STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 29, 2011
v	No. 298859 Wayne Circuit Court
BRIAN KEITH KEATTS, Defendant-Appellant.	LC No. 10-001156-FH

Before: M.J. KELLY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant of second-degree home invasion, MCL 750.110a(3),[1] and the trial court sentenced him to imprisonment for 3 to 15 years. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm defendant's conviction and sentence.

I. FACTS AND PROCEDURAL HISTORY

On December 17, 2009, Patricia Samson, her son and her fiancé arrived at her home at about 4:40 p.m. As they arrived, a man, later identified as Nick Duke, was exiting the home with frozen food items and a remote control car. Defendant was inside the home. Samson's son and fiancé entered the house, and her son grabbed Duke and dragged him up the stairs. Samson remained outside because she was unsure "if there were any firearms involved or what was going on." Once her son and fiancé were in the house, Samson heard "all kinds of yelling and screaming and arguing and fighting." Samson's fiancé said the scene "was pretty chaotic" and that he tried "to keep a fight from starting or anybody from getting hurt." Samson's son said that "[i]t was a pretty intense situation" inside the house with "screaming, fighting, upset . . . ." There was a heated argument between Samson's son and fiancé and defendant and Duke, and everyone was upset and angry. Samson's fiancé said that Duke "gave [him] a push" and jumped off the second floor balcony. Samson saw Duke jump from the second story of the house to the ground, run to a white van and get into the passenger seat; the van drove off.

[1] The jury acquitted defendant of unlawfully driving away a motor vehicle, MCL 750.413, and receiving or concealing a stolen motor vehicle, MCL 750.535(7).

Eventually, Samson entered the home, and defendant was still inside. Samson knew defendant from the neighborhood, but she had not given him permission to enter her home. Samson's son had not given defendant permission to enter the home either. When Samson entered the home, there was a lot of yelling and screaming. Defendant begged Samson's son not to kill him and not to call the police and offered his wallet and later offered to get Samson's property back. Some of the items that were taken from the house included an X-Box, Playstation, jewelry, radio controlled cars, silverware, a motorcycle, a Bose radio, a television, a safety deposit box, a stereo and speakers. Defendant and Samson's son drove around to different houses looking for the stolen property; ultimately, they recovered some of the property at the home of another individual named Brian (not defendant) and at a location across the street from Brian's home. Samson testified that while she was at the police station reporting the crime, defendant made threatening phone calls to her.

As stated above, the jury found defendant guilty of second-degree home invasion. Following the jury's verdict, defendant filed a motion to correct invalid sentence, arguing, in part, that he was improperly assessed ten points for Offense Variable (OV) 9 because the victims were not at home at the time of the offense, and there was no evidence that they were placed in danger of injury or loss of life. The trial court found that OV 9 was properly scored at ten points.

Defendant also moved for a new trial, arguing that the verdict was against the great weight of the evidence. The trial court denied the motion, concluding:

> the jury properly and beyond a reasonable doubt found the Defendant guilty of home invasion based on a theory of aiding and abetting that was put forward by the prosecution and was substantiated by the evidence. . . . They do so find that he was guilty either as a principal or as an aider and abett[e]r. And the conviction for home invasion in the second degree was proper in all respects. The motion for a new trial is denied.

II. ANALYSIS

Defendant first argues that the evidence is insufficient to sustain his conviction of second-degree home invasion, either as a principal or as an aider and abetter.

This Court reviews de novo claims of insufficient evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence in a criminal case, a reviewing court must examine 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 Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). A reviewing court must avoid weighing the proofs or determining what testimony to believe, and all conflicts in the evidence must be resolved in favor of the prosecution. *Id.* Circumstantial evidence and the reasonable inferences therefrom can constitute satisfactory proof of the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of second-degree home invasion are that the defendant (1) entered a dwelling, either by a breaking and entering or without permission, (2) with the intent to commit a felony, larceny, or assault in the dwelling. MCL 750.110a(3).

"[O]ne who counsels, aids, or abets in the commission of an offense may be tried and convicted as if he had directly committed the offense." *People v Smielewski*, 235 Mich App 196, 203; 596 NW2d 636 (1999). To convict defendant under an aiding and abetting theory, the prosecutor had to establish that "'(1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that 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 he gave aid and encouragement.'" *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995), rev'd in part on other grounds *People v Mass*, 464 Mich 615 (2001). In addition, the prosecutor was required to establish that defendant possessed the specific intent to commit a larceny inside the dwelling or that he had knowledge that Nick Duke intended to commit a larceny inside the dwelling. *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995).

Viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to convict defendant of second-degree home invasion, either as a principal, or as an aider and abetter. On December 17, 2009, Samson and her son and fiancé discovered defendant inside their home. Defendant did not have permission to be in the home. At the time, Nick Duke was exiting the home with his arms full of Samson's and her son's belongings. Numerous items had been removed from the home. When Samson's son and fiancé confronted defendant, he begged them not to call the police and offered them his wallet. He also offered to get the stolen property back and ultimately helped them recover some of the stolen property. While Samson was at the police station reporting the crime, defendant made threatening phone calls to her.

Defendant specifically challenges the sufficiency of the evidence regarding intent. Because of the difficulty in proving an actor's state of mind, minimal circumstantial evidence is sufficient to prove intent. *People v Fetterley*, 229 Mich App 511, 518; 583 NW2d 199 (1998). An aider and abetter's state of mind may be inferred from all the facts and circumstances. *Carines*, 460 Mich at 757. Factors that may be considered include a close association between the defendant and the principal and the defendant's participation in the execution of the crime. *Id.* at 757-758. Defendant and Duke are cousins. The homeowners discovered defendant and Duke at their home together; defendant was inside and Duke was exiting the home with his arms full of the homeowners' belongings. Under the circumstances, it can be inferred that defendant either intended to commit a larceny inside the home or had knowledge that Duke intended to commit a larceny. It is true, as defendant asserts, that mere presence is insufficient to support a conviction based upon an aiding and abetting theory; however, it is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

For all the above reasons, the evidence was sufficient to sustain defendant's conviction of second-degree home invasion.

Defendant next argues that the jury's verdict was against the great weight of the evidence and that the trial court erred in denying his motion for new trial.

An appellate court reviews a trial court's ruling on a motion for new trial based on the claim that the verdict was against the great weight of the evidence for an abuse of discretion. *Lueth*, 253 Mich App at 680. A new trial is warranted "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). A grant of a new trial because the verdict was against the great weight of the evidence is disfavored. *Id.* at 639.

For the same reasons as explained above, we conclude that the verdict was not against the great weight of the evidence. The evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.

Defendant finally argues that the trial court erred in assessing him ten points for OV 9 and that defense counsel was ineffective for failing to object to the sentencing guidelines calculation based on the improper scoring of OV 9.

This Court reviews a trial court's scoring of a sentencing variable for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

OV 9 concerns the "number of victims." MCL 777.39(1). Ten points are to be assessed for OV 9 when the offense involves "2 to 9 victims who were placed in danger of physical injury or death . . . ." MCL 777.39(1)(c).

Citing *People v Gillam*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2007 (Docket No. 270760), defendant argues that a score of zero for OV 9 is proper when no one was home at the time of the commission of second-degree home invasion. This Court's unpublished opinions are not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1). In any event, the record does not support defendant's contention that nobody was home at the time of the offense. While the victims were not at home at the time defendant entered the home, they returned home while the home invasion was in progress and while defendant was still inside the home and Duke was exiting the home with his arms full of the homeowners' belongings. There was evidence that after Samson's son and fiancé entered the home, things were chaotic and there was yelling, screaming, arguing and fighting between Samson's son and fiancé and defendant and Duke. At some point, Samson entered the home, as well. By invading the home, defendant created a dangerous situation in which Samson and her son and fiancé were placed in danger of physical injury. There was evidence to support the scoring of ten points for OV 9. Because there was evidence in the record to support a score of ten points for OV 9, it would have been futile for defense counsel to object to the sentencing guidelines calculation based on the improper scoring of OV 9. Defense counsel is not ineffective

for failing to raise a meritless objection or advance a futile argument.[2] See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Michael J. Kelly
/s/ Donald S. Owens
/s/ Stephen L. Borrello

[2] We observe that while defendant agreed to the score of ten points for OV 9 at sentencing, he moved to correct the sentence, in part, based on his contention that OV 9 should have been scored at zero points.