STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 4, 2002
v	No. 229483 Saginaw Circuit Court
JOSEPH WILLIAM CICERO, Defendant-Appellant.	LC No. 00-018250-FC

Before: Saad, P.J., and Owens and Cooper, JJ.

PER CURIAM.

A jury convicted defendant of home invasion first degree, MCL 750.110a(2), possession of burglar's tools, MCL 750.116, armed robbery, MCL 750.529, assault with intent to murder, MCL 750.83, and conspiracy to commit home invasion first degree, MCL 750.157a; MCL 750.110a(2). The court sentenced defendant to concurrent terms of seven to twenty years' imprisonment for home invasion, seventeen months to ten years' imprisonment for possession of burglar's tools, fifteen to thirty years' imprisonment for armed robbery, fifteen to thirty years' imprisonment for assault with intent to murder, and seven to twenty years' imprisonment for conspiracy to commit home invasion. Defendant appeals as of right, and we affirm.

On July 15, 1999, defendant, Anthony Cicero,[1] and William Leinberger, broke into the home of Ms. Eugenia Ninke, an eighty-three year old widow. Defendant and Anthony knew Ms. Ninke because they used to be neighbors. During the robbery, Ms. Ninke was repeatedly hit over the head with a hard object and suffered multiple injuries requiring medical attention.

I. Sufficiency of the Evidence Claims

Defendant argues that there was insufficient evidence to convict him of possession of burglar's tools and assault with intent to murder. We disagree. In reviewing sufficiency of the evidence claims, this Court views the evidence in the light most favorable to the prosecution and

[1] We note that Anthony Cicero is defendant's younger brother.

determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). It is the function of the jury to decide the weight and credibility of a witness' testimony and such matters will not be resolved anew on appeal. *Johnson, supra* at 731, n, 7.

A. Possession of Burglar's Tools

According to MCL 750.116:

> Any person who shall knowingly have in his possession any . . . tool or implement, device, . . . adapted and designed for . . . forcing or breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ the same for the purpose aforesaid, shall be guilty of a felony . . . .

Initially, we note that defendant does not contend that the prosecution failed to prove that the butter knife used to break into Ms. Ninke's home was a burglar tool. Rather, defendant's sole contention on appeal is that he never possessed or aided and abetted in the possession of the butter knife.

Defendant can be convicted of possession of burglar's tools as an aider and abetter if he procured, counseled, aided, or abetted in the possession of said object. See MCL 767.39; *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). "Aiding and abetting" includes all forms of assistance rendered to the perpetrator of a crime and all words or deeds that supported, encouraged or incited the commission of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). To convict defendant under such a theory, the prosecutor must show that: (1) the crime charged was committed by defendant or another person; (2) defendant performed acts or encouraged the commission of the crime; and (3) defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that he gave the aid or encouragement. *Id*. at 757-758; see also *People v Rigsby*, 92 Mich App 95, 97-98; 284 NW2d 499 (1979). Defendant's state of mind can be inferred from all the facts and circumstances. *Carines, supra* at 758. "Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime." *Id*., quoting *People v Turner*, 213 Mich App 558, 569, 540 NW2d 728 (1995).

The evidence here indicates that defendant and Leinberger were unsuccessful in their initial attempt to break into Ms. Ninke's home. After this attempt, defendant and Leinberger requested Anthony's help to get inside. Both Anthony and defendant admitted that Anthony agreed to help and that Anthony brought the butter knives to break into Ms. Ninke's house. Thus, while defendant may not have actually possessed the butter knives, he clearly encouraged Anthony, his younger brother, to commit this offense by requesting his assistance to break into Ms. Ninke's home for the purpose of stealing money. Moreover, defendant knew that Anthony intended to possess burglar's tools because defendant asked Anthony to break into the house and

then watched as he used a butter knife to open Ms. Ninke's door. Accordingly, a rational trier of fact could find that defendant possessed burglar's tools under an aiding and abetting theory.

B. Assault with Intent to Murder

To prove assault with intent to murder, the prosecution must establish beyond a reasonable doubt that the defendant committed: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); see also MCL 750.83. An intent to kill may be inferred from the facts in evidence and because the state of an actor's mind is difficult to prove, only minimal circumstantial evidence is required. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Defendant's cousin, Tammy Kelly, testified that defendant told her he thought he had killed Ms. Ninke when he hit her on the head. See *Johnson, supra* at 731, n, 7. As such, the jury could find that defendant committed the assault. Furthermore, combining this statement with the specifics of the attack, a rational trier of fact could find that defendant also possessed an intent to kill. Defendant hit an elderly woman repeatedly in the head and left her bleeding on the floor. Compare *People v Aslin*, 179 Mich App 456, 459; 446 NW2d 832 (1989) (knocked the victim down twice). Indeed, it appears that defendant actually targeted Ms. Ninke's head because the only other injury she sustained was to her elbow, which she raised to protect her head. The emergency room doctor also opined that Ms. Ninke's injuries resulted from multiple blows with a hard object. These blows caused Ms. Ninke to suffer several cuts to her head that required sutures or staples, one cut going all the way to her skull.[2] Accordingly, we find that there was sufficient evidence to convict defendant of assault with intent to murder.

II. Jury Instructions

Defendant also claims that the trial court erred reversibly when it instructed the jury about his failure to testify. We disagree. This Court reviews de novo a defendant's claim of instructional error. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). However, preserved non-constitutional error is presumed harmless unless the defendant can rebut this presumption with evidence that the error resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999).

The Michigan Supreme Court, in *People v Hampton*, 394 Mich 437, 438; 231 NW2d 654 (1975), held that if a defendant elects not to testify in a criminal case, "the court [m]ay instruct on the effect thereof, unless defense counsel . . . expressly requests, before the Court instructs the

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[2] In *People v Swartz*, 171 Mich App 364, 378; 429 NW2d 905 (1988), this Court found insufficient evidence of an intent to kill when the victim's injuries from a putty knife only amounted to a red mark on her cheek. However, the Court in *Hoffman, supra* at 111, held that there was sufficient evidence of intent to kill when the victim's head was repeatedly smashed into the pavement and she was hit with a baseball bat in the head and shoulders area.

jury, that no instruction be given on the subject in which event no instruction on the subject shall be given." In the instant case, the defense attorney specifically objected in chambers to the trial court giving an instruction with regard to defendant's failure to testify. However, the trial court claimed that it was error not to give the instruction and provided it to the jury. The trial court erred in giving this instruction over defense counsel's objection. *Id*.

However, in *People v Roberson*, 167 Mich App 501; 423 NW2d 245 (1988), this Court, noting the Supreme Court's decision in *Hampton, supra*, decided that such an error was subject to a harmless error analysis. Given the overwhelming evidence of the defendant's guilt in *Roberson, supra*, this Court held that reversal was not required.[3]

Here, defendant concedes that the evidence against him for home invasion and conspiracy to commit home invasion is strong. Moreover, as we previously found, there is sufficient evidence that defendant aided and abetted his brother in the possession of burglar's tools and that he committed assault with intent to murder. Ample evidence also exists that defendant committed armed robbery. See *People v Norris*, 236 Mich App 411, 414; 600 NW2d 658 (1999). Defendant broke into Ms. Ninke's home, stole money from her purse, and assaulted her during the robbery. As a result of this attack, Ms. Ninke received several severe cuts on her head and a broken elbow. See *id*. at 415, n, 3. These injuries resulted from multiple blows with a hard object. See *id*. at 414-415 (an object is considered dangerous if the defendant used it to cause death or serious injury). After a careful review of the record, we find that defendant has failed to show that the trial court's error resulted in a miscarriage of justice. See *Lukity, supra* at 493-494.

III. Scoring of Offense Variable Seven

Defendant also asserts that the trial court erred in scoring offense variable seven. We disagree. This Court upholds a sentencing court's scoring decision if there is any supporting evidence in the record. *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

The requirements for scoring offense variable 7 are listed in MCL 777.37:

> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was treated with terrorism, sadism, torture, or excessive brutality ..... 50 points
>
> (b) No victim was treated with terrorism, sadism, torture, or excessive brutality ..... 0 points

[3] We note that the Michigan Supreme Court denied leave to appeal in *Roberson, supra*, lv den 431 Mich 874 (1988).

Defendant asserts that this case does not compare with the excessive brutality present in *People v Hernandez*, 443 Mich 1, 3-4, 18; 503 NW2d 629 (1993), where the victim was repeatedly beaten with a bat even after he had been knocked down. However, this Court finds ample evidence in the record to support the trial court's scoring decision. Here, defendant beat an elderly woman repeatedly on the head and elbow with a pan. While a pan may not be the equivalent of a baseball bat, the beating was so severe that one of the lacerations went all the way to Ms. Ninke's skull and several sutures and staples were ultimately required for her injuries. Moreover, Ms. Ninke's suffered an olecranon fracture to her left elbow that required surgery. At the time of trial, Ms. Ninke's injuries continued to cause her pain. We find no error in the trial court's decision to score offense variable seven.

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Jessica R. Cooper