m., indicates he was not planning a friendly visit to the residence, the lack of evidence regarding defendant's intent to commit a larceny before or during the illegal entry are at issue in this appeal.

Defendant did not fully enter the residence. Testimony indicated that while there were items of value within defendant's grasp, he did not touch anything within the dwelling. Furthermore, testimony revealed that defendant scanned the room very quickly, for only a matter of seconds, and then left the residence without being prompted by a resident and without attempting to remove anything from the dwelling. Defendant was not asked by any of the occupants of the home regarding his reason for entry, nor was he confronted by any them.[4] While we are aware of the numerous cases which hold that minimal evidence of intent to commit a larceny is sufficient to sustain a conviction under MCL 750.110a(2), our review of the record leads us to conclude that the prosecution was unable to produce any evidence from which the jury could conclude that defendant had any intent to commit a larceny.[5]

While the jury had the right to disregard defendant's testimony that he was simply looking for a lost friend, given that defendant had told the police that he was planning on sleeping on the porch of the home, the prosecution was still obligated to produce *some* evidence from which the jury could conclude that defendant had an intent to commit larceny. Our review of the record in this case leads us to conclude that there were no additional proofs to distinguish the crime of which the defendant was convicted from the lesser misdemeanor offense of entering without permission. MCL 750.115(1). Accordingly, defendant's conviction for a violation of MCL 750.110a(2) cannot stand.

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[3] Defendant concedes this fact in his trial testimony and in his brief on appeal.

[4] The lack of any response by defendant is important to the extent that a defendant's nonresponsive conduct can be properly seen as evidence of his consciousness of guilt. See *People v Solmonson*, 261 Mich App 657, 666-667; 683 NW2d 761 (2004).

[5] Indeed, the trial court's statements on the record indicate the trial court's concern with whether there was sufficient evidence to support the first-degree home invasion charge. At one point in the proceedings, while questioning the parties regarding the possibility of resolving the matter with a plea to a lesser charge, the trial court stated: "Why isn't it Illegal Entry? I mean—don't get me wrong. I realize this—you know this guy and your file tells you who this guy is. So I think you know what he had in mind and maybe you're right. But the point is what he did was minimal in terms of—unless there is a different version here I haven't heard. But I haven't heard you say that. . . ."

An appellate court may, upon finding insufficient evidence to support a conviction, vacate that conviction and direct the trial court to enter a conviction of a necessarily included lesser offense, "'when a conviction for a greater offense is reversed on grounds that affect only the greater offense.'" *People v Bearss*, 463 Mich 623, 631; 625 NW2d 10 (2001), quoting *Rutledge v United States*, 517 US 292, 306; 116 S Ct 1241; 134 L Ed 2d 419 (1996). This remedy is constitutionally permissible because a "verdict regarding a necessarily included lesser offense always is encompassed in the verdict on the greater offense." *Bearss*, 463 Mich at 631.

The misdemeanor, entering without permission, MCL 750.115(1), is a necessarily included lesser offense of first-degree home invasion. *People v Silver*, 466 Mich 386, 392-393; 646 NW2d 150 (2002) (Taylor, J., joined by Young, J.), 394-395 (Kelly, J., joined by Cavanagh, J., concurring), 396 (Weaver, J., joined by Corrigan, C.J., concurring in pertinent part, and dissenting in part); 646 NW2d 150 (2002). "The two crimes are distinguished by the intent to commit 'a felony, larceny, or assault,' once in the dwelling." *Id.* at 392.

For these reasons, we vacate defendant's conviction and sentence, and remand this case to the trial court with instructions to enter a conviction of entering without permission, and to resentence defendant accordingly.

II. Jail Credit

Defendant argues that the trial court erred in declining to apply 193 days that defendant spent in jail before sentencing to the sentence resulting from this case.

As defendant acknowledges, this Court has determined that a parolee who is jailed following an arrest for a new criminal offense thus serves time on the sentence from which he was paroled until that earlier sentence has expired or otherwise been terminated. See *People v Stead*, 270 Mich App 550, 552; 716 NW2d 324 (2006); *People v Seiders*, 262 Mich App 702, 705-707; 686 NW2d 821 (2004). Defendant argues that these cases were incorrectly decided, but fails to acknowledge that they established binding precedent. See MCR 7.215(J)(1).

Moreover, our Supreme Court has recently considered this issue, and resolved it in substantial accord with this Court's precedents:

> [T]he jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of his earlier sentence unless and until discharged by the Parole Board. For that reason, he remains incarcerated regardless of whether he would otherwise be eligible for bond before conviction on the new offense. He is incarcerated not "because of being denied or unable to furnish bond" for the new offense, but for an independent reason. Therefore, the jail credit statute, MCL 769.11b, does not apply. [*People v Idziak*, 484 Mich 549, 562-563; 773 NW2d 616 (2009) (footnote omitted).]

Accordingly, upon resentencing, the trial court should again order that any term of incarceration imposed begin to run only after the earlier sentence has been fully served.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Jane E. Markey
/s/ Stephen L. Borrello