STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2010
v	No. 290723 Kent Circuit Court
JONATHAN EDWARD HARTGER, Defendant-Appellant.	LC No. 07-005090-FH

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's February 17, 2009 order denying his motion for relief from judgment. Because we conclude that there was a sufficient factual basis for defendant's guilty plea, and because the record does not establish that the plea was involuntary, we affirm.

I. FACTS AND PROCEDURAL HISTORY

On June 26, 2007, defendant pleaded guilty to first-degree home invasion, MCL 750.110a(2). In exchange for defendant's guilty plea, the prosecution agreed not to bring any other charges against defendant related to the home invasion or to any other home invasions by defendant of which it was aware. The plea colloquy contained the following exchange:

> *The Court.* You are charged with the offense of home invasion in the first degree. Do you understand the nature of the charge against you?
>
> *The Defendant.* Yes, sir.
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> * * *
>
> *The Court.* Do you intend to plead guilty to this offense?
>
> *The Defendant.* Yes, sir.
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> * * *

The Court. On April 21st of this year, did you break and enter in to the home of John Stewart at 3872 Clearview Street, Northeast, in the City of Grand Rapids, Kent County, Michigan?

The Defendant. Did I personally break in to the house?

The Court. Did you get in to the house?

The Defendant. No, sir.

The Court. Were you with people who did get in to the house?

The Defendant. Yes, sir.

The Court. Who got in to the house?

The Defendant. A person I know of [by] the name of Nick Williams.

The Court. And how did you get to that residence?

The Defendant. We were driving around and I believe I -- I was intoxicated at the time, and one of us got out to go use the bathroom.

The Court. Just a minute. I'm sure you have excuses in your own mind, but you knew what you were doing.

The Defendant. Yes, sir.

The Court. All right. Now were you with Mr. Williams when he went inside the house?

The Defendant. No, sir. Was I with him? I was not in the house -- yes, sir, I was with him.

The Court. How did he get in the house?

The Defendant. I believe through a back slider door.

The Court. That was closed but unlocked?

The Defendant. I believe so, yes, sir.

The Court. And when he was inside that house -- was the purpose of him going in there to see what he could steal?

The Defendant. Yes, sir.

The Court. Did he take things?

The Defendant. Yes, sir.

The Court. What did he take?

The Defendant. I'm not going [to] lie here. I believe he took a computer and a bag of change and maybe a couple of Ipods.

The Court. Weren't you there when he came out of the house?

The Defendant. Yes, sir.

The Court. And he came from the house carrying stuff, right?

The Defendant. Yes, sir.

The Court. Which came from the house that he entered, correct?

The Defendant. Yes, sir.

The Court. Were you driving or was he driving?

The Defendant. I was not driving, sir, at any time. He was driving. I was sitting in the passenger seat.

The Court. So you and he then went with this stolen property and took it to some location?

The Defendant. Yes. I -- yes, sir, I did that. Yep.

The Court. It was your desire to share in the proceeds of this, is that right?

The Defendant. The proceeds I got from it were I believe $100 in the change that was stolen.

Based on this exchange, the trial court accepted defendant's guilty plea. It explained that defendant "certainly is an aider and abettor." The trial court sentenced defendant to 75 to 240 months' imprisonment.

Defendant filed applications for leave to appeal with this Court and the Supreme Court; both were denied. *People v Hartger*, 481 Mich 879; 748 NW2d 840 (2008); *People v Hartger*, unpublished order of the Court of Appeals, entered February 6, 2008 (Docket No. 282914).[1]

[1] In his application for leave to appeal filed with this Court, defendant argued that his sentence was not "individualized," as the trial court failed to recognize that his culpability was "as an

In January 2009, defendant, now represented by current appellate counsel, moved for relief from his judgment of sentence and conviction. He argued that there was an insufficient factual basis for his guilty plea, because the colloquy at the plea hearing failed to establish that he intended for Williams to commit the home invasion or that he performed any act or gave any encouragement that assisted Williams in the commission of the crime. Moreover, he asserted that because mere presence at a crime scene is insufficient to establish a defendant's guilt, any inculpatory inference from his admissions at the plea proceeding was not sufficient to provide the proper factual basis. Defendant also asserted that his plea was involuntary because he was never explained the elements of aiding and abetting. In addition, defendant asserted that because he had informed prior appellate counsel that he wanted to withdraw his plea and because counsel acknowledged in the application for leave to appeal that defendant was no more than an accessory after the fact, prior appellate counsel was ineffective for not filing a motion to withdraw plea or raising any issues concerning the validity of his plea in the application for leave. Defendant further claimed that trial counsel was ineffective because trial counsel did not explain the elements of aiding and abetting to him and allowed him to plead guilty to a crime that he did not commit.

The trial court, without requesting a response from the prosecutor or holding an evidentiary hearing, denied defendant's motion for relief. It stated that, pursuant to a review of the plea hearing transcript, it was clear that defendant gave encouragement to Williams and that defendant knew Williams intended the commission of the home invasion at the time he gave the encouragement. In addition, the trial court found no merit to defendant's claim that his plea was not knowingly, voluntarily, and freely entered.

After this Court granted defendant's application for leave to appeal the order denying his motion for relief from judgment, *People v Hartger*, unpublished order of the Court of Appeals, entered April 10, 2009 (Docket No. 290723), defendant moved for a remand so that he could renew his motion for relief before the trial court. He asserted that he had filed a grievance against prior appellate counsel, and that the Attorney Grievance Commission had issued a letter of admonishment against prior appellate counsel. Defendant also asserted that during the grievance proceedings, he discovered that prior appellate counsel had prepared, but did not file, a motion to withdraw plea, which raised the exact same issues that defendant raised in his motion for relief from judgment. This Court granted a remand so that defendant could renew his motion for relief from judgment. *People v Hartger*, unpublished order of the Court of Appeals, entered May 21, 2010 (Docket No. 290723).

Defendant filed a renewed motion before the trial court. The prosecutor admitted that because prior appellate counsel prepared a motion to withdraw plea, but neglected to file the motion, the "sensible thing" would be for the trial court to treat defendant's renewed motion as a motion to withdraw plea. Thus, based on the parties' agreement, the trial court treated the renewed motion as a timely-filed motion to withdraw plea after sentence. See MCR 6.310(C). In addition, and also with the parties' consent, the trial court took testimony from defendant and trial counsel, the purpose of which was to establish whether defendant understood that he could

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accessory after the fact," Williams received a minimum sentence of only six months, and he was young and did not have a lengthy criminal record.

only be guilty of the home invasion as an aider and abettor if he gave Williams aid or encouragement.

Defendant testified that he pleaded guilty because it was his belief that if he received money from the home invasion he was guilty of the crime as an aider and abettor. And he was guilty of receiving $100 that was taken by Williams from the Stewart residence. He explained that he told trial counsel that the home invasion was not planned, that he never went into the house, that he was not the driver of the car, but trial counsel told him that if received any money from the home invasion, he was guilty as an aider and abettor. Trial counsel never discussed with him whether he knew that Williams was going to commit the home invasion.

Defendant testified that he did not know what Williams was going to do that evening. Defendant explained that he was a passenger in Williams's car, and that they were drinking and smoking weed, when he got out of the car in a cul-de-sac to go to the bathroom. While he was urinating, Williams went off, and he presumed that Williams went to urinate. Eventually, when he was sitting in the car, Williams started to bring items to the car. Defendant had a pretty good idea that the items were stolen from someone's house.

Defendant admitted that he had written several letters to the trial court. In one letter, which was written before he was sentenced, defendant informed the trial court that he was writing "to communicate a message of acknowledged guilt." He was "disgusted about the choices" he had made. In another letter, written after he was sentenced, defendant wrote:

> I was driving with my co-defendant in his car, he was driving. He was staying with me at my mom[']s [house] . . . . [A]nd we had both been drinking. I got out to use the bathroom on the side of the road in a neighborhood right near my father[']s house. When he starts coming back to the car with a bunch of stuff in his hands. He made several trips back and forth to the house and to the car with stuff that ended up being the Stewarts['] residence and there [sic] belongings, that he said "He got from there [sic] basement." I was drunk and high on marijuana and agreed to him when we got to my house, when we arrived, at my mom[']s he asked if he could bring it inside. I made the biggest mistake of my life and said yes. I am not going to play it off like I am completely innocent here[.] I am not stupid and new [sic] this stuff was stolen. <u>I never went into that house or any other house.</u> I told you this at my preliminary, where you said, "I sound like an aider and abider [sic], but I am going to take your Guilty plea anyway." I only plead [sic] because my Court appointed public defender told me to. I told him as well I never went into any house. I was involved, and I feel I am guilty by association.

Trial counsel testified that he discussed with defendant what was necessary to be guilty of home invasion and that defendant could be guilty even if he did not go into the Stewart residence. He recalled that defendant said that he was a passenger in the car, that he did not go into the house, and that he did not participate in the home invasion. Trial counsel could not remember if he specifically explained what was necessary for defendant to be guilty as an aider and abettor. In his view, defendant could be guilty as an aider and abettor if defendant acted as a lookout or if he would have given warning to Williams, but trial counsel could not recall if there

was any discussion whether defendant engaged in those activities. Trial counsel testified that his general philosophy is to inform clients of the evidence against them, to give an assessment of the likelihood of conviction, to advise them of their trial rights, and to inform them of any plea bargain. If a client decides to plead guilty, he leaves it to the trial court to determine the necessary factual basis for the plea.

Trial counsel also testified that he discussed with defendant the evidence against him, which would include Williams testifying against him at trial. According to trial counsel, after defendant and Williams were arrested, Williams implicated defendant as a coparticipant in the home invasion and several other breaking and enterings. He also explained that Williams, who was living with defendant, was not from the area and that Williams indicated that defendant "pointed out where they should go." In addition, defendant and Williams had been using credit cards taken in the home invasion, were on video cashing coins from the home invasion, and, when arrested, were found with a money clip belonging to the Stewarts.

The trial court, after reviewing all of the material presented, which also included defendant's presentence investigation report (PSIR), had no question about defendant's active participation in the home invasion. It found that defendant's testimony was "barely credible" and "in some aspects not to be believed." It stated:

> And while the defendant would like to give the explanation of intoxication, it is no more than an explanation, certainly not an excuse for what I find to be his active participation in this crime in which he directed this Ohio native to a neighborhood known to the defendant, that of his father's, a neighborhood he no longer lived in, and was actively participating in, not only as a lookout, clearly the person who knew of and provided to [Williams] a place where all of these belongings were going to go.
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> What did one--would a rational person think, having relieved themself [sic] on the side of the road, seeing his driver go in and out of the house numerous times, knowing that he was going to profit from this, and knew a place where his drunk mother could allow him to stash the stuff without any kind of vigilance or objection? He left his father's house; his father was more attentive to his son's needs than his mother, apparently. And it's clear to me that--it was clear to me then that there was sufficient evidence to suggest that the defendant was by no means anything other than an active co-participant.

The trial court found no basis for defendant to withdraw his guilty plea, and denied defendant's motion.

II. ANALYSIS

In his supplemental brief on appeal, defendant claims that the trial court abused its discretion in denying his motion to withdraw plea because there was an insufficient factual basis for the plea and because his plea was involuntary.[2] We disagree.

A. STANDARD OF REVIEW

There is no absolute right to the withdrawal of a plea. *People v Jones*, 190 Mich App 509, 512; 476 NW2d 646 (1991). Thus, the decision to grant a motion to withdraw plea after sentence is within the sound discretion of the trial court. *People v Boatman*, 273 Mich App 405, 406; 730 NW2d 251 (2006). We will not disturb the trial court's decision absent a clear abuse of discretion that resulted in a miscarriage of justice. *Id.* at 406-407.

B. FACTUAL BASIS

Defendant first claims that there is not a sufficient factual basis for his plea because there were no facts elicited at either the plea proceeding or the evidentiary hearing that demonstrated that he knew of Williams's plan or intention to commit the home invasion or that he performed any acts or provided any encouragement that assisted in the commission of the crime.

A trial court may not accept a guilty plea unless it is convinced that the plea is accurate. MCR 6.302(A). MCR 6.302(D)(1) provides:

> If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

There is an adequate factual basis for a plea if a factfinder could properly convict the defendant on the facts elicited from the defendant at the plea proceeding. *People v Hogan*, 225 Mich App 431, 433; 571 NW2d 737 (1997). "A factual basis for acceptance of a plea exists if an inculpatory inference can reasonably be drawn by a jury from the facts admitted by the defendant even if an exculpatory inference could also be drawn and defendant asserts the latter is the correct inference." *Guilty Plea Cases*, 395 Mich 96, 130; 235 NW2d 132 (1975).

We agree with defendant that the plea colloquy at the plea proceeding failed to provide a sufficient factual basis for defendant's guilty plea to first-degree home invasion as an aider and abettor. The three elements necessary for a conviction under an aiding and abetting theory 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

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[2] Based on the parties' stipulation below, we, like the trial court, will treat defendant's renewed motion for relief from judgment as a timely-filed motion to withdraw plea after sentence. Accordingly, defendant's arguments in his brief on appeal that relate to the requirements for obtaining relief from judgment, see MCR 6.508, are now generally irrelevant.

> 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 he gave aid and encouragement. [*People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999) (quotation omitted).]

No facts admitted by defendant during the plea colloquy establish that he performed any acts or gave any encouragement to Williams that assisted in the commission of the home invasion. Defendant denied being the driver of the car, and he was never asked if he led Williams to the Stewart residence or even to the surrounding neighborhood. He was also never asked if he acted as a lookout for Williams. The only fact that could provide an inference that defendant intended Williams to commit the home invasion and that he provided any act of assistance or encouragement was his presence outside the Stewart residence. However, "[m]ere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to establish that a defendant aided or assisted in the commission of the crime." *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999).

Nonetheless, when an appellate court determines that the plea colloquy fails to establish an element of the crime, the prosecutor shall be given an opportunity to establish the missing element. *Guilty Plea Cases*, 395 Mich at 129. "If [the prosecutor] is able to do so and there is no contrary evidence, the judgment of conviction shall be affirmed. If the prosecutor is unable to establish the missing element, the judgment of conviction shall be set aside. If contrary evidence is produced . . . the court shall decide the matter in the exercise of its discretion." *Id.* This Court has clarified that the evidence to establish the missing element can be produced by the prosecution; it need not come from the defendant. See *People v Kedo*, 108 Mich App 310, 314-317; 310 NW2d 224 (1981); *People v Brown*, 96 Mich App 565, 570-572; 293 NW2d 632 (1980). Indeed, after this court's remand order, the parties stipulated to the trial court hearing testimony from defendant and trial counsel. The trial court also considered two letters that defendant wrote and certain facts recited in the PSIR. Defendant does not claim on appeal that the trial court erred in referring to the letters and the PSIR.

At the evidentiary hearing, defendant testified that the home invasion was not planned. He claimed that he did not have any knowledge that Williams intended to commit the home invasion. The trial court, however, did not find defendant to be credible. We give deference to the trial court's credibility determination. *People v Walters*, 266 Mich App 341, 352; 700 NW2d 424 (2005).

In his testimony, trial counsel summarized the evidence against defendant. According to trial counsel, Williams, in his interview with the police after he and defendant were arrested, implicated defendant in the home invasion and in other breaking and enterings. In addition, trial counsel testified that Williams was not familiar with the Grand Rapids area; he had moved from Ohio and was staying with defendant and defendant's mother. Williams told the police that defendant "pointed out where they should go." The Stewart residence, as established by defendant's post-sentencing letter to the trial court, was in the same neighborhood as defendant's father's house. In addition, the PSIR indicated that defendant admitted to the police to entering several garages and possibly a residence with Williams over the April 21, 2007 weekend. Moreover, trial counsel's testimony and the PSIR indicated that defendant received more than $100 from the home invasion. Defendant, when arrested, had $1,095 in cash on his person. He

and Williams were also seen on video surveillance tapes using a Coinstar machine to convert $337 in coins taken from the Stewart residence and using credit cards belonging to the Stewarts.

Although defendant denied having any knowledge that Williams intended to commit the home invasion, the inculpatory inferences from the evidence against defendant would allow a jury to convict defendant of the home invasion as an aider and abettor. Using the facts that Williams was not familiar with the Grand Rapids area and that the Stewart residence was in the same neighborhood as defendant's father's house, and the fact that defendant participated in other breaking and enterings with Williams, a jury could infer that defendant intended the commission of the home invasion and that he performed an act or encouragement that assisted in the commission of the crime. Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant's motion to withdraw plea on the basis that the plea was not supported by a sufficient factual basis.

C. INVOLUNTARY PLEA

Defendant also claims that his plea was involuntary because he never understood what was necessary for him to be guilty of the home invasion as an aider and abettor.

"A guilty plea . . . is valid only if done voluntarily, knowingly, and intelligently . . . . Where a defendant pleads guilty to a crime without having been informed of the crime's elements, this standard is not met and the plea is invalid." *Bradshaw v Stumpf*, 545 US 175, 183; 125 S Ct 2398; 162 L Ed 2d 143 (2005). However, the court taking the guilty plea is not required to explain the elements of the charge to the defendant; "the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel." *Id.*; see also MCR 6.302(B)(1) ("[T]he court must advise the defendant . . . of . . . the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses[.]"). "[E]ven without such an express representation [by counsel], it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." *Henderson v Morgan*, 426 US 637, 647; 96 S Ct 2253; 49 L Ed 2d 108 (1976).

At the plea proceeding, the trial court informed defendant that he was charged with committing first-degree home invasion. Defendant, when asked if he understood the nature of the charge against him, replied that he did. Accordingly, nothing in the record of the plea proceeding indicates that defendant did not understand the nature of the charge against him.

At the evidentiary hearing, defendant testified that he believed that he was guilty of the home invasion as an aider and abettor because trial counsel had represented to him that if he received any of the proceeds from the home invasion he was guilty as an aider and abettor. However, we give deference to the trial court's determination that defendant's testimony was not credible. *Walters*, 266 Mich App at 352.

There is nothing in trial counsel's testimony from the evidentiary hearing to support defendant's testimony that counsel told him that if he merely received money from the home invasion he was guilty of the crime as an aider and abettor. Trial counsel testified that he

discussed with defendant what was necessary for a person to be found guilty of a home invasion. While trial counsel testified that he was not sure if he "necessarily specifically explained" to defendant what was necessary to be convicted as an aider and abettor, counsel testified that what he "did explain to [defendant] was the entire factual scenario that [he] thought would be introduced at trial, which was not just this incident . . . there was significant other evidence that would have been introduced . . . . So we kind of discussed that." In addition, when asked how he believed defendant could be guilty as an aider and abettor if defendant did not enter the Stewart residence, trial counsel replied that defendant would be guilty if "he was assisting by actively looking out, or if he would have given warning" to Williams. Trial counsel did not testify that defendant could be guilty as an aider and abettor if he received money taken during the home invasion. Moreover, trial counsel did not testify that he never discussed with defendant whether defendant acted as a look out or would have given any warning to Williams. He testified that because it was three years later, he could not remember whether he engaged in such discussions with defendant.

According to the Supreme Court, we may presume that trial counsel adequately explained to defendant the nature and elements of the first-degree home invasion charge. *Henderson,* 426 US at 647. Nothing in the record, except for defendant's testimony, which was found not to be credible by the trial court, suggests that trial counsel failed to adequately explain, or incorrectly explained, to defendant how he could be convicted of the home invasion as an aider and abettor. Accordingly, we reject defendant's argument that his guilty plea was invalid because it was involuntary.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto