

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 20, 2012

v

CEAZAR ANTWON ABERNATHY,

Defendant-Appellant.

No. 308225
Saginaw Circuit Court
LC No. 10-034964-FH

Before: CAVANAGH, P.J., and HOEKSTRA and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of conspiracy to commit first-degree home invasion, MCL 750.157a; MCL 750.110a(2), and second-degree home invasion, MCL 750.110a(3). We reverse and remand for resentencing.

On September 2, 2010, defendant approached two homes located near each other, rang the doorbells, and asked if a “Melanie” or “Melodie” lived at the home. Each time, after being told that no one with that name lived there, defendant entered the passenger side of a tan-colored Cadillac and drove away. Both homeowners contacted the local police because the events seemed suspicious. Shortly thereafter, the Cadillac was located in the driveway of a home a couple miles away. The first responding officer noticed that the front door of the house had been kicked in and firearms were lying on the porch. No one was in the house, but two people were spotted in the cornfield behind the house. Shortly thereafter, one suspect was located and arrested. The bottom of his shoe matched the impression on the front door. Another officer waited for defendant to exit the cornfield and, when he did, he was arrested. Neither suspect had a weapon. Inside the home, jewelry and other items had been piled on a bed. A gun cabinet in the bedroom had been pried open with a knife. The eight firearms had been removed and placed on the front porch of the home; none were missing.

On appeal, defendant argues that his motion for directed verdict on the charge of conspiracy to commit first-degree home invasion should have been granted because there was no evidence that the conspirators agreed to commit a first-degree home invasion. We agree.

We review de novo a trial court's denial of a motion for directed verdict to determine whether the evidence, when viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the prosecution proved the elements of the crime beyond a reasonable doubt. *People v Parker*, 288 Mich App 500, 504; 795 NW2d 596 (2010).

Criminal conspiracy exists when two or more people voluntarily agree to effectuate the commission of a criminal offense. *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). It is a specific intent crime, requiring both "the intent to combine with others and the intent to accomplish the illegal objective." *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). "Establishing that the individuals specifically intended to combine to pursue the criminal objective of their agreement is critical because the gist of the offense of conspiracy lies in the unlawful agreement . . . [meaning] . . . the crime is complete upon formation of the agreement" *Justice (After Remand)*, 454 Mich at 345-346 (quotations and citation omitted). And, as our Supreme Court further explained, "although the government need not prove commission of the substantive offense or even that the conspirators knew all the details of the conspiracy, it must prove that 'the intended future conduct they . . . agreed upon include[s] all the elements of the substantive crime.'" *Mass*, 464 Mich at 629 n 19 (citations omitted).

The substantive crime in this case is first-degree home invasion as set forth in MCL 750.110a(2), which provides:

A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling . . . 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.

Thus, to establish the crime of conspiracy to commit first-degree home invasion, the prosecution is required to prove that the defendant specifically intended to combine with another to accomplish a first-degree home invasion and the intended future conduct they agreed upon included all the elements of first-degree home invasion. See *Mass*, 464 Mich at 629 n 19.

In this case, the evidence was insufficient to establish a conspiracy to commit first-degree home invasion. There was evidence that defendant intended to combine with another to break and enter a dwelling to commit a larceny, but there was no evidence that the conspirators agreed to do so either while armed with a dangerous weapon or while the dwelling was occupied by another person. That is, there was no evidence that the intended future conduct they agreed upon included the "armed or occupied" element of first-degree home invasion. Although direct proof of the conspiracy is not necessary, the circumstances, acts, and conduct of the parties also did not tend to establish a conspiracy to commit first-degree home invasion. See *Justice (After Remand)*, 454 Mich at 347. Accordingly, the trial court's denial of defendant's motion for directed verdict on this charge is reversed and the conviction is vacated. Because defendant's minimum sentence

of 216 months exceeds the sentence range for a Class C offense like second-degree home invasion, this matter is remanded for resentencing. See MCL 769.34(2), 777.16f, and 777.64.

Reversed and remanded for resentencing and correction of the judgment of sentence with regard to the vacated conviction. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Douglas B. Shapiro