STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 1, 2002
v	No. 224539 Saginaw Circuit Court
ROBERT LEE DRAIN, Defendant-Appellant.	LC No. 99-017293-FC

Before: Fitzgerald, P.J., and Bandstra and K. F. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of safe breaking, MCL 750.531(B), and first-degree home invasion, MCL 750.110a(2). He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of twenty to forty years' for the safe-breaking conviction and ten to thirty years for the home invasion conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied his constitutional right to self-representation when the trial court appointed substitute counsel following defendant's request that his original appointed counsel be dismissed and that he allowed to proceed in propria persona.

A criminal defendant has the right to represent himself under both the Michigan and United States Constitution, US Const, Am VI; Const 1963, art I, § 13. See also MCL 763.1. *Martinez v Court of Appeals*, 528 US 152; 120 S Ct 684; 145 L Ed 2d 597 (2000); *People v Adkins*, 452 Mich 702, 720; 551 NW2d 108 (1996). However, the right to proceed in propria persona is not absolute and is balanced against the countervailing constitutional right to counsel because a defendant cannot be afforded both. *Id.*

Here, there is no indication that defendant objected to either the appointment of substitute counsel or his handling of the case. Because of this inaction, defendant has waived appellate review. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Generally, in circumstances where there are two competing constitutional rights and one has to be explicitly invoked while the other involuntarily attaches without a specific request, the better rule is that the court should indulge every reasonable presumption against waiver of the right to counsel. *Adkins*, *supra* at 721

Defendant next argues that the police officer's warrantless entry into defendant's girlfriend's motel room to arrest defendant was not justified by exigent circumstances and that the evidence subsequently seized should therefore be suppressed. We disagree.

Generally, a search conducted without a warrant is unreasonable unless there exists both probable cause and a circumstance establishing an exception to the warrant requirement. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999); *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000). Probable cause to search exists when facts and circumstances, known to the officers at the time of the search, warrant a reasonably prudent person to believe that a crime has been or is being committed and that the evidence sought will be found in a stated place. *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001).

Here, it is uncontroverted that defendant was clearly visible to the officers on their arrival at the motel. Defendant has cited no authorities that support a position that a known suspect whom the police believe is armed and dangerous has a constitutional right against seizure. Defendant was clearly visible for all to see and had no expectation of privacy because there is no protection for what a person knowingly exposes to the public. *People v Hulsey*, 176 Mich App 566, 569; 440 NW2d 59 (1989). Acting on their training, knowledge, and experience, the officers made the contemporaneous decision to enter and secure defendant to prevent an escalation that would threaten their safety or that of the other occupants of the motel room or allow defendant to elude them.

Once inside, the officers conducted a permissible protective sweep of the premises, *People v Cartwright*, 454 Mich 550, 559; 563 NW2d 208 (1997), and discovered evidence of unlawful activity. The evidence seized was openly displayed and thus need not be suppressed because it was lawfully seized. *Wong Sun v United States*, 371 US 471, 484; 83 S Ct 407; 9 L Ed 2d 441 (1963).

Defendant next argues that insufficient evidence was presented to allow a rational trier of fact to find beyond a reasonable doubt that defendant attempted to "break, burn, blow up, or otherwise injure or destroy" the safe or that he aided, encouraged, or procured anyone to do so. He asserts that the evidence established only that he was present at the scene when the safe was broken into and that his presence is insufficient to sustain a conviction on an aiding and abetting theory.

When reviewing a claim of insufficiency of the evidence, we review the record de novo and consider the evidence presented in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

To convict on the prosecutor's theory that defendant "procured" another person to open the safe required the prosecutor to establish proactive action on the part of defendant. The prosecutor was required to show that: (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed 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 Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). An aider and abettor's state of mind may be inferred from all the facts and circumstances and the requisite intent is that

necessary to be convicted of the crime as a principal. *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001). To be convicted, the defendant must either himself possess the required intent or participate while knowing that the principal possessed the required intent. *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991),

Here, the evidence established, and defendant does not dispute, that defendant broke into a residence, stole a safe, and transported it to Detroit. Although conflicting evidence was presented with regard to whether defendant himself attempted to break open the safe, evidence was presented that defendant or his accomplice asked a man named Ollie whether he had any tools in his truck that could be used to open the safe. Evidence was also presented that Ollie subsequently broke open the safe, and that defendant took the contents of the safe. This evidence, when viewed in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to conclude that defendant stole the safe with the intent to break the safe and that he aided, encouraged, or procured another to break the safe.

Next, defendant argues that the evidence was not sufficient to support the trial court's scoring of offense variable 13 and 14. We disagree. Sufficient credible evidence was presented to support a finding that defendant's activities were part of a pattern of felonious activity involving a combination of three or more crimes against a person or property. MCL 777.43(c). In addition, sufficient credible evidence was presented to support a finding that defendant was the leader in a multiple offender situation. MCL 777.44(a).

Defendant also asserts that the trial court's departure from the sentencing guidelines range constituted an abuse of discretion because the court's reasons for departure were neither substantial nor compelling and because the reasons articulated by the trial court were incorporated into the guidelines' determination. On review, once this Court is satisfied that the trial court's reasons for departure were objective and verifiable, review is limited to whether the court abused its discretion in concluding that the factors were substantial and compelling reasons for departure. *People v Babcock*, 244 Mich App 64, 77-78; 624 NW2d 479 (2000).

A departure may be based on factors taken into account in determining the appropriate sentence range if the court finds from the facts contained in the court record, including the presentence investigation report, that the factor has been given inadequate or disproportionate weight. MCL 769.34(3)(b). Here, the trial court stated:

> I don't think the guidelines adequately consider the impact that it had on these particular victims, the mode of hitting homes at random in the countryside, the fact of the other stolen objects that the police came upon as they were investigating this case indicating a long course of continuing activity. I don't think they adequately contemplated the extensive criminal record and I am referring particularly to two pages worth of juvenile history . . . And then, of course, starting with the armed robbery, the attempted breaking and entering and the carrying of a concealed weapon leading up to the events of this particular incident . . .. I don't believe that the guidelines adequately contemplate the great depth and extent of criminal activity involved by the defendant and his friends, and so it's for these reasons and for the protection of society that I have exceeded the guidelines.

The factors identified by the trial court are objective and verifiable and therefore appropriate. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). We find no abuse of discretion in the trial court's finding that these factors were not adequately considered in the scoring of the guidelines and constitute substantial and compelling reasons to depart from the statutory minimum sentence. *Id.*

Although not an issue on appeal, a review of the record reveals that defendant was charged with and convicted of *second-degree* home invasion, not first-degree home invasion as indicated on the judgment of sentence. Hence, we remand for the limited ministerial task of correcting the judgment of sentence.

Defendant's convictions and sentences are affirmed, and the matter is remanded for correction of the judgment of sentence. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly