STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED February 19, 2004
v	No. 245141 Charlevoix Circuit Court
BRANDON MITCHELL MARKEL, Defendant-Appellant.	LC No. 02-715-FH

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree home invasion, MCL 750.110a(2), predicated on an aiding and abetting theory. He was sentenced to five to twenty years' imprisonment. Defendant appeals as of right, arguing that there was insufficient evidence to support the conviction and rebut the alibi defense, that trial counsel was ineffective in several regards, and that there was a scoring error at sentencing. We disagree and affirm.

I. BASIC FACTS

This case arises out of a home invasion on the night before Thanksgiving in 2001. Carla Murray testified that she filed a police report on Thanksgiving morning, November 22, regarding a break-in of her home, and particularly, the basement of the home. A basement bedroom window had been broken out, but it had been done so in a very careful manner. It was the bedroom of Murray's son, Charles Burkle, who resided in the home. Murray's husband, who was Burkle's stepfather, also resided in the home. Missing from the bedroom was a guitar and computer tower, and a side table was broken. Murray recalled locking the doors to the home the night before. Burkle was not home the night of the crime. Murray testified that she did not hear anything during the night because she had taken a sleeping pill, and she asserted that no one had been given permission to enter the home. Murray indicated that there was a trail behind her home that lead to the parking lot of a Glenn's Market.

Next to testify was seventeen-year old Brett Probert, who acknowledged that he was testifying pursuant to a plea agreement under which he plead guilty to misdemeanor larceny on a

charge of credit card fraud,[1] while numerous other charges would be dropped or not brought. These charges or potential charges regarded a large number of breaking and enterings (B&Es), including five B&Es at Charlevoix High School alone, drunk driving by a minor, resisting and obstructing a police officer, and unlawfully driving away a motor vehicle on two occasions, plus any charge arising out of the crime upon which defendant was eventually convicted, i.e., the Murray home invasion. Probert revealed a troubled youth that not only included several trips through the court system but placement in a treatment facility for troubled youths by his parents. He admitted to drug addiction, mainly Ecstacy and crack cocaine. Probert often committed B&Es to help support his drug habit, which was costly.

Probert testified that he met defendant in October 2001 through some mutual friends. They often did Ecstacy together. Probert was also friends with Burkle. Probert stated that he broke into Murray's home the night before Thanksgiving 2001. Earlier, Probert met with Burkle, and Burkle indicated that he had some drugs. Probert purchased an Ecstacy pill from Burkle, and then subsequently met up with defendant and another friend, Nate Caneval. Probert told defendant and Caneval that Burkle had a lot of drugs, including Ecstacy and marijuana, and suggested that they break into the Murray residence and steal the drugs, to which defendant and Caneval agreed. Probert could not recall the specifics of the conversation regarding the decision to break into the Murray residence.

> *Q*. Okay. When you say "we talked about it," can you – can you tell the jury specifically what you talked about, do you remember?
>
> *A*. No, I don't remember
>
> * * *
>
> *Q*. All right, do you remember if the defendant was interested in that [Ecstacy and marijuana]?
>
> *A*. Uh, prob – um, yes. Um, we both did it, so it's kind of like what we were into at that time, so we decided to go get it.

The three of them drove in Caneval's car to Glenn's Market and parked in the lot; Probert was driving. Probert was questioned about any discussions the three had during the drive.

> *Q*. Did you guys talk at all about what you were going to do or what was going to happen?
>
> *A*. No, we didn't. We pretty much played it – just – we knew what we were doing, going up there to get it. But we didn't talk about how or anything like that.

[1] He subsequently testified that he plead guilty to a felony related to the credit card fraud charge, and if he successfully completed probation, it would be reduced to a misdemeanor.

After arriving at Glenn's, they walked through the woods on a trail ending up at the Murray residence, and Probert unsuccessfully tried opening the doors to the home, while defendant and Caneval waited in the backyard. Probert testified that he then went to the back of the home and told defendant and Caneval that the doors were locked. Defendant and Caneval responded: "It's impossible to get in." Probert then told defendant and Caneval to go for "a walk or go do whatever, and I'll find a way in." Thereafter, Probert broke Burkle's bedroom basement window, and crawled into the home. The window already had a crack, and Probert carefully cracked the window further and removed the pieces. During the time that Probert was in the home, Caneval would talk with him at times through the window. Probert could not find any drugs, and he ended up taking a portable scale and a computer tower; he did not take a guitar. Probert was pretty sure that he handed the scale to Caneval through the broken window, though he was not absolutely certain it was Caneval. Probert testified that he carried the computer tower through the home and walked out a door with it. He did not see Murray or her husband as he walked through the home, but he did hear a television. The three of them returned to the car at Glenn's Market and drove back to Probert's home.

When questioned about particulars with respect to what defendant was doing at the time of the home invasion, Probert responded: "I don't know exactly where he was. But Nate was there, and that's all I remember." Probert stated that defendant had not spoken to him through the broken basement window. Probert testified that he could not recall who was carrying what when they returned to the car. He further testified that the scale and computer tower were left in Caneval's car and that is the last he saw of the items. Had they found drugs, Probert indicated that they would have probably used them and sold them. Probert believed that defendant was addicted to Ecstacy. He recalled that possibly the three of them agreed that if they were confronted about the crime, they would deny any involvement. Probert admitted on cross-examination that he was high on Ecstacy on the night of the break-in.

Burkle testified that when he returned to his home on Thanksgiving morning, the police were there in response to the break-in, and Burkle told police that a computer tower was missing and that his room appeared ransacked. A week or two later, Burkle told police that a guitar was also missing; he had not noticed it missing earlier because the guitar case had been left behind and he assumed the guitar was in the case. But he discovered later it was not. Burkle did not report a scale missing, although it was possible that a scale was taken from his room and he did not realize it. Burkle acknowledged that he told Probert that he had a large quantity of Ecstacy, but he did not believe that he sold any to Probert at the time because he did not have the drugs on his person. Defendant was not with Probert when Burkle told Probert about his Ecstacy supply. Burkle testified that he did not tell Probert where he kept his Ecstacy. He also conceded that he used Ecstacy quite often. Burkle was confident that it was Probert who broke into his home looking for drugs, and he conveyed his belief to police. In a phone conversation with defendant after the crime, defendant indicated that he was with Probert at Probert's home on the night of the crime. Burkle personally confronted Probert at a party a couple days after the home invasion, and Probert did not admit to the crime. Defendant, who was also at the party, told Burkle that Probert was not involved in the break-in, and that Probert was with him at the time of the crime. Burkle testified that he believed defendant used Ecstacy quite often.

Chief of Police Daniel Reece, who investigated the home invasion, testified that Burkle thought that Probert committed the crime. He indicated that none of the stolen items were ever recovered. The window glass pieces appeared to have been removed a piece at a time; there were no glass shards in the interior of the residence. Probert's version of events matched the physical evidence at the crime scene, although police were unable to lift any usable fingerprints or footprints from the scene. On cross-examination, Reece acknowledged that there was no physical evidence establishing that there were three individuals involved in the home invasion.

The prosecutor rested his case, and defendant proceeded to call his witnesses without moving for a directed verdict. Defendant first called Collin Ford, a longtime friend, to the stand. Collin testified that on the day before Thanksgiving 2001, he was house-sitting for his aunt, Laurie Gilbert, and that defendant and other friends stayed at the house that evening and throughout the night. Ford testified that he recalled the date because it was the first time his aunt allowed him to housesit. Probert, who Ford knew, did not appear at Gilbert's house that night. To the best of Ford's memory, defendant did not leave the house at anytime that evening or night; he was there the entire night. Ford stayed at Gilbert's house the week of Thanksgiving, and defendant and others spent most of the time with him. On cross-examination, it became evident that Ford had difficulty recalling specific dates and times and how he knew that it was the day before Thanksgiving on which defendant remained at the house all evening and night. However, despite apparent confusion, he remained adamant that it was the day before Thanksgiving.

Lisa Schneider testified that she went to Gilbert's house with friends around Thanksgiving 2001, and at the house she met Ford and defendant through a mutual friend. She hung out at the house for a few days, and stayed over, she believed, two nights. Schneider believed that the first night she stayed over was the night on which the home invasion occurred; the night before Thanksgiving. She recalled that defendant was there that evening and stayed the night without leaving. Schneider remembered that she colored defendant's hair that night. On cross-examination, as in the case of Ford's testimony, Schneider had difficulty recalling specific dates and times, and she could not clearly explain how she knew defendant was over at Gilbert's on the night before Thanksgiving. However, she was also adamant that it was the date of the crime that she stayed overnight at the house, and that defendant was there the whole time. Schneider testified that Probert was at Gilbert's house at some point in time, but she did not recall him ever staying the night.

Lisa Schneider's sister Emily testified next. She stated that she met Ford and defendant and talked to them on the night of November 21, 2001 (day before Thanksgiving), at the aunt's house. Emily arrived at the house in the late afternoon on the 21st and stayed all night. She testified that defendant was there all night, and she did not recall him ever leaving. Emily did not see Probert at the house. We note that Emily repeatedly stated that she did not know what day Thanksgiving fell on in 2001, she thought maybe it was Saturday. She testified that she dated defendant for about three months. On cross-examination, Emily showed difficulty recalling specific dates and times.

Laurie Gilbert testified that she had Ford housesit for her from a few days before Thanksgiving 2001, through November 28th. Gilbert indicated on cross-examination that she did not know what occurred at her house during this time period.

As a rebuttal witness, the prosecutor called Gary Probert, Brett Probert's father, who testified that in mid to late November 2001, defendant was staying at his home. He recalled that on the night before Thanksgiving, defendant was present at the house. Mr. Probert remembered going down in his basement on Thanksgiving, where he saw his son and defendant sleeping, and he asked defendant if he wanted anything to eat. He also recalled seeing defendant's car at his home. Mr. Probert testified that the only reason he could remember that defendant was at his home was because it was Thanksgiving and the holiday stood out in his memory.

The case went to the jury, and it returned a guilty verdict on the charge of first-degree home invasion.

II. ANALYSIS

Defendant maintains that there was no evidence establishing that defendant aided and abetted Probert in the home invasion, and the prosecutor's sole theory of guilt was aiding and abetting. Defendant argues that "[a] person's mere presence at the scene of a crime, even with knowledge that an offense is about to be committed or being committed, is not enough to make him an aider or abettor." Defendant also asserts that the evidence was insufficient to overcome the alibi defense. We find that there was sufficient evidence to support defendant's conviction for aiding and abetting first-degree home invasion.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution 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, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence and the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines,* 460 Mich 750, 757; 597 NW2d 130 (1999). 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).

"A conviction of aiding and abetting requires proof of the following elements: (1) the underlying crime was committed by either the defendant or some other person, (2) the defendant performed acts or gave encouragement that aided and assisted 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 of giving aid or encouragement." *People v Smielewski,* 235 Mich App 196, 207; 596 NW2d 636 (1999). "Every 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." MCL 767.39.

Here, there was clearly sufficient evidence that Probert, as the principal, committed the underlying crime of first-degree home invasion. The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) that when the defendant did so, he or she intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) the defendant was armed with a dangerous weapon or another person was lawfully present in the dwelling. MCL 750.110a(2). There was evidence that Probert broke in through the basement window with the intent to commit a larceny inside. Further, there was evidence that Probert actually committed a larceny while being present in the home, and that Murray and her husband were lawfully in the dwelling when the crime occurred.

With respect, in part, to the third element of aiding and abetting, there was sufficient evidence that defendant had knowledge that Probert intended to commit a home invasion, where Probert testified that there was an agreement by the three friends to break into the home and steal drugs. The element which gives us some concern regards whether defendant performed acts or gave encouragement that aided and assisted the commission of the crime.

"One aids or abets when he takes conscious action to make the criminal venture succeed." *People v Usher*, 121 Mich App 345, 350-351; 328 NW2d 628 (1982). Aiding and abetting is used to describe all forms of assistance rendered to the perpetrator of the crime. *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974). This term comprehends all words or deeds which may support, incite, or encourage the commission of the crime. *Id.* It includes the actual presence of an accessory, in preconcert with the principal, for the purpose of rendering assistance if necessary. *Id.* The amount of aid or encouragement is not material if it had the effect of inducing the commission of the crime. *Id.*

However, mere presence, even with knowledge that a crime is being committed or is about to be committed, is not enough to establish aiding and abetting, nor is mere mental approval sufficient, nor passive acquiescence or consent. *People v Burrel*, 253 Mich 321, 323; 235 NW 170 (1931); *People v Norris*, 236 Mich App 411, 420; 600 NW2d 658 (1999); *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992); *People v Killingsworth*, 80 Mich App 45, 49-50; 263 NW2d 278 (1977); CJI2d 8.5 and commentary, which includes additional case law authority.

Viewing the evidence in a light most favorable to the prosecution, Probert's testimony established that defendant, because of his drug dependency, agreed with Probert and Caneval to commit the home invasion so that drugs could be obtained. Defendant then accompanied the two to Glenn's Market and eventually to the Murray residence in order to assist in carrying out the agreement to commit the home invasion. Defendant was present at the crime scene while Probert entered the home and committed the larceny. It could be inferred that, in light of defendant's desire for drugs, his agreement to commit a home invasion, and his actions in accompanying Probert and Caneval to the crime scene, he was prepared to render assistance if necessary during the commission of the crime. Defendant then left the scene with his two accomplices. Viewing the totality of the circumstances, especially defendant's agreement that they should break into the home and his accompaniment of Probert and Caneval to the crime scene, it could be found that defendant supported, incited, or encouraged the commission of the

crime regardless of the amount of encouragement or aid given. *Palmer, supra* at 378. Defendant was not merely present, nor did he passively acquiesce, he engaged in going to the Murray residence with his accomplices, remaining there throughout the crime, and returning to a safe haven, after initially planning the commission of the home invasion with his cohorts. Additionally, Probert's testimony placing defendant at the crime scene was sufficient to overcome the alibi defense. Reversal is not warranted.

Defendant next argues that counsel ineffectively implemented at trial his chosen strategy of an alibi defense, where he failed to properly prepare the alibi witnesses with respect to the specific date of the crime, and where the prosecutor was thus able to effectively impeach the witnesses and create doubt as to their recall of dates and times. Defendant also argues ineffective assistance of counsel for counsel's failure to make alternative arguments, aside from alibi, that, assuming defendant's presence at the crime scene, the evidence was insufficient for guilt under an aiding and abetting theory and that there had been a voluntary abandonment of any crime. Counsel, defendant argues, should have also requested instructions related to these defenses.

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Our review is limited to the record because no *Ginther* hearing occurred. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Defendant's claim regarding failure to properly prepare the witnesses has no merit. First, because we are relegated to the existing record, there is no way to determine to what extent counsel actually prepared the witnesses for trial. Second, there are references made at trial by

the alibi witnesses that they in fact spoke to counsel about the particulars of their testimony. Third, these were all young witnesses trying to recall events that occurred a year earlier, and they were thus easy targets for the prosecutor to show confusion, regardless of the level of preparation. Cross-examination on year-old events with a focus on particular dates and times will, quite often, lead to an appearance of confusion when there is cross-examination by a skilled attorney. Moreover, many witnesses would in fact have difficulty recalling specifics in such circumstances. We find no basis for reversal on this argument.

The second claim is that counsel should have, in light of the evidence, argued to the jury that, assuming they believed Probert's testimony, the testimony did not show that defendant aided and abetted a home invasion, and that the evidence could also be interpreted as showing that defendant had voluntarily abandoned the crime. We find that defense counsel's decision to pursue an alibi defense and not pursue alternate arguments did not fall below an objective standard of reasonableness. Defendant has failed to overcome the strong presumption that counsel's performance constituted sound trial strategy. It is quite possible that had counsel argued to the jury that defendant's presence was insufficient to support a conviction, the jury would have completely disregarded the alibi defense and found a lack of credibility and sincerity in defendant's position. There is no basis for reversal.

Finally, defendant presents a scoring-sentencing issue. The minimum guidelines range was 45 to 75 months, and defendant was sentenced to a minimum of 60 months' or 5 years' imprisonment. The crime for which defendant was convicted occurred after January 1, 1999; therefore, the legislative sentencing guidelines are applicable. MCL 769.34(2).

MCL 769.34(10) provides, in part, that this Court shall affirm a sentence that is within the appropriate guidelines range "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." The trial court has discretion in determining the number of points to be scored on any particular variable provided there is evidence on the record that adequately supports the score. *People v Cain,* 238 Mich App 95, 129-130; 605 NW2d 28 (1999).

The challenge regards offense variable ten (OV 10), MCL 777.40, which deals with the exploitation of a vulnerable victim. Five points is to be scored where "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, *asleep,* or unconscious." MCL 777.40(1)(c). The trial court scored this at five points because Murray and her husband were asleep when the crime occurred and thus they were vulnerable. There was a challenge to the trial court's ruling, and therefore, the issue has been preserved. If the score was reduced 5 points, for an overall OV score of 31 instead of 36, the OV level would change from level IV to III, and the guidelines range would become 36 to 60 months. It is true that the minimum range given would still fall within the new range; however, it is arguable that the judge settled on a sentence in the middle of the range and that he would not have given defendant 60 months if the range was 36 to 60 months.

Below there was an argument, in part, that the proofs were insufficient to show that Murray and her husband were asleep at the time of the home invasion. However, this argument is not made on appeal. Rather, defendant argues that, assuming the victims were asleep, the

provision does not apply as a matter of law. Defendant argues that, had Murray and her husband been awake, they would have been more vulnerable because they may have confronted the intruder and placed themselves in danger. We disagree. Common knowledge dictates that a person becomes more vulnerable to a home invasion at night because the intruder is exploiting the fact that the homeowner is most likely asleep and will not hear the intrusion, thus increasing the chances that the home invasion will be successfully accomplished by the intruder. We find no error.

Affirmed.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Jane E. Markey