STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 6, 2000
v	No. 217713 Houghton Circuit Court
ORMOND FRANCIS FISH, Defendant-Appellant.	LC No. 98-001614 FH

Before: Hood, P.J., and Saad and O'Connell, JJ.

PER CURIAM.

The jury convicted defendant of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and second-degree criminal sexual conduct, MCL 750.520c(1)(f); MSA 28.788(3)(1)(f) (CSC II). The trial court sentenced defendant to ten to twenty years' imprisonment for the first-degree home invasion conviction, and two to fifteen years' imprisonment for the CSC II conviction, to be served consecutively. Defendant appeals as of right and we reluctantly affirm defendant's conviction, but remand to the trial court for the purpose of resentencing.

While the complainant was babysitting at the home of an acquaintance, she heard two bumps coming from the kitchen. She looked into the kitchen and saw a person's hand trying to pet the dog. The complainant went into the kitchen to investigate, and discovered defendant with his penis exposed. Defendant suddenly rushed the complainant, slammed her against the front door, and punched her in the head and shoulders. He then "groped" her breast, prompting her to believe that defendant was going to rape her. The complainant and one of the children were eventually able to push defendant outside the house.

Defendant testified that on the night in question, he drank a six-pack of beer, went to a local bar, and ordered a pitcher of beer. Defendant remembered finishing one pitcher and ordering a second pitcher; however, he could not recall finishing it. Defendant's recollection of the remainder of the night was minimal because he blacked out at the bar. He remembered leaving the bar, hearing a dog barking, getting yelled at by someone, and then waking up in the county jail. Defendant said that when he entered the house where the complainant was babysitting, he believed that he was entering his own home and petting his own dog. Defendant denied entering the home with the intent to commit CSC.

Defendant first argues that there was insufficient evidence to support his conviction. This is a close question. In reviewing the sufficiency of the evidence, we examine the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 749, amended 441 Mich 1201 (1992). The elements of first-degree home invasion are: (1) entering a dwelling without permission, (2) with intent to commit a felony in the dwelling, and (3) another person was present in the dwelling at the time of entry. MCL 750.110a(2)(b); MSA 28.305(a)(2)(b). Here, defendant challenges the prosecutor's proofs regarding entering the home with the intent to commit a sexual assault on the complainant. Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Here, the complainant testified that when she first found defendant inside the home, defendant had his penis exposed. Further, she testified that he accosted her, pressed his body firmly against hers, pinned her against a door, and "groped" her breast. The complainant also explained that defendant's touching of her breast was not simply an accidental touching in an attempt to get away from her during a confrontation. Instead, she stated that defendant was not trying to get away from her at all, and that he "groped" her breast for about two seconds. Defendant's intent may be inferred from all the facts and circumstances. *People v Safedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Defendant's violent attack on the complainant, coupled with his exposed penis and his groping of her breast, could lead a rational jury to conclude that he intended to commit CSC inside the home. In light of defendant's history of excessive drinking to the point of blacking out on numerous occasions, it is likely that this "town drunk" stumbled into the wrong house. However, it is the jury that makes the decision, not the trial court and not the appellate court. Accordingly, because there was at least minimally sufficient evidence to allow a jury to find defendant guilty of first-degree home invasion conviction, we cannot disturb this jury verdict.

Defendant also argues that the prosecution failed to meet its burden to refute defendant's intoxication defense, which would negate the specific intent crime of home invasion. In support, defendant cites *People v Cannoy*, 136 Mich App 451, 454; 357 NW2d 922 (1984). However, *Cannoy* is distinguishable from this case. *Cannoy* involved the factual evidence required for a nolo contendere plea to a specific intent crime when a defendant does not recall the incident due to intoxication. *Cannoy* has not been extended outside nolo contendere pleas. The prosecution in the instant case did not need to specifically offer evidence to negate defendant's intoxication defense. Thus, defendant's reliance on *Cannoy* is misplaced.

However, because home invasion, like breaking and entering, is a specific intent crime, *People v Blankenship*, 108 Mich App 794, 798; 310 NW2d 880 (1981), the prosecution must nonetheless prove specific intent beyond a reasonable doubt. *People v McKinley*, 168 Mich App 496, 509; 425 NW2d 460 (1988). More specifically, the prosecution here had to prove that defendant entered the home with the specific intent to commit CSC in order to sustain defendant's conviction of first-degree home invasion. We find that the prosecution met its burden.

The officer who arrested defendant moments after the incident described defendant as talking "pretty good and not slurring his speech." The person who booked defendant on the night of his arrest

described defendant as smelling of alcohol, and slurring a bit, but she did not think that he was intoxicated, so she never ordered defendant to take a breathalyzer examination to determine his blood-alcohol content. The child who helped fight off defendant testified that although she may have thought defendant was drunk on the night in question, because of the manner in which he ran away from the house, she never smelled alcohol the entire time that he was inside her home. Moreover, defendant's testimony was vague regarding the amount of alcohol he consumed that night. Although he testified that he purchased two pitchers of beer that night, he could not state whether he drank both pitchers. And the manager of the bar in which defendant drank that night described his behavior that night as stable and not obnoxious. Though we have some questions regarding the wisdom of the jury verdict, viewing the evidence in a light most favorable to the prosecution, the prosecution produced sufficient evidence from which a rational trier of fact could conclude that defendant was not only capable of forming the requisite intent, but that he also actually possessed the requisite specific intent.

Defendant also protests that his ten- to twenty-year home invasion sentence was not proportionate to the seriousness of the offense and the offender. We agree. The judicial sentencing guidelines do not cover the crime of home invasion. Michigan Sentencing Guidelines (2d ed, 1988), 1; *People v Edgett*, 220 Mich App 686, 690; 560 NW2d 360 (1996). However, proportionality is the standard for determining the validity of defendant's home invasion sentence. *Edgett*, *supra* at 696. In sentencing defendant, the trial court noted that defendant's potential for rehabilitation was minimal, and that defendant had apparently not learned from his past transgressions, because he continued the same drinking habits for over twenty-five years. However, there is no evidence that defendant ever committed violent crime or ever broke into someone's home. While it is true that defendant has refused to attend to his drinking problem, he has no history of criminal behavior and accordingly, we believe the sentence imposed is disproportionate to the offense and the offender. His conduct must be punished, he should seek help for his drinking problem, but it does not appear nor did the trial court find that this defendant has a history of endangering others or that he presents a danger to the community.[1] Therefore, we remand to the trial court for the purpose of resentencing.[2]

Affirmed as to convictions, remanded for resentencing. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Henry William Saad

[1] This Court does not minimize the importance of punishing someone who is guilty of home invasion or assault. However, it is the severity of the sentence that concerns us here. The dissent points out that defendant's long history of drinking came out during oral argument. This history, of course, was well documented. At trial, defendant admitted that he had a long history of alcoholism and that he had been convicted of drunk driving on three occasions, the last time in 1997. More importantly, however, during oral argument the prosecution clearly stated that defendant, a 41-year-old man, had no history of assaultive behavior and no history of home invasion. Indeed, other than a history as the town drunk, the prosecutor opined that this defendant is not predatory, nor does he pose a threat to the community. It is for these reasons that we remand for resentencing.

[2] Defendant also argues that he is entitled to resentencing in light of the ameliorative penalty provisions of the statutory sentencing guideline. We disagree. The offense here occurred on October 17, 1998, and the statutory guidelines apply only to offenses committed on or after January 1, 1999. The statutory language clearly states that the Legislature intended that the statutory sentencing guidelines have prospective, not retroactive, effect. MCL 769.34(1); MSA 28.1097 (3.4)(1). Accordingly, there is no basis for defendant's argument that the Legislature intended the new statutory guidelines to apply to crimes committed before January 1, 1999. *People v Reynolds*, ___ Mich App ___; ___ NW2d ___ (Docket No. 211458, issued 3/17/00).