# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>August 12, 2010 |
| v | No. 288799<br>Oakland Circuit Court |
| JUSTIN MARK GRIESEMER,<br><br>Defendant-Appellant. | LC No. 2008-221657-FH |

Before: M. J. KELLY, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree home invasion. See MCL 750.110a(2). The trial court sentenced defendant to serve 2-1/2 to 20 years in prison for this conviction. Because we conclude that there were no errors warranting relief, we affirm. We have decided this appeal without oral argument under MCR 7.214(E).

The jury found defendant guilty of aiding and abetting Daniel Young, who entered a neighbor's garage and stole a set of golf clubs. The parties did not dispute that Young committed first-degree home invasion. The issue at trial was whether defendant actually aided and abetted the commission of the offense or whether defendant was only an accessory after the fact.

Defendant first argues that he could not be convicted of aiding and abetting Young because there was insufficient evidence that Young actually committed a first-degree home invasion. In reviewing claims challenging the sufficiency of the evidence, "this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009).

One element that must be proven to convict a defendant as an aider and abettor is that the crime charged was committed by the defendant or by another person. *People v Norris*, 236 Mich App 411, 419; 600 NW2d 658 (1999). Defendant contends that the prosecutor failed to prove that Young actually committed first-degree home invasion as opposed to some lesser offense. However, defendant stipulated at trial that Young committed a first-degree home invasion. A defendant's admission or stipulation can support an element of a charge. See *Old Chief v United States*, 519 US 172, 186; 117 S Ct 644; 136 L Ed 2d 574 (1997) (noting that a defendant's offer to admit to an element is good evidence). And the element of a charge to which a defendant

stipulates cannot be attacked on the ground that the prosecutor failed to present sufficient evidence of that element. *People v Kremko*, 52 Mich App 565, 575; 218 NW2d 112 (1974). In light of the stipulation, the evidence was sufficient to prove that Young committed the crime of first-degree home invasion for purposes of the charge against defendant.

Defendant alternatively argues that his trial counsel was ineffective for stipulating to the fact that Young committed first-degree home invasion. Because the trial court did not hold an evidentiary hearing on defendant's motion for a new trial, our review is limited to errors apparent on the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). In order to establish a claim of ineffective assistance of counsel, defendant must show that his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). "Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy." *Horn*, 279 Mich App at 37-38 n 2. Trial counsel may be ineffective for making a strategic decision that is not sound or reasonable. *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988).

The elements of first-degree home invasion are (1) that the defendant (a) broke and entered a dwelling, or (b) entered a dwelling without permission; (2) that when the defendant broke and entered or entered without permission, (a) he intended to commit a (i) felony, (ii) larceny, or (iii) assault therein, or (b) he committed a (i) felony, (ii) larceny, or (iii) assault while entering, present in, or exiting the dwelling; and (3) when the defendant entered, was present in, or was leaving the dwelling, (a) he was armed with a dangerous weapon, or (b) another person was lawfully present in the dwelling. MCL 750.110a(2); *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010). In the absence of the third element, the crime is reduced to second-degree home invasion. MCL 750.110a(3). The crime is reduced to third-degree home invasion if, instead of committing or intending to commit a felony, larceny, or assault, the defendant commits or intends to commit a misdemeanor. MCL 750.110a(4)(a).

Defendant contends that when first-degree home invasion is based on the commission of a larceny while the entrant was entering, present in, or exiting the dwelling, the larceny in question must be a felony—that is, the value of the goods taken must be at least $1,000. See MCL 750.356. Because the evidence showed that the value of the golf clubs was significantly less than $1,000, defendant contends that his counsel should not have stipulated that Young committed first-degree home invasion. At the time of defendant's trial, analogous published authority strongly suggested that a misdemeanor larceny was sufficient to support the "larceny" element of MCL 750.110a(2). See *People v Sands*, 261 Mich App 158, 163; 680 NW2d 500 (2004) (noting that the statutory language does not distinguish between misdemeanor and felony assaults and, for that reason, either a misdemeanor or felony assault will support the element). In light of the then existing authorities, we cannot conclude that it was unreasonable for defendant's trial counsel to concede that Young committed first-degree home invasion and defend on the ground that defendant did not aid or abet the commission of the offense. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Donald S. Owens