STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2014
v	No. 316556 Oakland Circuit Court
TREMAINE RANDALL ROSS, Defendant-Appellant.	LC No. 2012-243814-FH

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of possession of burglar's tools, MCL 750.116, and attempted unlawfully driving away a motor vehicle (UDAA), MCL 750.92; MCL 750.413. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 2 to 20 years for possession of burglar's tools and 2 to 5 years for attempted UDAA. We affirm.

Dawn Fritz testified that, while stopped at the intersection of Cooley Lake Road and Elizabeth Lake Road, she looked over at Lakes Auto Sales, a used car lot that stands on the corner of the intersection, and observed a black GMC Envoy with a man slouched behind the steering wheel so that only the top of his head was visible. It was after 8:00 p.m. and the lot was closed. As she started to turn her attention back to the traffic light, she noticed another man pop up from beneath the steering wheel of the silver Dodge Durango which was parked next to the Envoy. The second man quickly exited the Durango, carrying a long black tool with a red handle on one end and something metallic on the other, and got into the passenger seat of the Envoy. The Envoy then pulled out of the lot. The witness called 911 and then followed the Envoy long enough to observe its license plate number and report it to the 911 operator.

West Bloomfield Police stopped the Envoy shortly thereafter. Defendant was sitting in the passenger seat, his brother-in-law and the SUV's owner, Errol Merity, was driving, and there was a third man in the back seat. A search of the vehicle turned up a dark green CD case between the passenger seat and the console containing approximately 12 keys of several makes and models of vehicles. Under the passenger seat were a flat-head screwdriver, two hammers, miscellaneous papers and cards, and a wallet containing defendant's identification and social security number.

Meanwhile, back at Lakes Auto Sales, a detective inspecting the Durango discovered that the key hole on the driver's side had been "punched" in order to disengage the lock, there was extensive damage to the steering column and the ignition, a cable was hanging down from the steering column, and there were plastic pieces from the steering column on the floorboard of the driver's side. The detective testified, based on his experience in auto theft units, he believed that the tools found in the Envoy had been used in an attempt to steal the Durango.

The West Bloomfield Police received word to arrest the occupants of the van; Merity and the man in the back seat were arrested. Defendant was not arrested, however, because he was no longer at the scene. Prior to receiving their arrest instructions, officers noticed that defendant's breathing was labored and called an ambulance for defendant. Defendant was taken to Henry Ford Hospital to be treated for an asthma attack. Fifteen or twenty minutes after defendant left in the ambulance, a West Bloomfield officer attempted to contact him at the hospital but he had already left. Defendant was eventually arrested and charged as a principal or, alternatively, an aider and abettor. He argues that the prosecution presented insufficient evidence to permit a rational trier of fact to find him guilty under either theory of either charged offense.

We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have concluded that the essential elements of the charged crimes were proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (quotation marks and citation omitted). "It 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). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To convict a defendant of UDAA, the prosecution must show that the defendant (1) was in possession of a vehicle, (2) was driving it away, (3) was committing the act willfully, and (4) possessed or drove the vehicle away without authority or permission. *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993). Attempted UDAA consists of an intent to commit UDAA or to bring about certain consequences which would amount to UDAA, and an act in furtherance of that intent which goes beyond mere preparation. See *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

MCL 767.39 provides that "[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." To convict a defendant of aiding and abetting, the prosecutor must prove that (1) a crime was committed by defendant or some other person, (2) the defendant performed the acts or gave encouragement that assisted in 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 he gave aid and encouragement. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). "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 or abettor; nor is mere mental approval, passive

acquiescence or consent sufficient." *People v Turner*, 125 Mich App 8, 11; 336 NW2d 217 (1983).[1]

Defendant's argument involves the question of identity. Identity is always an essential element in any criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Identity may be established by direct testimony or circumstantial evidence. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). The credibility of identification testimony is a question for the trier of fact that this Court will not resolve anew. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

Defendant correctly states that Fritz could not identify him, but incorrectly assumes that this renders her testimony valueless. In addition, defendant incorrectly assumes that simply because the portion of Merity's plea-hearing statement that was read into the record did not ascribe a role in the attempted UDAA to defendant, the only rational inference was that defendant had no role.

The jury heard Fritz testify that the heavyset African-American man she saw exit the Durango carrying a long, black, red-handled tool with a metallic end got into the passenger seat of the Envoy. The jury heard West Bloomfield Police Department Officer James Pettinato's testimony that defendant was in the passenger seat when he stopped the Envoy. The evidence also showed that officers found defendant's wallet, two hammers, and a flat-head screwdriver under the seat on which defendant was sitting, and that one of the hammers matched the description of the long, black, red-handled tool with a metallic end that Fritz had described. Viewed in a light most favorable to the prosecution, a rational jury could have determined beyond a reasonable doubt that defendant broke into the Durango and, given the damage to the steering column and ignition, attempted to drive it away. The evidence was clearly sufficient to show that defendant was more than merely present during the attempted UDAA.

Regarding possession of the burglar's tools, defendant insists that no "credible and reliable evidence was presented to the jury to support findings beyond a reasonable doubt that he possessed the tools found in Errol Merity's vehicle." Defendant points out that it was Merity who identified him as the owner of the tools found beneath the passenger seat of the Envoy. Defendant argues that Merity's attempt to exonerate himself by shifting the blame onto defendant raises serious questions about Merity's credibility and reliability.

To convict a defendant of possession of burglar's tools, the prosecution must prove that the defendant (1) possessed tools adapted and designed for breaking and entering, (2) knew the tools were adapted and designed for that purpose, and (3) possessed them with the intent to use them for breaking and entering. *People v Wilson*, 180 Mich App 12, 16; 446 NW2d 571 (1989). Possession is not synonymous with ownership, and may be individual or joint, actual or constructive. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). Constructive possession of burglar's tools requires the

[1] The court instructed the jury that defendant's mere presence at the scene of the crime was not enough to prove that he assisted in committing it.

establishment of a link between defendant and the burglar's tools other than defendant's mere presence in proximity to the tools. See *id*. at 520.

In the instant case, the tools, along with defendant's wallet, were found under the seat where defendant was sitting when stopped by the police. One of the tools that the officers found under the passenger seat matched the description of the tool Fritz had observed the heavyset African-American man carrying as he got out of the Durango. In addition, the tools were consistent with what could have been used to "punch" the Durango's lock and damage its steering column and ignition. Waterford Detective Lawrence Novak testified that, based on his experience, he believed the tools had been used to try to steal the Durango. Viewed in a light most favorable to the prosecution, and resolving conflicts in the evidence in favor of the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant actually or constructively possessed the tools, knew they could be used to break into a vehicle, and used them in an attempt to steal the Durango. Alternatively, the jury could have concluded beyond a reasonable doubt, based on the foregoing evidence, that defendant aided and abetted Merity in his possession of the burglar's tools and intended their use in the attempted theft of the Durango.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell