

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY BOB JOHN,

Defendant-Appellant.

UNPUBLISHED

October 10, 2006

No. 263082

Wayne Circuit Court

LC No. 04-001741-01

Before: White, P.J, and Zahra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from convictions of first-degree home invasion, MCL 750.110a(2), and aggravated assault, MCL 750.81a(1). He was sentenced to 50 months to 20 years in prison for the home invasion conviction and to one year in jail for the assault conviction. We affirm defendant's convictions, but remand for resentencing.

Defendant first argues that because he committed a home invasion by assaulting a person in a dwelling, the offense cannot be elevated to first-degree home invasion on the basis of the presence of another person lawfully in the dwelling. We disagree.

A home invasion may be committed in several ways. The elements of second-degree home invasion are: (1) that the defendant (a) broke and entered a dwelling, or (b) entered a dwelling without permission, and (2)(a) that when the defendant broke and entered or entered without permission, he intended to commit a (i) felony, (ii) larceny, or (iii) assault therein, or (b) that the defendant committed a (i) felony, (ii) larceny, or (iii) assault while entering, present in, or exiting the dwelling. MCL 750.110a(3). If the defendant was armed with a dangerous weapon or another person was lawfully present in the dwelling when the defendant entered, was present in, or was leaving the dwelling, the crime is elevated to first-degree home invasion. MCL 750.110a(2).

Defendant asserts that his conviction was predicated on an assault in the dwelling after entering without permission, and argues that because someone must necessarily be present when the charge is predicated on the commission of an assault, that person's presence cannot elevate the crime to first-degree home invasion. We first note that the charge was not predicated on the commission of an assault. Rather, the information charged defendant with committing a larceny after entering without permission while another person was lawfully on the premises. The evidence clearly established, and the trial court found as fact, that defendant entered the victim's

garage without permission while the victim was home, knocked her down and took her purse. Thus, the offense as charged was established. Further, we reject the argument that the statutory offense of first-degree home invasion does not encompass the conduct of entering a dwelling without permission, while someone is lawfully present, and the commission of an assault on that person. Such conduct is clearly and unambiguously encompassed in the plain language of the statute.

Defendant next argues that he was denied his right to a public trial when the court excluded his family members from the sentencing hearing. We agree.

A criminal defendant has a constitutional right to a public trial. US Const, Am VI; Const 1963, art 1, § 20. In *Waller v Georgia*, 467 US 39, 46; 104 S Ct 2210; 81 L Ed 2d 31 (1984), the United States Supreme Court “emphasized the need for specific findings to help determine whether an order of closure is proper[.]” *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). The requirements for total closure are “(1) [t]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure.” *Id.*, citing *Waller, supra* at 48. When only partial closure is involved, “only a substantial, rather than a compelling, reason for the closure is necessary.” *Id.* at 170.

In this case, it appears that there was only a partial closure limited to defendant’s family members. The record does not explain why they did not enter the courtroom, and when defendant asked that they be admitted, the court denied the request without explanation.¹ A defendant is not “required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee,” but “the remedy should be appropriate to the violation.” *Waller, supra* at 49-50. In this case, the appropriate remedy is to vacate defendant’s sentences and remand for resentencing. Because there is nothing in the record to suggest that the court’s ruling was the result of any prejudice or improper attitude toward defendant, and defendant claims no error with respect to the sentencing decision itself, resentencing by a different judge is not warranted. See e.g., *People v Hegwood*, 465 Mich 432, 440-441 n 17; 636 NW2d 127 (2001).

Defendant’s convictions are affirmed, but the sentences are vacated and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly

¹ Plaintiff asserts that the closure was based on defendant’s family’s actions on the first day of trial. However, the record is silent on the reasons the court forbade defendant’s family from being present at sentencing, and it is not apparent that the asserted misconduct and the family’s presence would impact on the sentencing proceeding.