

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERNIS JOHNSON,

Defendant-Appellant.

UNPUBLISHED

June 1, 1999

No. 205015

Recorder's Court

LC No. 95-011979

Before: Hoekstra, P.J., and Saad and R.B. Burns,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3). Defendant was sentenced to seven to fifteen years in prison. We affirm.

Defendant claims there was insufficient evidence to convict him of home invasion because he had permission to be in the dwelling. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, a court will view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Under MCL 750.110a(3); MSA 28.267, a person is guilty of second-degree home invasion if (1) he breaks and enters a dwelling with intent to commit a felony or a larceny in the dwelling, or, (2) a person enters without permission with intent to commit a felony or a larceny in the dwelling. Defendant claims that he had permission from both complainant and complainant's landlord to enter the upstairs flat. A rational trier of fact could conclude, however, that defendant did not have permission to enter the flat.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Although complainant testified that defendant once had a key, she denied giving him a key during the period in which this incident took place. Complainant also testified that defendant did not pay rent and only stayed at the flat off and on when they were together. Indeed, the longest

time defendant ever stayed with complainant was one month. The fact that defendant had to kick the door down to get into the flat on September 23, 1995, supports complainant's contention that he did not have a key.

In addition, complainant's landlord, who lived in the flat downstairs, did not consider defendant a resident of the flat. She testified that he did not pay rent and that she never provided him with keys to the flat. When viewed in the light most favorable to the prosecution, this evidence was sufficient for a rational trier of fact to find that defendant did not have permission to enter the flat.

Defendant also contends that the trial court erred when it sentenced defendant based on the court's personal conclusion that defendant was guilty of arson. We disagree. This Court reviews the legality of a trial court's imposition of sentence for an abuse of discretion. *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995). A trial court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). This principle is violated when the sentence is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.*

Where there is support on the record that a greater offense has been committed by a defendant, it may constitute an aggravating factor to be considered by the judge at sentencing without an admission of guilt by defendant. *People v Purcell*, 174 Mich App 126, 130-131; 435 NW2d 782 (1989). Though the trial court may not have thought the proof to be beyond a reasonable doubt necessary for a conviction of the greater charge, it may have thought, based on a preponderance of the evidence, that defendant committed the greater offense. *Purcell*, 174 Mich 130-131.

Therefore, the question is: is there a preponderance of the evidence that defendant committed arson? There is. The landlord first heard footsteps to the upstairs flat where complainant, defendant's ex-girlfriend and mother of his child, lived. After calling 911 about the footsteps, the landlord witnessed defendant come down the stairs from the upstairs flat. After discovering smoke coming from the flat, police officers called the fire department. Firefighter Steven Lesniak found a beer bottle filled with kerosene on the kitchen counter with smoke coming from it. There was also a burned hole in the middle of the kitchen floor. Also, defendant's clothes were missing and no evidence was presented that the landlord witnessed anyone else on the stairs between the time she saw defendant and the time the police arrived. Because she was directly below the flat, it is reasonable to conclude that she would have heard another person enter the flat after defendant, especially because she had already been alerted that something was wrong.

Because the police officers discovered smoke and evidence of a fire directly after the landlord heard and witnessed defendant come down the steps of the flat, the trial court reasonably found by a preponderance of evidence that defendant committed arson. Furthermore, defendant's sentence falls within the guidelines range. A sentence imposed within an applicable sentencing guidelines range is presumptively proportionate, and is neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Because the crime is serious, and the sentence was within the guidelines range, defendant's sentence was proportionate.

Finally, defendant says that his right to allocution was denied because the trial court interrupted him. We disagree. At sentencing, a trial court must give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence. MCR 6.425 (D)(2)(c); *People v Westbrook*, 188 Mich App 615, 616; 470 NW2d 495 (1991). The defendant's right of allocution requires strict compliance, and the court must specifically ask the defendant separately if he wishes to address the court. *People v Berry*, 409 Mich 774, 781; 298 NW2d 434 (1980); *Westbrook*, 188 Mich App 617.

In *People v Howell*, 168 Mich App 227; 423 NW2d 629 (1988), this Court held that the defendant's right to meaningful allocution was not denied when the trial judge interrupted him. *Howell*, 168 Mich App 236. The *Howell* Court also held defendant was given more than a reasonable opportunity for allocution because defendant was given two opportunities to advise the court of significant circumstances that he wanted it to consider before sentencing.

Similarly, defendant here had the opportunity to explain his circumstances. The trial judge interrupted defendant once to ask who defendant was talking about. Defendant continued and then ended his comments: "And I beg of you to please give consideration or leniency for the losses I've already suffered. Thank you." At that point, the trial judge commented and asked questions of defendant and defendant responded. After the trial judge finished he said to defendant, "Anything further you want to say, Mr. Johnson?" Defendant responded, "No, sir."

As in *Howell*, 168 Mich App 227, defendant here had two opportunities to explain his circumstances. Defendant was not denied his right to meaningful allocution because he was given a reasonable opportunity to advise the court of circumstances he wanted the court to consider in imposing a sentence.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Robert B. Burns