STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 11, 2000
v	No. 206312 Washtenaw Circuit Court
THOMAS LOVELL GREGORY, Defendant-Appellant.	LC No. 96-005921-FH

Before: Owens, P.J., and Murphy and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3), and possessing stolen property in excess of $100, MCL 750.535(1); MSA 28.803(1). He was sentenced as a fourth-offense habitual offender, MCL 769.12(1)(a); MSA 28.1084(1)(a), to life imprisonment for the second-degree home invasion conviction, and to ten to sixty years' imprisonment for possessing stolen property. We affirm defendant's conviction for possession of stolen property, but vacate his conviction for second-degree home invasion.

Factual Background

At trial, the prosecutor presented evidence that, during late 1995 and early 1996, at least five residences in the same general neighborhood were broken into and property was stolen while the owners were away. Evidence was also presented that defendant possessed property stolen during each of these break-ins. This evidence was presented as circumstantial evidence that defendant perpetrated the charged offense, that being second-degree home invasion at the residence occupied by Lycia Niethammer. At trial, Niethammer testified that, while she was away from home between 6:30 a.m. and 5:30 p.m. on January 11, 1996, someone broke into her house by throwing a piece of concrete through the back door window and stole jewelry, a camera and about $200 in cash. She specifically described one stolen item, plaintiff's Exhibit 6, as a ring consisting of a pear-shaped garnet with about five diamonds on each side. An area jeweler testified that, on January 12, 1996, he bought Exhibit 6 and other jewelry from defendant for a total of $100, of which Exhibit 6 accounted for $40 to $45. The price he paid defendant for this jewelry reflected its "scrap value" and not its value as jewelry. The

prosecutor's expert in the field of jewelry evaluation appraised the fair market value of Exhibit 6 as $650. The prosecutor also presented evidence pursuant to MRE 404(b) relating to four of the other burglaries that occurred in the area to establish defendant's identity as the burglar and to prove defendant's knowledge that the property he possessed was stolen. Defendant was convicted of second-degree home invasion involving the Niethammer residence, and possessing stolen property valued in excess of $100 with respect to Exhibit 6.

Sufficiency of the Evidence

Defendant first argues that the evidence adduced at trial was insufficient to support his convictions. In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). However, this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515.

A. Home Invasion

Defendant contends that his conviction of second-degree home invasion is invalid because there was no physical evidence directly connecting him to the Niethammer residence break-in and because evidence of his possession of stolen property from that and other area break-ins is insufficient to warrant his conviction of home invasion. We agree.

Defendant relies on the accepted principle that mere possession of stolen property is insufficient to support a conviction of breaking and entering (now home invasion).[1] As this Court stated in *People v McDonald*, 13 Mich App 226, 236-237; 163 NW2d 796 (1968):

> [U]nexplained possession of property recently stolen, unaccompanied by other facts or circumstances indicating guilt, will not sustain a conviction for breaking and entering, even though it is some evidence the possessor is guilty of theft. [Emphasis deleted.]

This Court found such "other facts or circumstances indicating guilt" from the defendant's possession of goods stolen from a market and muddy tire tracks left by the defendant's car that established that the defendant had been in the parking lot next to the market that was burglarized. *Id.* at 237.

In *People v Benevides*, 71 Mich App 168, 174-176; 247 NW2d 341 (1976), this Court, quoting from *People v Tutha*, 276 Mich 387, 395; 267 NW 867 (1936), stated, " 'Possession of stolen property within a short time after it is alleged to have been stolen raises a presumption the party in

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[1] A person who breaks and enters a dwelling with intent to commit a felony or a larceny in the dwelling is guilty of home invasion in the second degree. MCL 750.110a(3); MSA 28.305(a)(3).

possession stole it, and this presumption is either weak or strong depending upon the facts.'" The evidence in *Benevides* established that a truck was observed by a neighbor at the home where the break-in occurred, that the lights in the burglarized house were turned on and the side door was open, that the owner of the home was on vacation, and that property stolen from the home was discovered in the truck and on the defendant's person a short distance from the break-in. *Id.* at 170-171. In *People v Olson*, 65 Mich App 224, 229; 237 NW2d 260 (1975), the defendant was shown to be in possession of burglar tools as well as stolen property when he was arrested, and one of the tools was directly linked to the break-in.

In *People v Rankin*, 52 Mich App 130, 132-135; 216 NW2d 620 (1974), this Court, after analyzing several cases where convictions for breaking and entering were upheld based on the defendants' possession of stolen property, concluded that these cases all involved "added circumstances that were deemed to justify the charge and conviction related directly toward placing the accused at the scene of the crime." The prosecutor asserts that these "other circumstances" are likewise present in this case based upon the evidence of other similar break-ins that was presented under MRE 404(b). Evidence of other uncharged misconduct may be admitted where the prosecutor establishes: (1) that the evidence is offered for a proper purpose under MRE 404(b); (2) that the proffered evidence is relevant to a fact or issue of consequence; and (3) that the probative value of the evidence does not contravene the balancing test of MRE 403. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994); *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). Further, when other acts evidence pursuant to MRE 404(b) is used to establish a defendant's identity with respect to a particular crime, two additional requirements must be met: (1) the evidence must be sufficiently similar to establish a "signature," and (2) there must be evidence with respect to at least one of the other incidents that establishes the defendant's identity with respect to that incident. *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982).[2]

We find that the trial evidence was insufficient to support defendant's conviction of second-degree home invasion. On the one hand, defendant was shown to be in possession of stolen property from five separate residential burglaries that occurred in the same vicinity. Furthermore, the evidence demonstrated that defendant usually sold stolen property on either the date of the theft or within one or two days thereafter. Also, the five break-ins discussed during trial all involved essentially the same modus operandi: entry into the home by breaking a rear window with a foreign object during daytime hours while the owners were away. Finally, the evidence disclosed that defendant was found hiding in a closet during a police raid on the apartment where he resided, that the apartment was full of items stolen in the five break-ins, and that defendant refused to obey a court order requiring him to provide a

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[2] We acknowledge that the *Golochowicz* decision has been undercut to some degree by later decisions of our Supreme Court. See *VanderVliet*, *supra*; *Starr*, *supra*. However, as *VanderVliet* made clear, "*Golochowicz* identifies the requirements of logical relevance when the proponent is utilizing a *modus operandi theory* to prove identity." 444 Mich at 52. Thus, in this case where the prosecutor sought to use the other acts evidence as a theory of the burglar's *modus operandi* to prove defendant's identity, the requirements of the *Golochowicz* case are still applicable.

handwriting exemplar. However, while this evidence clearly establishes defendant's guilt for the possession of stolen property charge, it does not establish his identity as the individual who actually broke into any of the homes that were burglarized.

With regard to the similarity requirement, we note that the fact that the burglar used some object to break out a window at the back of these homes to gain entrance while the occupants were away is not a particularly distinctive method of breaking into a residence. However, even if we were to accept this evidence as sufficient to satisfy the "similarity" requirement, the prosecutor failed to present any evidence (aside from defendant's possession of property stolen from the five homes) to identify defendant as the individual who actually committed any of these burglaries. For example, defendant was not seen at or near any of the burglaries, he was not apprehended with the property as he fled the scenes of any of the burglaries, and his possession of the stolen property was at a time and place somewhat removed from the burglaries.

The prosecutor offered evidence that during the two and one-half months prior to defendant's arrest, thirteen break-ins occurred in the general vicinity, while there were no break-ins during the month after defendant's arrest. This evidence was clearly meant to suggest that defendant was the individual responsible for the burglaries because they ceased (for one month) after his arrest. However, while this evidence established that there were thirteen break-ins prior to defendant's arrest, the prosecutor offered no evidence connecting defendant to eight of those burglaries. Once again, this evidence simply did not establish defendant's identity as the burglar beyond a reasonable doubt.

Given the failure to establish defendant's identity with respect to these other incidents, and the absence of a strong similarity between the incidents, the prosecutor's use of the other acts evidence was insufficient to establish defendant's identity as the individual who broke into any of the homes. In short, the prosecutor failed to establish necessary preconditions to allow him to use the other acts evidence to prove defendant's identity, and even with the other acts evidence, the prosecutor only demonstrated that defendant possessed stolen property shortly after it was stolen. There were no other facts or circumstances that established defendant's guilt of the home invasion charge. "The possession or sale of stolen goods will not, without more, establish a prima facie case of breaking and entering with intent to commit larceny." *Rankin, supra* at 135. Therefore, we must conclude that there was insufficient evidence to support defendant's conviction for second-degree home invasion.

B. Possession of Stolen Property

The elements of the crime of possessing stolen property with a value over $100 are: (1) that the property was stolen, (2) that the fair market value of the property exceeds $100, (3) that the defendant received, possessed, or concealed the property with the actual or constructive knowledge that the property had been stolen, and (4) that the property was identified as being previously stolen. *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993). The sole element that defendant challenges here is the value of the property. However, his contention that the evidence is insufficient to support the conclusion that the value of the stolen property exceeded $100 is unpersuasive. The value of stolen property is generally determined by the use of the fair market value of the property. *People v Dyer*, 157 Mich App 606, 609; 403 NW2d 84 (1986), citing *People v Johnson*, 133 Mich App 150, 153;

348 NW2d 716 (1984). Plaintiff's expert witness clearly testified that the fair market value of Exhibit 6 was $650. This amply satisfies the "value element" necessary for defendant's conviction of possessing stolen property valued in excess of $100.

Admission of other acts evidence under MRE 404(b)

Defendant next contends that he was denied his due process right to a fair trial because the trial court admitted evidence of other uncharged misconduct. The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Starr, supra* at 496; *VanderVliet*, *supra* at 74.

Evidence of four area break-ins in addition to that at the Niethammer residence was introduced to show that defendant knew that the stolen property in his possession was in fact stolen at the time he sold it, and to create a presumption that defendant perpetrated the Niethammer break-in.[3] Whether defendant knew that the property was stolen was an element of the offense of possession of stolen property. *Gow, supra* at 96. That defendant was found in possession of so many recently stolen items (including personalized items such as the two telephone credit cards that were found in a wallet along with his identification) supports the conclusion that he was aware that the property was stolen. Therefore, the other acts evidence was offered for a proper purpose under MRE 404(b)(1), and the evidence was material to an issue of consequence to the proceeding. This other acts evidence thus satisfies the first and second requirements for admission under MRE 404(b).

The crux of this issue is whether the probative value of the evidence was substantially outweighed by its potential for unfair prejudice. As our Supreme Court has pointed out, the proper inquiry here is not whether the challenged testimony was more prejudicial than probative, but whether its probative value is *substantially* outweighed by the risk of *unfair* prejudice. *Starr, supra* at 499. Defendant's possession and sale of quantities of property recently stolen from five separate burglaries constitutes significant proof of his knowledge that the property was stolen. While this evidence may not

[3] The prosecutor offered both of these justifications in his notice of intent to use other acts evidence pursuant to MRE 404(b). Given our determination that the foundation for the admission of this evidence was insufficient to prove defendant's identity as the burglar, we likewise conclude that it was an abuse of the trial court's discretion to admit the MRE 404(b) evidence to prove defendant's identity. However, use of the other acts evidence to prove defendant's knowledge that the property was stolen was a separate evidentiary issue, and admission under that theory was not subject to the additional constraints placed on the use of other acts evidence to prove identity.

establish his identity as the thief, it conclusively demonstrates that he was at least the "fence" for the stolen property. Given the strength of the probative value derived from this evidence, it does not appear that the probative value is substantially outweighed by the risk of unfair prejudice. Consequently, the trial court properly permitted the prosecutor to introduce this evidence pursuant to Rule 404(b). Furthermore, we note that the trial court gave a limiting instruction to the jury regarding the evidence, thus minimizing any danger of unfair prejudice. *Starr, supra* at 75; *VanderVliet, supra* at 498. No prejudicial error necessitating reversal occurred.

Self-incrimination

Defendant next alleges that he was deprived of his right to due process of law when a police officer commented at trial on defendant's refusal to furnish the police with a handwriting exemplar, despite a court order requiring him to do so. Defendant failed to object to this testimony at trial and has therefore not preserved this issue for appellate review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). In any event, even if we review this unpreserved issue for plain error, *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999), we conclude that it is without merit. Requiring a defendant to provide a handwriting exemplar does not implicate the Fifth Amendment privilege against self-incrimination. *United States v Dionisio*, 410 US 1, 5; 93 S Ct 764; 35 L Ed 2d 67 (1973); *Gilbert v California*, 388 US 263, 266-267; 87 S Ct 1951; 18 L Ed 2d 1178 (1967); *People v Burhans*, 166 Mich App 758, 762; 421 NW2d 285 (1988); *People v Petrac*, 89 Mich App 188, 189-190; 280 NW2d 478 (1979); *People v Smogoleski*, 14 Mich App 695, 700; 166 NW2d 14 (1968). Moreover, the trial court gave the jury a proper limiting instruction regarding its use of this evidence.[4] Use of a proper cautionary instruction will generally dispel or eliminate any unfair prejudice stemming from otherwise properly admitted evidence. See *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). We conclude that no plain error requiring reversal has been demonstrated.

Jury Instructions

Defendant next argues that the trial court's failure to instruct the jury that unexplained possession of stolen property is not enough to sustain a conviction for home invasion without additional evidence of circumstances indicating guilt deprived him of his right to due process of law and prejudiced the determination of his guilt or innocence. See *Benevides, supra* at 174-175. Defendant has preserved this issue because defense counsel requested a jury instruction to that effect. *People v Piper*, 223 Mich App 642, 644; 567 NW2d 483 (1997). Nevertheless, given our conclusion that defendant's

[4] The court instructed the jury:

> There has been some evidence that the defendant refused to provide [a] sample of his handwriting for comparison with the handwriting written on the check on Erica Block's account after having been ordered to do so by this court. You must decide whether this evidence is true and if true whether it shows that the defendant had a consciousness of guilt.

conviction for home invasion must be set aside, there is no need to address this issue. *People v Schmitz*, 231 Mich App 521, 535; 586 NW2d 766 (1998).

Consideration of defendant's lack of remorse at sentencing

Defendant next maintains that the trial court's consideration at sentencing of his alleged lack of remorse denied him his right to due process of law. We disagree. Reference to the sentencing transcript reveals that the trial court made only passing reference to remorse, stating, "But considering the principle of proportionality, considering the number of victims of your actions over the years; considering the number of victims in this case, and your clear lack of remorse, the Court believes that this recommendation clearly is a proportion of [sic] sentence." There exists a subtle distinction between a sentencing court's permissible consideration of a defendant's lack of remorse and its impermissible consideration of his failure to admit guilt. In *People v Wesley*, 428 Mich 708, 720, 723, 727; 411 NW2d 159 (1987), several justices opined that the difference is illusory. However, that decision failed to resolve the issue, and this Court continues to distinguish the remorse and guilt factors. See *People v Calabro*, 166 Mich App 389, 395-396; 419 NW2d 791 (1988). The trial court did not err by considering defendant's lack of remorse. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995).

Speedy trial issues

Defendant next argues that he was denied the benefits of the "180-day rule" and was deprived of his constitutional right to a speedy trial. We disagree.

A. 180-Day Rule

MCL 780.131(1); MSA 28.969(1)(1) provides that whenever the Michigan Department of Corrections receives notice that a criminal charge is pending against a defendant incarcerated in a state prison, for which a prison sentence might be imposed upon conviction, the inmate "shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for a final disposition of the warrant, indictment, information, or complaint." The record reveals that, on September 26, 1996, defendant was sentenced following his trial and conviction for another home invasion charge resulting from the crime spree that included the present charges. Because defendant's trial in the instant matter commenced within 180 days of his September 26, 1996, sentence for the previous conviction, and because defendant apparently demanded separate trials for his various home invasion charges, no violation of the 180-day rule occurred. Time consumed in trying a defendant on another charge should not be charged against the prosecutor under the 180-day statute. *People v Hill*, 402 Mich 272, 282-283; 262 NW2d 641 (1978). There was no error.

B. Speedy Trial

The right to a speedy trial is guaranteed to criminal defendants by US Const, Am VI, Const 1963, art 1, § 20, and MCL 768.1; MSA 28.1024. Determination of whether a defendant was denied a speedy trial is a mixed question of fact and law. The factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to de novo review. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). To determine whether a defendant has been denied his right to a speedy trial, this Court must balance the following factors: (1) length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) prejudice to the defendant. *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101, 118 (1972); *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993).

Because the time between defendant's arrest and the commencement of his trial in the instant case was less than eighteen months, he must show that he was prejudiced by the delay. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). This he has not done. Any delay was occasioned by the fact that, by his own request, before this trial defendant was tried, convicted and sentenced for another home invasion charge. Because the delay was attributable to defendant, and because he has failed to demonstrate any prejudice resulting from it, his allegation of error fails.

Denial of defendant's motion to suppress evidence

As his eighth allegation of error, defendant claims that the trial court erred by denying his motion to suppress evidence seized pursuant to a search warrant from the apartment where defendant resided with his girlfriend. A trial court's ruling on a motion to suppress evidence as illegally seized will not be reversed on appeal unless clearly erroneous. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). A ruling is clearly erroneous when it leaves this Court with a definite and firm conviction that the trial court made a mistake. *Id.* at 449.

Defendant describes as illegal the seizure of a radio, wallet, credit cards and a language translator. Ann Arbor Detective Gregory Stewart, one of the investigating officers in this case, testified at the hearing on defendant's motion that he participated in the search on March 7, 1996. At the time of the search, he was familiar with the property stolen during the various break-ins described at trial. The credit cards that defendant contends were improperly seized were actually telephone credit cards, one in the name of a break-in victim and one in the name of her company. Stewart stated that the wallet in question was lying on top of a dresser in the apartment, and police searched it because they were looking for stolen checks and small pieces of jewelry that could be placed in confined areas, including the wallet. They seized it because it contained a victim's telephone credit cards as well as a driver's license indicating that defendant lived at the apartment searched. Police seized the radio because it was in plain view inside a bedroom and matched the description of a radio reported stolen. Likewise, the language translator, although not specifically mentioned in the search warrant, was found when the police opened the drawer of a night stand and noticed that the translator in the drawer matched the description of a stolen item.

At the conclusion of the hearing, the trial court ruled that the police had probable cause to believe that the articles seized – even if they were not specifically named in the search warrant – were incriminating, that they were found in plain view, and that the seized evidence was admissible against

defendant. This ruling is not clearly erroneous. The police seized certain items that, although not specifically named in the search warrant, the officers either knew, or had probable cause to believe, were stolen in recent break-ins. The seizure of these items was therefore proper. *Arizona v Hicks*, 480 US 321, 326; 107 S Ct 1149; 94 L Ed 2d 347 (1987). Furthermore, the seized evidence was properly admitted against defendant at trial because his wallet bore identification listing the apartment as his address, he was present at the time of the search, and he told Officer Stewart that he resided at the searched premises most of the time. There was no error.

Double jeopardy

Defendant next maintains that his convictions of second-degree home invasion and possessing stolen property are premised on a single transaction in violation of his US Const, Am V right to be free from double jeopardy. Because we have vacated defendant's conviction for second-degree home invasion, this issue is moot and we need not review it. *Schmitz, supra.*

Use of prior convictions at sentencing

Defendant further contends that the trial court erred by denying his motion challenging the accuracy and constitutional validity of certain prior convictions. This allegation is without merit. Prior to sentencing, defendant moved to preclude the sentencing court's consideration of certain prior convictions on the alleged ground that they were constitutionally invalid because he was not represented by counsel at the time. See *United States v Tucker*, 404 US 443, 445-446, 448; 92 S Ct 589; 30 L Ed 2d 592 (1972). The court denied defendant's motion. In *People v Moore*, 391 Mich 426, 440-441; 216 NW2d 770 (1974), our Supreme Court stated that, in order to invoke a *Tucker* hearing, a defendant must present prima facie proof that a previous conviction violated *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), or must present evidence that he has requested such records from the sentencing court and that court has failed to reply or has refused to furnish copies within a reasonable time. Because defendant concedes that he has not met these requirements, he is not entitled to a *Tucker* hearing, and his allegation of error fails.

Effective Assistance of Counsel

As his final issue, defendant argues that he was denied the effective assistance of counsel at trial because his attorney failed to supply the prima facie proof required by *Moore, supra*, to invoke a *Tucker* hearing. Defendant failed to move for an evidentiary hearing on this matter pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), and our review is therefore limited to the facts contained on the record, *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *Id.* at 596. To establish ineffective assistance of counsel, defendant "must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced [him] as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant has failed to demonstrate ineffective assistance of counsel. First, he has adduced no evidence on appeal satisfying *Moore*'s requirements for generating a *Tucker* hearing, and his trial counsel therefore cannot be faulted for failing to produce such evidence. Second, even assuming arguendo that such proof exists regarding some of defendant's prior convictions, there remain, according to the prosecutor's uncontroverted count, ten constitutionally valid convictions for the sentencing court to consider when imposing sentence. Therefore, defendant has failed to demonstrate prejudice and his claim must fail. *People v Crawford*, 232 Mich App 608, 615; 591 NW2d 669 (1998).

We affirm defendant's conviction and sentence for possession of stolen property, but vacate his conviction for second-degree home invasion.

/s/ Donald S. Owens
/s/ William B. Murphy