

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 15, 2011

v

JEANOR JAMES,

No. 298638
Wayne Circuit Court
LC No. 09-025157-FH

Defendant-Appellant.

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of first-degree home invasion, MCL 750.110a(2), two counts of assault with a dangerous weapon (felonious assault), MCL 750.82, and malicious destruction of a building of another where the destruction is less than \$200, MCL 750.380(5). Defendant was sentenced to 48 to 240 months for the first-degree home invasion conviction, 36 to 48 months for the two felonious assault convictions, and 93 days, time served, for the malicious destruction of a building conviction. We affirm defendant's convictions and sentences for first-degree home invasion and malicious destruction of a building, and affirm her felonious assault convictions but remand these two convictions for re-sentencing.

Defendant argues that there was insufficient evidence to convict her of first-degree home invasion, malicious destruction of a building, and the two counts of felonious assault. Specifically, defendant contends that the prosecution's witnesses' identification testimony was insufficient to prove that defendant was one of the assailants.

In reviewing a sufficiency of the evidence challenge, this Court reviews the record de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006) aff'd 482 Mich 851 (2008). This Court will affirm a conviction if it is determined, in reviewing the evidence in a light most favorable to the prosecution, that the jury could have found that the elements of the crime were proved beyond a reasonable doubt. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). In reviewing the record, this Court is "required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It is irrelevant whether the evidence is direct or circumstantial, the same deferential standard is applied. *Id.* As such, the prosecution can establish the elements of a crime from circumstantial evidence and reasonable inferences arising

therein. *Id.* Furthermore, should any conflict arise, this Court should resolve such conflicts in favor of the prosecution. *Wilkins*, 267 Mich App at 738.

In a criminal prosecution, the identity of the defendant is an essential element of every crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The positive identification of a defendant by a witness may be sufficient to sustain a conviction. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). This Court defers to the trier of fact's determination concerning the credibility of the identification testimony. *Id.*

The record shows that complainant, Shyvon Tyner, positively identified defendant as one of the assailants that unlawfully entered Shyvon's Windemere home and assaulted her and the other complainant, Leon Rollins, Sr. A reasonable jury could have concluded that Shyvon had ample opportunities to verify defendant's identity since it was established that defendant was one of the women that argued with Shyvon for several minutes prior to the attack. Further, Shyvon's daughter, Whitney Turner, testified that the three women that arrived at the Windemere home and argued with Shyvon were the same women that returned to the vehicle after the attack. After the incident occurred, Shyvon identified defendant to Detroit Police Officer Thomas as one of the assailants. Although defendant argues that Shyvon could not have positively identified defendant as one of the assailants because Rollins blocked Shyvon's view during the attack, a reasonable jury could conclude that Shyvon was able to positively identify defendant during the attack. Additionally, a reasonable jury could have also relied on Rollins' identification of defendant as one of the assailants after the incident occurred. What defendant is essentially asking this Court to do is to overturn the jury's credibility findings, but we "will not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses." *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). We defer to the jury's determination that defendant was positively identified as one of the assailants and therefore held that there was sufficient evidence to prove beyond a reasonable doubt that defendant committed first-degree home invasion and two counts of felonious assault.

We likewise disagree with defendant's argument that the prosecution failed to provide sufficient evidence to convict defendant of malicious destruction of a building. To sustain a malicious destruction of a building conviction, the prosecution must show that defendant willfully and maliciously destroyed the real property of another without authorization. See *People v Foster*, 103 Mich App 311, 320; 302 NW2d 862 (1981) (discussing jury instructions for a malicious destruction of real property offense); MCL 750.380. This Court has held "that in order to commit the crime of malicious destruction of property, a defendant must have the intent to injure or destroy the property." *People v Culp*, 108 Mich App 452, 458; 310 NW2d 421 (1981).

Although there is no direct evidence to prove that defendant herself damaged the Windemere premises, we conclude that there was sufficient evidence for a reasonable jury to conclude that defendant assisted and encouraged the commission of the malicious destruction of a building. MCL 767.39, the aiding and abetting statute, provides:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall

be punished as if he had directly committed such offense. [See *People v Moore*, 470 Mich 56, 62; 679 NW2d 41 (2004).]

By enacting this statute, the Legislature abolished the common law distinctions between principals and accessories and intended for all offenders to be convicted of the underlying offense. *People v Robinson*, 475 Mich 1, 9; 715 NW2d 44 (2006). Accordingly, one who aids or encourages the completion of a crime can be convicted as if they committed the crime themselves. *Moore*, 470 Mich at 63.

There was sufficient evidence presented at trial for a reasonable jury to conclude that defendant aided, abetted, or encouraged the other assailants to commit malicious destruction of a building. Evidence suggested that defendant engaged in aggressive behavior at the Windemere home, carried a weapon, and rushed the porch to attack the complainants. The record also shows that weapons were retrieved from the vehicle in which defendant and the other female assailants arrived. A reasonable jury could conclude that defendant's aggressive behavior and threatening language further incited and encouraged the other assailants to break the windows and kick the door at the Windemere home. Once unlawfully in the home, defendant assaulted Rollins and Shyvon. A reasonable jury could conclude that defendant encouraged the damage so that they could enter to harm the complainants. In sum, we conclude that there was sufficient evidence to prove beyond a reasonable doubt that defendant aided and abetted the others in damaging the home, and therefore, is guilty of the principal offense of malicious destruction of a building.

Lastly, defendant argues that the trial court violated the *Tanner*¹ rule and requests this Court to vacate and remand for resentencing on the felonious assault convictions. Since defendant failed to object and preserve the sentencing issue at the lower court, we confine our review for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In reviewing for plain error, this Court must determine if defendant established that an: "(1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Carines*, 460 Mich at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (internal quotations omitted).

Under Michigan's indeterminate sentence scheme, prison sentences generally have the maximum term set by statute and the minimum term set by a sentencing judge. *People v Harper*, 479 Mich 599, 623-624; 739 NW2d 523 (2007). The purpose of an indeterminate sentence is to provide corrections authorities with the flexibility they need in exercising their jurisdiction and judgment. *People v Tanner*, 387 Mich 683, 689-690; 199 NW2d 202 (1972). In *Tanner*, the Michigan Supreme Court held that a minimum sentence cannot exceed two-thirds of the maximum sentence or it would frustrate the purpose of Michigan's indeterminate sentence scheme. *Id.* at 690. The *Tanner* rule is now codified in MCL 769.34(2)(b). Under the felonious

¹ *People v Tanner*, 387 Mich 683, 689-690; 199 NW2d 202 (1972).

assault statute, the maximum sentence permitted is four years, MCL 750.82(1). The record shows that the trial court imposed a minimum sentence of 36 months, four months higher than allowed under the statute. We conclude that the trial court made a plain error that affected defendant's substantial rights in imposing 36 months as the minimum sentences for defendant's felonious assault convictions. We therefore remand for resentencing on the felonious assault convictions. See *People v Thomas*, 447 Mich 390, 392-394; 523 NW2d 215 (1994).

Defendant's convictions are affirmed, but the case is remanded only for resentencing on the felonious assault convictions. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio