STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 6, 2012
v	No. 301505 Isabella Circuit Court
MAWUT MAYEN, Defendant-Appellant.	LC No. 2009-000794-FH

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

WHITBECK, J. (*dissenting*).

In this case, the majority affirms defendant Mawut Mayen's bench trial conviction for first-degree home invasion[1] on the basis of the conclusion that there was sufficient evidence to establish Mayen's identity as the perpetrator of the home invasion. But because I believe that the record lacked sufficient evidence to establish Mayen's identity as the perpetrator, I would vacate Mayen's conviction and sentence for first-degree home invasion, and remand to the trial court for entry of an order of acquittal on this charge.

I. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

When reviewing a sufficiency challenge, this Court reviews the evidence de novo, in a light most favorable to the prosecution, "to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt."[2] This Court may not set aside the trial court's findings of fact unless they are clearly erroneous.[3]

[1] MCL 750.110a(2).

[2] *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005); *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

[3] *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

B. LEGAL STANDARDS

MCL 750.110a(2) sets forth the elements of first-degree home invasion:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

"Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime."[4] And close temporal proximity of a defendant's possession of the stolen goods to the commission of the crime is circumstantial evidence that the defendant committed the crime.[5] Thus, ordinarily, a finder of fact may infer that the possessor of recently stolen property was the thief.[6] However, the mere possession of recently stolen property is insufficient as a matter of law to support a conviction for *burglary*.[7] The prosecution must also present evidence of other facts and circumstances indicating guilt to support the conviction based on breaking and entering.[8] To support a breaking and entering conviction where the accused was found in possession of the stolen property, there must be additional circumstances directly related toward placing the accused at the scene of the crime.[9]

C. APPLYING THE LEGAL STANDARDS

Nancy Parshall's testimony was sufficient to establish that *someone* entered her family's dwelling without permission and committed a felony while other persons were lawfully present in the dwelling. Therefore, the remaining issue was the perpetrator's identity. The trial court found that circumstantial evidence was sufficient to prove beyond a reasonable doubt that Mayen committed the home invasion:

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[4] *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

[5] *Hutton*, 50 Mich App 359.

[6] *People v Hayden*, 132 Mich App 273, 283; 348 NW2d 672 (1984).

[7] *People v Hutton*, 50 Mich App 351, 357; 213 NW2d 320 (1973).

[8] *Id.* at 358.

[9] *People v Rankin*, 52 Mich App 130, 132-134; 216 NW2d 620 (1974).

> Looking at the totality of the circumstances, the Court is of the opinion that there is little explanation for how once the Court has made the determination that the Defendant was the one that did the Financial Transaction Device, had the financial transaction device in his possession at five—between 5:00 and 7:00 a.m., within a small number of hours after this incident happened at the Bloem Parshall residence, that he could not have been the one that was also present and took the items that were identified, including the credit card that was used at his residence, on his computer, using his access code.

Thus, according to the trial court, the evidence suggesting–and it is nothing more than a suggestion–that shortly after the home invasion Mayen used a credit card number from a credit card that was taken from the home was sufficient to establish that Mayen was the person who committed the home invasion. The majority agrees, but I cannot.

I first clarify that despite the trial court's statement that Mayen "had the financial transaction device in his possession at five—between 5:00 and 7:00 a.m.," neither the credit card itself—nor any of the other items taken from the Parshall's home—were found in Mayen's possession. At most, when viewed in the light most favorable to the prosecution, the evidence showed only that Mayen may have fraudulently used the credit card number to make a purchase on his computer within hours of the breaking and entering. And the closeness in time between the home invasion and Mayen's possible use of the credit card number may tend to *suggest* that he was in possession of the physical credit card by means of perpetrating the home invasion. However, without more, I believe that the trial court erred in reaching the conclusion that Mayen was necessarily guilty of the home invasion beyond a reasonable doubt. There was absolutely no direct evidence placing Mayen at the scene of the crime—no witnesses, no physical evidence (e.g., fingerprints)—linking him to the scene. And, again, the stolen credit card itself was never located in Mayen's possession or elsewhere.

Moreover, in my opinion, there were no additional circumstances directly related toward placing Mayen at the scene of the crime.[10] Unlike in *People v Stoneman*,[11] and other cases cited by the majority,[12] there were no additional circumstances, remarkable[13] or otherwise, that accompanied the possession. Indeed, here, there was no possession at all, only an inference of possession. Thus, to conclude that Mayen was the perpetrator of the home invasion on the basis of the combined inferences (1) that he possessed the credit cards and (2) that he therefore was the person who took the credit cards from the home is a logical leap that I am not willing to make.

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[10] *Id.*

[11] *People v Stoneman*, 7 Mich App 65, 67; 151 NW2d 206 (1967) (where the defendant was found in possession of a stolen safe).

[12] See e.g., *People v Hutton*, 50 Mich App 351, 355; 213 NW2d 320 (1973) (where the defendant was found in possession of stolen electronic equipment).

[13] *Stoneman*, 7 Mich App at 70 (stating that "remarkable circumstances accompan[ied] the possession").

The prosecution also argues that Mayen's flight and abrupt dropping out of school was sufficient circumstantial evidence to show that Mayen committed first-degree home invasion. But, again, this "added circumstance" does nothing to place Mayen at the scene. While flight can be evidence of consciousness of guilt,[14] Mayen was just as likely to have fled on the basis of his guilt for the use of a credit card, if he in fact used it, and not necessarily because he committed the home invasion.

In sum, I would hold that there was insufficient evidence to support Mayen's home invasion conviction. Therefore, I would vacate Mayen's conviction for first-degree home invasion and remand to the trial court for entry of an order of acquittal on this charge.[15]

/s/ William C. Whitbeck

[14] *People v Smelley*, 485 Mich 1023, 1024; 776 NW2d 310 (2010)

[15] *People v Thompson*, 424 Mich 118, 130; 379 NW2d 49 (1985), cert den sub nom *Thompson v Foltz*, 498 US 971; 111 S Ct 440; 112 L Ed 2d 423 (1990) (stating that when a conviction is reversed on grounds of insufficient evidence, retrial is barred by principles of double jeopardy). See also *Burks v United States*, 437 US 1; 98 S Ct 2141; 57 L Ed 2d 1 (1978).