# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 18, 2010 |
| v | No. 290501<br>Wayne Circuit Court |
| JAMES ANTHONY CARREKER,<br><br>Defendant-Appellant. | LC No. 08-010942-FH |

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 12 to 20 years' imprisonment for the first-degree home invasion conviction. We affirm defendant's conviction and sentence, but remand for entry of a corrected sentencing information report (SIR) and an amended Judgment of Sentence.

The first argument on appeal is that there was insufficient evidence to find defendant guilty of first-degree home invasion. When reviewing a claim of insufficient evidence, this Court reviews the record de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). In reviewing the sufficiency of the evidence, this Court does not interfere with the fact finder's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of first-degree home invasion are (1) the defendant broke and entered a dwelling or entered the dwelling without permission, (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling, and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. MCL 750.110a(2); *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004). Identity is an essential element of every crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976).

Furthermore, MCL 767.39 provides:

> [e]very 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.

The elements of aiding and abetting are: (1) the 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 that the defendant gave aid and encouragement. *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). However, a person's mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider and abettor. *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999).

In applying the appropriate standards of review, we hold that the evidence was sufficient to find beyond a reasonable doubt that defendant either broke into the victim's house, or aided another who broke into the victim's house. The evidence supported the finding that the victim's home was broken into and entered, as the screen to a window was cut and pulled forward, and the couch just inside that window had been moved away from the window. It was also undisputed that the victim and his wife were in the house when it was broken into. With respect to identity, defendant was found leaving the area of the victim's house, dropped a claw hammer when approached by police, wore clothing similar to that described by a neighbor, and eventually admitted to being at the victim's house standing guard for an unidentified person who broke into the victim's house. Defendant's intent to commit a larceny or felony after breaking in was established by the time the break-in occurred, as well as by his flight from the scene, see *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008), quoting *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). These facts were sufficient to convict defendant under either a direct theory, or an aiding and abetting theory, particularly when we keep in mind that "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Defendant argues that he is entitled to resentencing in front of a different judge, not because his sentence was unlawful, but because the trial court seemed a bit confused about a sentencing rule. Defendant failed to preserve this issue at sentencing, in a motion for resentencing, or in a motion to remand. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Unpreserved sentencing errors are reviewed for plain error affecting substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

This Court applies the following test in determining whether resentencing should occur before a different judge:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to

> any gain in preserving the appearance of fairness. [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (quotation marks and citations omitted).]

Although defendant asserts that the trial court appeared a bit confused regarding the two-thirds rule of *Tanner*[1], his minimum sentencing range, as a fourth habitual offender, was 51 to 170 months. MCL 777.63; MCL 777.21(3)(c). Two-thirds of the 20-year (240 month) maximum sentence would be 160 months. MCL 769.34; *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). Thus, the trial court did not err when it sentenced defendant because his 12-year (144 month) minimum sentence is within the minimum sentencing guidelines range, and is less than two-thirds of the 20-year maximum sentence. Accordingly, because no sentencing error occurred, defendant is not entitled to a remand for resentencing.

Defendant next argues that remand is needed to correct errors in his SIR, an issue defendant failed to properly preserve because he did not raise it at sentencing, in a motion for resentencing, or in a motion to remand. MCL 769.34(10); *Kimble*, 470 Mich at 310-311. This Court reviews unpreserved sentencing issues for plain error affecting substantial rights. *Sexton*, 250 Mich App at 227-228.

The only plain error in the SIR is that the trial court never corrected defendant's minimum sentencing range in the SIR. At sentencing, the trial court agreed with the prosecution and defendant to correct the scores on OV-13, OV-15, and OV-19, adjusting defendant from OV-level III to OV-level II. This resulted in defendant's minimum sentencing range being adjusted to 51 to 170 months. However, this was never corrected and defendant's SIR incorrectly states his minimum sentencing range to be 57 to 190 months. The prosecution agrees that this case should be remanded to correct errors in the SIR, and we remand for the ministerial task of correcting this error.[2] MCR 6.435(A).

Finally, we reject defendant's argument that under MCL 769.11b he is entitled to jail credit for time served before he was convicted, which is a question of law. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). This Court reviews de novo questions of law regarding statutory interpretation. *People v Idziak*, 484 Mich 549, 554; 773 NW2d 616 (2009).

MCL 769.11b does not apply to parolees who commit new felonies while on parole. *Id.* at 562. Defendant admits he was on parole on the date he was arrested for this offense, and therefore he is not entitled to credit for time served on the current conviction. The time defendant served in jail before his conviction in this case must be applied to the unexpired maximum portion of defendant's earlier sentence.

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[1] *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972).

[2] On remand, the Judgment of Sentence should be amended to accurately reflect that defendant was sentenced as a fourth habitual offender. MCR 6.435(A).

Affirmed, but remanded for correction of the SIR, and for amendment of the Judgment of Sentence as outlined in this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Jane M. Beckering