Document: People v. Jessie, 2018 Mich. LEXIS 2199

People v. Jessie, 2018 Mich. LEXIS 2199

Supreme Court of Michigan

October 30, 2018, Decided

SC: 157942

Reporter

2018 Mich. LEXIS 2199 * | 503 Mich. 888 | 919 N.W.2d 66 | 2018 WL 5733360

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MYRON GREGORY JESSIE, Defendant-Appellant.

Prior History: **[*1]** COA: 335736. Wayne CC: 16-005646-FC.

People v. Jessie, 2018 Mich. App. LEXIS 1817 (Mich. Ct. App., Apr. 24, 2018)

Core Terms

questions

Judges: Stephen J. Markman, Chief Justice. Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Richard H. Bernstein, Kurtis T. Wilder, Elizabeth T. Clement, Justices.

Opinion

Order

On order of the Court, the application for leave to appeal the April 24, 2018 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Content Type: Cases

Terms: 2018 mich lexis 2199

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Document: People v. Jessie, 2018 Mich. App. LEXIS 1817

People v. Jessie, 2018 Mich. App. LEXIS 1817

Court of Appeals of Michigan

April 24, 2018, Decided

No. 335736, No. 335738

Reporter

2018 Mich. App. LEXIS 1817 * | 2018 WL 1936018

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MYRON GREGORY JESSIE, Defendant-Appellant.PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DAVON LAMONT MILLER, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by People v. Jessie, 2018 Mich. LEXIS 2199 (Mich., Oct. 30, 2018)

Prior History: **[*1]** Wayne Circuit Court. LC No. 16-005646-01-FC.

Wayne Circuit Court. LC No. 16-005653-02-FC.

Core Terms

trial court, guidelines, home invasion, sentencing, armed robbery, convicted, score, first-degree, fact-finding, preoffense, offenses, commission of a crime, identification, codefendants, conversation, argues, assess, counts, felony, see people, resentencing, variables, abetting, weapon, front door, perpetrator, sweatshirt, advisory, episode, robbery

Judges: Before: BOONSTRA, P.J., and BECKERING and RONAYNE KRAUSE, JJ.

Opinion

PER CURIAM.

In this consolidated appeal, 1 defendants Myron Jessie (Docket No. 335736) and Davon Miller (Docket No. 335738) appeal by right their convictions and sentences entered after a joint trial before a single jury. The jury convicted Jessie of two counts of armed robbery, MCL 750.529, and one count of first-degree home invasion, MCL 750.110a(2), 2 and convicted Miller of two counts of armed robbery, and single counts of first-degree home invasion, carrying a weapon with unlawful intent, MCL 750.226, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Jessie as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 24 to 50 years for each robbery conviction, and 9 to 30 years for the home invasion conviction. The court sentenced Miller to concurrent prison terms of 18 to 40 years for each robbery conviction, 7 to 20 years for the home invasion conviction, and one to five years for the carrying a weapon with unlawful intent conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm **[*2]** conviction. We affirm in both appeals.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Jessie and Miller were charged with offenses related to the home invasion and armed robbery of Jessie's neighbors, Daniel and Terry McNamara, on May 23, 2017, in Detroit. The prosecution's theory was that Jessie was the linchpin of this criminal episode because he used his personal relationship with the McNamaras to induce them into opening their door for Miller and a third participant, Delond Matlock, 3 knowing that Miller and Matlock intended to commit a robbery. The victims testified that Jessie knocked on their front door and engaged Daniel in a conversation about Daniel mowing someone's lawn. Jessie then left and entered a white car with two other men. Moments later, Miller knocked on Daniel's front door, had a similar exchange with Daniel, and asked if he could return and use the side door. Miller then walked away toward the white car, although Daniel did not see whether he entered the car. Shortly thereafter, Miller and Matlock knocked on the side door of the house and again engaged Daniel in another similar lawn-related conversation. Matlock then pointed a pistol at Daniel and Miller **[*3]** demanded Daniel's rings. Matlock ordered Daniel into the basement, where Matlock held both Daniel and Terry at gunpoint and demanded their gold and wedding rings. Miller remained upstairs and searched the premises. Matlock stated that he would have to kill the McNamaras because they had seen his face, but when he attempted to fire the gun, it jammed. Daniel managed to retrieve his own gun, which he fired at Matlock as Matlock fled. Miller fled from the house as well, but left a sweatshirt behind. Both Daniel and Terry identified Jessie as the person who had originally approached the house, and from photographic lineups they identified Matlock and Miller as the robbers.

At trial, Jessie and Miller both denied involvement in the offense. The sweatshirt left at the scene contained Miller's DNA as well as that of two other unknown individuals (not Jessie or

Matlock). DNA analysis of bloodstains found at the scene revealed Matlock's DNA, with Miller and Jessie excluded as possible contributors.

II. DOCKET NO. 335736 (DEFENDANT JESSIE)

A. SUFFICIENCY OF THE EVIDENCE

Jessie first argues that the prosecution failed to present sufficient evidence that he knew of the codefendants' criminal intent **[*4]** or that he did anything to assist in the crimes being committed such as would support his conviction for first-degree home invasion and his two convictions for armed robbery on an aiding and abetting theory. We disagree. We review de novo a challenge to the sufficiency of the evidence. *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015). When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. See *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). "[A] reviewing 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).

Jessie's sufficiency argument does not focus on any specific element of the offenses for which he was convicted, but asserts that it is speculative to conclude that he participated in committing the offenses. At trial, the prosecution advanced the theory that Jessie was guilty of first-degree home invasion and armed robbery as an aider or abettor.

The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without **[*5]** permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010); MCL 750.110a(2). The elements of armed robbery are (1) an assault, and (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a dangerous weapon or with an article used or fashioned in such a way as to lead a reasonable person to believe that it is a dangerous weapon. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004); MCL 750.529.

A person who aids or abets the commission of a crime may be convicted and punished as if he or she directly committed the offense. MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant [either] intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement[,]" **[*6]** *People v Izarraras-Placante*, 246 Mich App 490, 496-497; 633 NW2d 18 (2001) (citation omitted), "or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense," *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). "Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider or abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Carines*, 460 Mich at 757; *People v Bennett*, 290 Mich App 465, 474; 802 NW2d 627 (2010).

Viewed in a light most favorable to the prosecution, the evidence was sufficient to show that Miller and Matlock committed the crimes of first-degree home invasion and armed robbery by forcing their way into the McNamaras' home while Matlock was armed with a pistol and taking

their rings and other belongings. And there was sufficient circumstantial evidence that Jessie assisted his codefendants in the commission of the crimes by using his personal relationship with the **[*7]** McNamaras to lay the groundwork for his codefendants to subsequently force their way into the house to rob the McNamaras. Specifically, the evidence showed that Jessie approached the McNamaras' front door and engaged Daniel in a bogus conversation about lawn services, [4] thereby causing Daniel to let down his guard when, moments later, Miller, whom Daniel did not know but reasonably associated with Jessie, came to the front door, engaged Daniel in the same conversation, and acquired permission from Daniel to return and use the side door, ultimately allowing Miller and Matlock the opportunity to force their way into the McNamaras' home and rob them.

Finally, the evidence also was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Jessie knew that his codefendants intended to commit armed robbery and home invasion at the time he gave aid and encouragement, or to at a minimum conclude that he was aware that Miller and Matlock intended to commit armed robbery and that the commission of a home invasion was a natural and probable consequence of the intended armed robberies. Jessie's conduct before the home invasion, the conspicuous similarities in the conversations **[*8]** with Daniel by both Jessie and Miller, the close temporal proximity in their appearances at the McNamaras' door, and the fact that Jessie entered the same white car that Miller approached supports the inference that Jessie and his codefendants acted in concert to commit the crimes. Accordingly, the evidence was sufficient to support Jessie's convictions of first-degree home invasion and two counts of armed robbery under an aiding and abetting theory. *Izarraras-Placante*, 246 Mich App at 496-497; see also *Reese*, 491 Mich at 139.

B. OFFENSE VARIABLE SCORING

Jessie also argues that he is entitled to be resentenced because the trial court erroneously assessed points for offense variables (OV) 8, 10, and 13. Although we agree that OV 8 was improperly assessed 15 points, we disagree regarding the other two variables and conclude that resentencing is not required. When reviewing a trial court's scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews **[*9]** de novo." *Id.*

1. OV 8

MCL 777.38(1)(a) directs the trial court to assess 15 points if "[a] victim was asported to another place of greater danger or to a situation of greater danger[.]" The "asportation" element of OV 8 is satisfied "[i]f a victim was carried away or removed to another place of greater danger or to a situation of greater danger[.]" *People v Barrera*, 500 Mich 14; 892 NW2d 789 (2017).

Jessie argues that OV 8 should not have been assessed points because he was not a participant in the asportation of either victim. We agree. No evidence was presented that Jessie was present during the victims' asportation, moved either victim into the basement, or directed that either victim be moved there. "[A] defendant shall not have points assessed solely on the basis of his or her co-offenders' conduct unless the OV at issue specifically indicates to the contrary." *People v Gloster*, 499 Mich 199, 206; 880 NW2d 776 (2016). In contrast to some other offense variables, OV 8 does not specifically direct the trial court to assess a defendant points based on the conduct of a codefendant. MCL 777.38. In light of the foregoing, the trial court clearly erred in finding that Jessie's conduct warranted the assessment of 15 points for OV 8.

Although the trial court erred in assessing 15 points for OV 8, the error does not entitle **[*10]** Jessie to resentencing. The trial court scored the guidelines for Jessie's convictions of armed robbery, which is a class A offense. MCL 777.16y. Jessie received a total OV score of 96 points,

which combined with his 52 prior record variable points, placed him in the E-V cell of the applicable sentencing grid, for which the minimum sentence range is 171 to 356 months for a second-offense habitual offender. MCL 777.62; MCL 777.21(3)(a). Reducing Jessie's OV score by 15 points would make his OV score 81 points and would not alter his placement in OV Level V (80-99 points), and thus would have no effect on his guidelines range. Because the alleged scoring error did not affect the appropriate guidelines range, Jessie is not entitled to resentencing on this basis. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); *People v Biddles*, 316 Mich App 148, 156; 896 NW2d 461 (2016).

2. OV 10

OV 10 addresses exploitation of a vulnerable victim, and the trial court must assess 15 points if "[p]redatory conduct was involved." MCL 777.40(1)(a). "'Predatory conduct' means preoffense conduct directed at a victim . . . for the primary purpose of victimization." MCL 777.40(3)(a). Predatory conduct encompasses "only those forms of 'preoffense conduct' that are commonly understood as being 'predatory' in nature . . . as opposed to purely opportunistic criminal conduct or 'preoffense **[*11]** conduct' involving nothing more than run-of-themill planning to effect a crime or subsequent escape without detection." *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011) (citation omitted). In order to find that a defendant engaged in predatory conduct, a trial court must conclude that (1) the defendant engaged in preoffense conduct, (2) the defendant directed that conduct toward "one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation[,]" and (3) the defendant's primary purpose in engaging in the preoffense conduct was victimization. *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008).

The trial court did not err in concluding that Jessie engaged in preoffense conduct directed at Daniel, with the intent to victimize both Daniel and Terry by having their home invaded and robbing them. There was evidence that the McNamaras had known Jessie, their neighbor, for approximately three years, and had paid him to perform odd jobs around their house to help him out. They trusted Jessie because he was their neighbor and considered him a friend. Using this trusted relationship, Jessie went to the McNamaras' front door and engaged Daniel in a strange conversation about lawn services, causing Daniel to let down his **[*12]** guard and ultimately allowing Miller and Matlock to take advantage of Daniel, invade the McNamaras' home, and rob both Daniel and Terry. Thus, the McNamaras were not random victims who were merely the subject of "opportunistic criminal conduct." 489 Mich at 462. Rather, the evidence showed that (1) Jessie engaged in preoffense conduct as demonstrated by his using his trusted relationship with the McNamaras to entice Daniel into trusting Jessie's associate, (2) Jessie's conduct was directed specifically toward Daniel, who was particularly vulnerable and susceptible to persuasion considering his relationship with Jessie, and (3) Jessie's primary purpose in engaging in the preoffense conduct was to lay the groundwork for his associates to invade the McNamaras' home and rob them. In light of the foregoing, the trial court did not clearly err in finding that Jessie's conduct warranted a 15-point score for OV 10. *Hardy*, 494 Mich at 438.

3. OV 13

OV 13 addresses a "continuing pattern of criminal behavior." The trial court must assess 25 points for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). Jessie argues that he has no qualifying offenses because **[*13]** his only prior felony was in 2007, and there were no other offenses that did not result in a conviction. However, all crimes within a five-year period, including the sentencing offense, must be counted, MCL 777.43(2)(a), and a pattern of criminal activity may be based on multiple offenses arising from the same event or from a single criminal episode. See *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001), and *People v Gibbs*, 299 Mich App 473, 487; 830 NW2d 821 (2013). Jessie was convicted of two separate counts of armed robbery—one for each victim, which are crimes against a person, MCL 777.16y, and he was also convicted of first-degree home invasion, which likewise is designated as a crime against a person, MCL 777.16f. Because Jessie was convicted of three qualifying offenses

resulting from separate criminal acts, the trial court correctly assessed 25 points for OV 13. See *People v Carll*, 322 Mich. App. 690, 704; 915 N.W.2d 387 (2018), citing *People v Gibbs*, 299 Mich App 473, 487; 830 NW2d 821 (2013) (stating that OV 13 is properly assessed at 25 points when a defendant commits separate criminal acts that arise out of "a single criminal episode" and noting that defendant Gibbs was convicted of the armed robbery of two individual victims as well as the unarmed robbery of a jewelry store.) 5 Accordingly, Jessie has not identified any scoring error that warrants resentencing.

II. DOCKET NO. 335738 (DEFENDANT MILLER)

A. SUFFICIENCY **[*14]** OF THE EVIDENCE

Miller argues that the prosecution failed to present sufficient evidence to establish his identity as a participant in the criminal episode. We disagree.

Identity is an essential element in a criminal prosecution, see *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt, *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Positive identification by a witness or circumstantial evidence and reasonable inferences arising from it may be sufficient to support a conviction of a crime. See *Nowack*, 462 Mich at 400; *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony is for the trier of fact to resolve and this Court will not resolve it anew. See *Nowack*, 462 Mich at 400.

Two eyewitnesses unequivocally identified Miller. Both Daniel and Terry selected Miller from photographic lineups, and identified him at trial as one of the criminal actors. Daniel testified that he "was one hundred percent certain [of Miller's identity as such] at the time [of the photographic lineup] and [was] still one hundred percent certain [at the time of trial]." Terry testified that she is good with faces and that Miller's face "stood out to her." She "just remembered his face, the way his eyes were." The detective who conducted **[*15]** the photographic lineup for Terry testified that she selected Miller "quick[ly]" and "was confident" in her identification. These witnesses' testimony, if believed, was sufficient to establish Miller's identity as one of the participants. *Davis*, 241 Mich App at 700. Additionally, apart from Daniel's and Terry's positive and unequivocal identifications of Miller, the prosecution presented evidence that the perpetrator identified as Miller fled from the house, leaving his sweatshirt behind, and that Miller's DNA was found on the sweatshirt. This DNA evidence enhanced the reliability of the eyewitness identifications. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support a finding beyond a reasonable doubt that Miller was one of the participants in the criminal episode. See *Nowack*, 462 Mich at 400.

Miller argues that the McNamaras' identification testimony was not reliable, and that he was found to be only one of three contributors of the DNA found on the sweatshirt. This challenge goes to the weight of the evidence rather than its sufficiency. *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). Indeed, these same challenges were presented to the jury during trial. This Court "will not interfere with the jury's determinations regarding weight of **[*16]** the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008); see also *Nowack*, 462 Mich at 400. Even where a witness's identification of the defendant is less than positive, the question remains one for the trier of fact. *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972). Applying these standards, we will not disturb the jury's determination that the evidence established Miller's identity as one of the perpetrators.

B. JUDICIAL FACT-FINDING

Miller also argues that the trial court erred by engaging in impermissible judicial factfinding in assessing points for OVs 4, 8, and 10. We disagree. Because Miller did not object on this basis at sentencing, this claim is unpreserved and our review is limited to plain error affecting substantial rights. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015).

Miller acknowledges that the trial court imposed sentences within the guidelines range that was calculated using judicially-found facts. His only argument—that the trial court was required to consider a guidelines range that was not based on judicial fact-finding—is meritless. In *Lockridge*, our Supreme Court held that Michigan's sentencing guidelines were constitutionally deficient, in violation of the Sixth Amendment, to the extent that they "require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score **[*17]** offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range . . . ." *Id.* at 364. To remedy this deficiency, the Court held that the guidelines are advisory only. *Id.* at 365. Under *Lockridge*, however, trial courts are still required to "continue to consult the applicable guidelines range and take it into account when imposing a sentence," and are permitted, to score the guidelines using judicially-found facts. *Id.* at 392 n 28. In fact, the *Lockridge* Court was clear that its opinion "does nothing to undercut the requirement that the highest number of points *must* be assessed for all OVs, whether using judge-found facts or not." *Id.* As this Court explained in *Biddles*, 316 Mich App at 158,

> [t]he constitutional evil addressed by the *Lockridge* Court was not judicial factfinding in and of itself, it was judicial fact-finding in conjunction with *required* application of those found facts for purposes of increasing a mandatory minimum sentence range, which constitutional violation was remedied in *Lockridge* by making the guidelines *advisory*, not by eliminating judicial fact-finding.

More recently, in *People v Steanhouse*, 500 Mich 453; 902 NW2d 327 (2017), our Supreme Court reaffirmed its holding in *Lockridge* that "the sentencing guidelines are advisory only." *Id.* at 466. The Court **[*18]** articulated that, "[w]hat made the guidelines unconstitutional, in other words, was the combination of the two mandates of judicial fact-finding and adherence to the guidelines." *Id.* at 467.

In this case, Miller was sentenced more than one year after *Lockridge* was decided. The trial court expressed its awareness that the guidelines were "only advisory." There is nothing in the record to suggest that the trial court sentenced Miller in a manner inconsistent with *Lockridge*. Because the guidelines were advisory, and the trial court was permitted to rely on judicially-found facts in assessing points for OVs 4, 8, and 10, Miller has not demonstrated that an "unconstitutional constraint on judicial discretion actually impaired his Sixth Amendment right." *Lockridge*, 498 Mich at 395. Accordingly, Miller is not entitled to resentencing.

Affirmed in both docket numbers.

/s/ Mark T. Boonstra

/s/ Jane M. Beckering

/s/ Amy Ronayne Krause

Footnotes

1 See *People v Jessie*, unpublished order of the Court of Appeals, issued December 6, 2017 (Docket Nos. 335736 & 335738).

2

The trial court granted Jessie's motion for a directed verdict on additional charges of carrying a weapon with unlawful intent, MCL 750.226, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.

3 Matlock pleaded guilty to two counts of armed robbery, one count of first-degree home invasion, and one count of felony-firearm. He is not a party to this appeal. We will sometimes refer to Miller and Matlock together as Jessie's codefendants.

4 Daniel testified that he did not mow lawns for money, that his lawn mower was broken, and that he found the conversation "strange."

5 Although Jessie was convicted on an aiding and abetting theory rather than as the principal perpetrator of the criminal acts, once convicted the trial court was directed to punish him as though he had directly committed the offenses. MCL 767.39.

Content Type: Cases

Terms: 2018 mich app lexis 1817

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Date and Time: Apr 10, 2019 09:07:10 a.m. CDT

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

Supreme Court
No. 157942

MYRON GREGORY JESSIE,

Defendant-Appellant.

Third Circuit Court No. 16-005646-01-FC
Court of Appeals No. 335736

ANSWER OPPOSING APPLICATION FOR LEAVE TO APPEAL

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STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

Supreme Court
No. 157942

MYRON GREGORY JESSIE,
Defendant-Appellant.

Third Circuit Court No. 16-005646-01-FC
Court of Appeals No. 335736

PLAINTIFF-APPELLEE'S ANSWER OPPOSING
APPLICATION FOR LEAVE TO APPEAL

The People of the State of Michigan, through Kym L. Worthy, Prosecuting Attorney, County of Wayne, JASON W. WILLIAMS, Chief of Research, Training, and Appeals, and Ana I Quiroz, Assistant Prosecuting Attorney, ask this Court to deny defendant's application for leave to appeal.

1. Defendant's application relies on the same arguments he made in the Court of Appeals.

2. The People's brief in the Court of Appeals adequately addresses this issue. See the People's brief on appeal, attached.

3. The Court of Appeals did not clearly err in rejecting defendant's arguments and affirming his conviction. MCR 7.305.

4. Defendant's application does not demonstrate any other grounds for granting leave to appeal. MCR 7.305.

5. To the extent Defendant raises issues in his application that he did not raise in the Court of Appeals, review is foreclosed since there is no "decision by the Court of Appeals" to review. MCR 7.305. See also this Court's order denying leave in *People v Holloway*, 35 Mich App

420; lv den 387 Mich 772 (1972): "[A]n appellant may not raise in this Court an issue not presented to the Court of Appeals."

6. In sum, Defendant's application raises no issues worthy of this Court's review.

Relief

THUS, Defendant's application for leave to appeal should be denied.

Respectfully submitted,

KYM WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief of Research,
Training, and Appeals

s/ Ana Quiroz
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Date: June 29, 2018.

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

Court of Appeals No. 335736

Lower Court No. 16-5646-01

-vs-

MYRON GREGORY JESSIE

Defendant-Appellant
_____/

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

DOUGLAS W. BAKER (P49453)
Attorney for Defendant-Appellant

DEFENDANT-APPELLANT'S BRIEF ON APPEAL (ORAL ARGUMENT REQUESTED)

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Wayne County Circuit Court by jury trial, and a Judgment of Sentence was entered on October 12, 2016. A Claim of Appeal was filed on November 16, 2016 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated October 25, 2016, as authorized by MCR 6.425(F)(3). This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. WAS THE EVIDENCE INSUFFICIENT TO CONVICT DEFENDANT-APPELLANT MYRON JESSIE AS AN AIDER AND ABETTER TO ARMED ROBBERY AND FIRST-DEGREE HOME INVASION? DID HIS CONVICTIONS OF THOSE OFFENSES THEREFORE VIOLATE HIS RIGHT TO DUE PROCESS?

Trial Court answers, "No."

Defendant-Appellant answers, "Yes."

II. IS RESENTENCING REQUIRED BECAUSE THE TRIAL COURT ERRONEOUSLY SCORED OFFENSE VARIABLES 8, 10, AND 13?

Trial Court made no answer.

Defendant-Appellant answers, "Yes."

STATEMENT OF FACTS

Introduction

On September 22, 2016, following a three-day jury trial in the Wayne County Circuit Court before the Honorable Mark T. Slavens, defendant-appellant Myron Jessie was convicted of two counts of armed robbery[1] and first-degree home invasion.[2] (T IV 73-81).[3] Judge Slavens later sentenced him to concurrent terms of 24-to-50 years for each armed robbery and 9-to-30 years for first-degree home invasion. (ST 26).

Overview and Issues on Appeal

Myron Jessie was charged, along with Davon Miller and Delond Matlock,[4] with two counts of armed robbery and one count each of first-degree home invasion, carrying a concealed weapon, possession of a firearm by a felon, and felony firearm. The charges arose after Miller and Matlock robbed Daniel and Terry McNamara at their home in Detroit, Michigan. Prior to the robbery, it was alleged that Mr. Jessie, who was the McNamara's neighbor and had done yard work for them in the past, knocked on their front door and asked Daniel McNamara to "cut some lawn down the street." (T IIII 92). Mr. McNamara declined.

About a minute after this "strange" conversation (T IIII 92-93), Davon Miller, whom Mr. McNamara had never met before, knocked on his door and also asked him to mow someone's "grass down the street." (T IIII 97). After Mr. McNamara told him no, Miller asked if he could come back to the side door. Mr. McNamara for whatever reason agreed. (T IIII 97-98). Shortly thereafter, Miller appeared at the side door with Delond Matlock. Matlock and Miller asked the

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[1] MCL 750.529.
[2] MCL 750.110a.
[3] References to the four-volume trial transcript are denoted, "T [Vol. No.] [page no.]."
[4] Defendant Matlock entered a guilty plea.

lawn-mowing question again and, after Mr. McNamara declined again, they proceeded to rob the McNamaras at gunpoint.

The prosecution presented no evidence of Mr. Jessie's purported involvement in this crime other than his brief interaction with Mr. McNamara at the door. Instead, the case against Mr. Jessie was premised on the assumption that he had to be involved with the crime because he asked the same odd question as Matlock and Miller. Although they presented no other evidence of his guilt, it was the prosecution's theory that Mr. Jessie was "the linchpin" to the whole crime. (T IIIIV 11). This theory, however, was based on mere speculation; it was not evidence supported by proof beyond a reasonable doubt.

Mr. Jessie appeals by right, and raises two issues: that the evidence presented at trial was insufficient to establish he aided and abetted Miller and Matlock, and, alternatively, that he is entitled to resentencing because the trial court erroneously scored Offense Variables 8, 10, and 13.

Trial Testimony

Myron Jessie lived next door to Daniel and Terry McNamara for four years. (T IIII 91-92). Mr. Jessie, who lived with his grandmother, often did yard work for the McNamaras. (T IIII 7, 34-35). Ms. McNamara testified that she often paid Mr. Jessie small amounts of money to do tasks around their house because Mr. Jessie did not have a job. (T III 35) About a week before the events of this case, Mr. Jessie dug a garden for Mrs. McNamara. (T III 34-35).

On May 23, 2017, at about 5:00-5:30 pm, Mr. Jessie knocked on the McNamara's front door. (T III 90-91). Mr. McNamara, who was watching television in the living room, answered the door and spoke with Mr. Jessie. (T III 92). According to Mr. McNamara, Mr. Jessie asked him what kind of lawn service he had and said he wanted him to "cut some lawn down the

street." (T III 92). Mr. McNamara found this conversation to be odd because Mr. Jessie had seen him use his lawn mower many times and because Mr. Jessie had his own lawn mower which he kept in his grandmother's garage. (T III 93). While having this conversation with Mr. Jessie, Mr. McNamara also noticed a white car parked in front of his house with two black males sitting in the car. (T III 93-94). He could not identify either individual in the car. (T III 93-94). The conversation between Mr. Jessie and Mr. McNamara lasted about a minute and then Mr. Jessie left the porch and got into the white car and Mr. McNamara went back to his couch to watch television. (T III 94-95).

About a minute later, there was a second knock at the door. (T III 96). When he answered the door, Mr. McNamara encountered an individual, later identified as Davon Miller ("Miller"), he had never met before. (T III 96). Miller was wearing a red and gray hoodie.. (T III 103). Miller also asked Mr. McNamara to mow someone's "grass down the street." (T III 97). Mr. McNamara, who found this conversation to be even stranger because he had not met Miller before, told him he could not mow the lawn because his lawn mower was broken. (T III 97-98). Before walking away, Miller asked if he could come back later and use the side door to the house. Mr. McNamara said yes, and Miller walked away toward the white car. (T III 98). Mr. McNamara did not see Miller get into the car and did not keep watching to see whether the white car drove away or not. (T III 98).

Approximately one minute later, Mr. McNamara heard a third knock, this time at the side door. (T III 99). When he opened the door, he saw Miller and another male, later identified as Delond Matlock ("Matlock"), standing on the porch. (T III 99). The group spoke briefly about having Mr. McNamara mow lawns again, and Miller tried to hand him $40 as payment. (T III 100). Mr. McNamara refused to take the money and told them he could not mow any lawns

because his lawn mower was broken. (T III 100). Matlock then pulled a .380 caliber pistol on him, and Miller, saying "this is what it looks like," demanded he take the rings off his fingers. (T III 100-101). Miller then ordered him into the home, while Matlock pointed a gun at him. (T III 101-102).

Once inside, Matlock ordered him to go down to his basement. Mr. McNamara's wife, Terry, was already in the basement looking for a DVD. (T III 13, 102). Matlock pointed the gun at the McNamaras, "oscillating" it between their heads. (T III 103). Matlock also asked for their gold, and had Ms. McNamara take off her wedding rings and throw them on the floor. (T III 17-20, 105). While in the basement, the McNamaras could hear Miller going through the kitchen and the rest of their home, including their bedroom. (T III 20,102).

Later on, Matlock told the McNamaras "I have to kill you now because you've seen my fac[e]." (T III 106). They refused to turn around. According to Mr. McNamara, Matlock then attempted to fire the gun into the ground but it jammed. (T III 106-107). Matlock then pulled the slide back to see what was wrong with the gun and an empty shell casing ejected from the gun. (T III 107). Ms. McNamara, on the other hand, testified that the gun was pointed at her head when Matlock made two attempts to shoot it and the shell casing was ejected on the second attempt. (T III 18-19).

Matlock realized his gun was not working and turned around. Mr. McNamara used the opportunity to get a gun he had stashed in the basement and started shooting at Matlock, hitting him once. (T III, 19-20, 107-108). Matlock started running up the stairs and out of the house. (T III 107-108).

Mr. McNamara followed Matlock as he tried to leave the home. (T III 108). While pursuing him, he saw Mr. Miller, who was no longer wearing his sweatshirt, also fleeing. (T III

108). Mr. Miller threw a rifle at him when he was running up the stairs. (T III 110). When he went back inside, Mr. McNamara found his rifles on the kitchen floor and Miller's sweatshirt. (T III 109). The sweatshirt later tested positive for Miller's DNA. (T III 196).

Motion for Directed Verdict

At the close of the prosecution's case-in-chief, trial counsel made a motion for directed verdict. (T III 166-167). In support of this motion, trial counsel argued that there was nothing in the record "to establish that [Mr. Jessie] had the necessary intent, that he assisted, he encouraged, he did anything." (T III 167). The trial court initially denied the motion, (T III 170) but later reconsidered and granted the motion in part, dismissing the charges of felony firearm, carrying a concealed weapon and felon in possession of a firearm. (T III 185).

The Sentencing Guidelines

The guidelines as prepared for sentencing yielded a minimum-sentence range of 171-356 months.[5] Although trial counsel objected to all of the offense variables based on *Lockridge*[6] and made some specific objections about other variables, he failed to make specific objections to the scoring of Offense Variables 8, 10, and 13. (ST 4-14).

Appellate counsel has filed a motion to remand objecting to the 15-point score for OV 8 ("victim asportation or captivity"), the 15-point score for OV 10 ("exploitation of vulnerable victim"), and the 25-point score for OV 13 ("continuing pattern of criminal behavior").

[5] See the Sentencing Information Report. (Attachment 1).
[6] *People v Lockridge*, 498 Mich 358 (2015)

I. THE EVIDENCE WAS INSUFFICIENT TO CONVICT DEFENDANT-APPELLANT MYRON JESSIE AS AN AIDER AND ABETTER TO ARMED ROBBERY AND FIRST-DEGREE HOME INVASION. HIS CONVICTIONS OF THOSE OFFENSES THEREFORE VIOLATED HIS RIGHT TO DUE PROCESS.

Standard of Review and Issue Preservation

An appellate court reviews insufficient-evidence claims de novo to determine whether a rational trier of fact could have found that the defendant's guilt was proven beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1980); *People v Wolfe*, 440 Mich 508, 515 (1992); *People v Hampton*, 407 Mich 354, 368 (1979). Evidentiary conflicts are to be resolved by viewing the evidence in the light most favorable to the prosecution. *Wolfe*, 440 Mich at 515.

Due process requires a verdict to be supported by legally sufficient evidence for each element of the crime. US Const Am XIV; Const 1963, art 1, § 17; *In re Winship*, 397 US 358 (1970); *Jackson*, 443 US at 307. "[T]he Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *People v Patterson*, 428 Mich 502, 525 (1987) (quoting *Winship*, supra).

Trial counsel moved for a directed verdict. (T III 166-167, 181-182). However, an insufficient-evidence claim is reviewable on appeal even when not raised below. *People v Wright*, 44 Mich App 111, 114 (1972).

Argument

Mr. Jessie was convicted of two counts of armed robbery and one count of first degree home invasion on the theory that he aided and abetted Davon Miller and Delond Matlock rob his neighbors, Daniel and Terry McNamara, at gun point in their home. In support of this tenuous

theory, the prosecution presented evidence that Mr. Jessie knocked on his neighbor's door, Mr. McNamara claimed he asked him to mow a lawn down the street, and, after Mr. McNamara declined, Mr. Jessie walked away and got into a white car parked in front of the McNamara's home. Mr. Jessie, who lived next door to the McNamara's with his grandmother for four years, regularly did yard work for them.

After this alleged conversation took place, Davon Miller came to the door and also asked Mr. McNamara to mow the lawn down the street. After Mr. McNamara declined, Miller asked him if he could come back to the side door later. Mr. McNamara said yes and Miller left. Mr. McNamara observed Miller walk towards the white car Mr. Jessie had previously gotten into. He did not wait to see if Miller got in the car and did not watch to see if the car drove away.

Moments later, Miller returned to the side door with Delond Matlock. After the two attempted to get Mr. McNamara to mow the lawn again, the two of them robbed the McNamara's at gunpoint in their home.

The only evidence the prosecution presented at trial to attempt to inculpate Mr. Jessie was the claim by Mr. McNamara that he asked the same question Miller and Matlock did. In an attempt to connect Mr. Jessie to the crime, the prosecution also tried to establish a connection between the white car and Matlock and Miller. Mr. McNamara, however, did not see any of the individuals inside the car and did not see if Miller got into the vehicle. The evidence merely establishes he walked toward the vehicle. This evidence is insufficient to establish Mr. Jessie aided abetted armed robbery, home invasion, or any crime. At best, the odd circumstances merely provide a speculative inference based on the assumption made by the prosecutor and complaining witness.

The trial evidence is also completely devoid of any evidence that Mr. Jessie had any knowledge of a firearm or any intent to commit a crime. There was no codefendant testimony or other evidence connecting him to the crime. Instead, his convictions are based on his limited interaction with Mr. McNamara on the porch.

The evidence of aiding and abetting armed robbery and first degree home invasion was constitutionally insufficient, even viewed in a light most favorable to the prosecution.

A. MR. JESSIE DID NOT AID AND ABET ARMED ROBBERY.

As stated above, Mr. Jessie was found guilty of armed robbery under an aiding and abetting theory. Aiding and abetting is a theory that allows for vicarious liability for accomplices. *People v Robinson*, 475 Mich 1, 6 (2006). To convict a defendant as an aider and abettor, the prosecution must prove: "(1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the principal in committing the crime, and (3) that the defendant intended the crime to be committed or knew principal intended its commission at the time that the defendant gave aid or encouragement. *Id.*"

Further, a defendant is responsible under an aiding and abetting theory for "crimes that are the natural and probable consequences of the offense he intends to aid or abet." *Robinson, supra* at 15. The requisite intent to be aid and abet can be established by direct or circumstantial evidence. *People v Carines*, 470 Mich 750 (1999). "Among factors relevant to such intent include "a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime." *Id.*"

The elements of armed robbery are established where, in the course of committing a larceny, the defendant (1) "used force or violence against any person who was present or assaulted or put the person in fear," and as the trial court here found, (2) "possessed a dangerous weapon." *People v Chambers*, 277 Mich App 1, 7 (2007).

Here, contrary to the jury's verdict, there is no evidence Mr. Jessie intended to assist a larceny or armed robbery, that he encouraged the principals to use a firearm, or that he knew of their intent to do so. Nor was the use of firearm a natural and probably consequence of Matlock and Miller's plan to rob the McNamaras.

There was simply no evidence presented that Mr. Jessie intended to commit a larceny, armed or otherwise. This evidence was essential to convict him as an aider and abetter. *Robinson*, 475 Mich at 6. In addition, although the prosecution argued that Mr. Jessie's interaction with Mr. McNamara somehow facilitated the crimes and made him the so-called "linchpin" to the offense, the act of knocking on the door and speaking with McNamara did nothing to give encouragement or assist Miller and Matlock to commit these crimes. At best, the evidence supports an inference based on an assumption by the prosecutor and the complainant.

The evidence presented at trial also failed to establish any meaningful relationship between Mr. Jessie and Miller and Matlock. Indeed, the only testimony establishing any type of connection between these individuals is the claim by the complaining witness that, despite the fact that Mr. Jessie had performed yard work for him and his wife in the past, Mr. Jessie, like the others, asked him to mow the lawn down the street. This is insufficient. As a result, Mr. Jessie's convictions for armed robbery must be reversed.

B. MR. JESSIE DID NOT AID OR ABET FIRST DEGREE HOME INVASION.

For the same reasons given above, the evidence was also insufficient to establish that Mr. Jessie aided and abetted first-degree home invasion.

A person is guilty of first-degree home invasion if (1) they break and enter or enter without permission a dwelling with the intent to commit a felony, larceny, or assault; or (2) they break and enter or enter without permission a dwelling and commit a felony, larceny, or assault therein; (3) and either the person is armed with a dangerous weapon or another person is lawfully present in the dwelling. MCL 750.110a.

As argued above, Mr. Jessie's limited interaction with Mr. McNamara shortly before Miller and Matlock robbed him and his wife in their home is insufficient to establish that he aided and abetted first-degree home invasion or any crime. The prosecution presented no evidence that Mr. Jessie knew or intended that Miller and Matlock would enter the McNamara's home and commit a larceny, armed or otherwise.

****

The remedy is to vacate and dismiss Mr. Jessie's convictions.

II. RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT ERRONEOUSLY SCORED OFFENSE VARIABLES 8, 10, AND 13.

Standard of Review and Issue Preservation

"The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257, 260 (2008); *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44, 46 (2006). Guideline variables may only be scored if the underlying facts are supported by a preponderance of the evidence. *People v Hardy*, 494 Mich. 430, 438; 835 NW2d 340, 344 (2013); US Const, Am XIV; Const 1963, Art 1, § 17; see *People v Lockridge*, 498 Mich 358, 365, 391-392; 870 NW2d 502 (2015). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, supra at 438.

Mr. Jessie preserved objections to the scores of OV 8, 10, and OV 13 by raising them in a proper motion to remand. *See* MCL 769.34(10); MCR 6.429(C); *People v Kimble*, 470 Mich 305, 311-12 (2004) (raising scoring error in motion to remand preserves issue for appeal).

Argument

Under the Michigan and United States Constitutions, defendants have a due process right to be sentenced on the basis of accurate information and in accordance with the law. *Townsend v Burke*, 334 US 736; 68 S Ct 1252; 92 L Ed 2d 1690 (1948); *People v Lee*, 391 Mich 618, 636-637; 218 NW2d 655 (1974); *People v Malkowski*, 385 Mich 244; 188 NW2d 559 (1971). US Const, Amends V, XIV; Mich Const 1963, art 1, §17. A sentence must be consistent with "substantial justice." MCR 2.613(A). "[I]t is difficult to imagine something 'more inconsistent with substantial justice' than requiring a defendant to serve a sentence that is based upon

inaccurate information." *People v Francisco*, 474 Mich 82, 91, n6; 711 NW2d 44 (2006). Thus, a defendant is entitled to resentencing when his sentence is predicated upon misscored variables and an inflated minimum sentencing range. *Id.* at 91-92; see also *People v Sours*, 315 Mich App 346, 350–51; 890 NW2d 401, 404 (2016) (applying *Francisco* rule post-*Lockridge*).

A. BECAUSE IT WAS BASED SOLELY ON CO-OFFENDER CONDUCT, THE 15-POINT SCORE FOR OV 8 WAS IMPROPER. THE PROPER SCORE IS 0 POINTS.

A score for OV 8 must be based on the defendant's actual participation and not solely on the behavior of his co-offenders. "[E]ven when an OV is phrased in a manner that does not explicitly refer to the defendant as the actor, the court may not assess that defendant points solely on the basis of his or her co-offender's conduct unless the OV at issue explicitly directs the court to do so." *People v Gloster*, 499 Mich 199, 209 (2016) (interpreting OV 10); see also *People v Hunt*, 290 Mich App 317, 326; 810 NW2d 588 (2010) (interpreting OV 7) (only "defendant's actual participation may be scored"). OV 8 provides for a 15-point score when "[a] victim was asported to another place of danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense," and for a 0-point score when "[n]o victim was asported or held captive." MCL 777.38(1). The statute provides only two further instructions: to "[c]ount each person who was placed in danger of injury or loss of life as a victim," and "[s]core 0 points if the sentencing offense is kidnapping." MCL 777.38(2). Unlike OVs 1, 2, and 3, it does *not* provide that all offenders in a multiple-offender case be assessed the same score. Compare MCL 777.38 with MCL 777.31(2)(b); MCL 777.32(2), and MCL 777.33(2)(a). Because OV 8, like OVs 10 and 7, does *not* "explicitly direct[] the court" to assess points on the basis of a co-offender's conduct, an OV-8 score must be based on the defendant's actual participation and not solely on the conduct of his co-offenders.

The trial court erred when it scored OV 8 at 15 points because that score was based solely on the conduct of Mr. Jessie's co-offenders. The only evidence of "victim asportation or captivity" resulted from conduct of the co-offenders: it was Miller and Matlock, not Mr. Jessie, who moved Mr. McNamara inside and then held him and his wife captive. Because Jessie's actual participation in the crime consisted only of talking to Mr. McNamara—not asporting him or holding him or his wife captive—the OV-8 score was unwarranted.

B. OV 10 SHOULD HAVE BEEN SCORED 0 POINTS INSTEAD OF 15, BECAUSE MR. JESSIE DID NOT ENGAGE IN PREDATORY CONDUCT.

The trial court assessed Mr. Jessie 15 points for OV-10, apparently on the theory that the same behavior that made Mr. Jessie guilty of aiding and abetting Miller and Matlock (knocking on Mr. McNamara's door and asking him to mow a lawn down the street) was "predatory conduct," which is defined as "preoffense conduct directed at a victim . . . for the primary purpose of victimization." MCL 777.40(3)(a). The score was unwarranted. Even assuming that Mr. Jessie's behavior was "preoffense,"[7] it was not predatory.

In *People v Huston*, our Supreme Court made clear the term "predatory conduct"

> "does not encompass *any* 'preoffense conduct,' but rather only those forms of 'preoffense conduct' that are commonly understood as being 'predatory' in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or 'preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection.'"

People v Huston, 489 Mich 451, 462, 802 NW2d 261 (2011)(emphasis in original) (quoting *People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 [2008]). That the Legislature has directed sentencing courts to assess 15 points (the highest number of points that can be scored under OV 10) for predatory conduct, "strongly suggests that the Legislature did not intend 'predatory

[7] Mr. Jessie's entire involvement in the crime consisted of his behavior at Mr. McNamara's door. For him, then, that behavior was not "preoffense," but the offense itself. MCL 777.40(3)(a).

conduct' to describe *any* manner of 'preoffense conduct.'" *Huston*, 489 Mich at 462 (emphasis in original). Rather, a 15 point score is reserved for only the "*most serious* of all exploitations." *Id.* (emphasis in original).

Here, there is simply no preoffense conduct by Mr. Jessie that could be considered predatory in nature. Indeed, the only so-called acts Mr. Jessie engaged in in this case were knocking on the door, talking to the complainant, and walking away. These activities, by any measure, fail to meet the definition of predatory conduct the Supreme Court set forth in *Huston*. If criminal at all, they suggest at most "opportunistic conduct" or "run-of-the-mill planning." *Id.* This is insufficient.

The conduct alleged here is also fundamentally unlike the types of cases in which this Court has upheld the scoring of OV 10 after *Huston*. Those cases have involved the type of conduct described as predatory by the Court in *Huston*, such as lying in wait and stalking. See *People v Ackah-Essian*, 331 Mich App 13 (2015) (defendant pre-selected a dark, abandoned home and lured a delivery man there to be surrounded and robbed by defendant and co-defendants); *People v Kosik*, 302 Mich App 146 (2013) (defendant investigated store and waited until victim was alone and isolated to attack). That type of conduct is completely absent here. The trial court, therefore, erred when it scored OV 10 at 15 points. The proper score was 0 points.

C. OV 13 SHOULD HAVE BEEN SCORED 0 POINTS INSTEAD OF 25, BECAUSE MR. JESSIE'S PARTICIPATION IN THE CRIME AT ISSUE WAS NOT BY ITSELF A "PATTERN OF FELONIOUS CRIMINAL ACTIVITY."

OV 13 ("continuing pattern of criminal behavior") was scored 25 points on the theory that the sentencing offenses by themselves were "part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). There were no other qualifying crimes. Mr. Jessie had just one other felony conviction, stemming from an incident in July 2007. See the presentence report (attached) at p 5 ("Criminal Justice: Adult History"). Because to be "part of a pattern of felonious criminal activity" a crime must have occurred "within a 5-year period including the sentencing offense," MCL 777.43(2)(a), the 2007 crime cannot count toward the OV-13 score. Nor does the record disclose any offenses that did not lead to conviction. See MCL 777.43(2)(a) (pattern may include crimes that did not lead to conviction). Thus, the only crimes that could count toward OV 13 were the three for which Mr. Jessie was convicted in this case.

Mr. Jessie's participation in the crimes at issue here did not constitute a "pattern of felonious criminal activity." MCL 777.43(1)(c). An OV-13 pattern may arise from a single criminal incident in which at least three "separate acts" lead to "distinct crimes." *People v Gibbs*, 299 Mich App 473, 488; 830 NW2d 821, 828 (2013) ("Gibbs committed three separate acts against each of the three victims and these three distinct crimes constituted a pattern of criminal activity"). Here, though, Mr. Jessie's participation in the sentencing offenses consisted of a single act toward a single victim: making the "strange" lawn-mowing request of Mr. McNamara. That single act is not enough to constitute an OV-13 "pattern." Nor does it matter that his co-offenders may have committed three separate acts; again, a sentencing judge may not assess

offense-variable points "solely on the basis of [a] co-offender's conduct unless the OV at issue explicitly directs the court to do so," and OV 13 does not. *Gloster*, 499 Mich at 209; see generally the argument above at Point II(A). Because "no pattern of felonious criminal acts were committed," OV 13 should have been scored 0 points. MCL 777.43(1)(g).[9]

D. THE ERRORS REQUIRE RESENTENCING.

Resentencing is required when guidelines-scoring errors affect the sentence range. *Francisco*, 474 Mich at 91-92. Correcting the offense variable scores at issue here would change the sentence range. The OV total is presently 96 points and the OV Level is V. See sentence tr. at 12; Sentencing Information Report (attached). When applying the correct scores Mr. Jessie's OV total is 41 points, and the OV Level is IIII. As a result, the sentence range is reduced from 171-356 months to 126-262 months. Even reducing the OV total by 17 points would affect the sentence range. Resentencing is therefore required.

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[9] Mr. Jessie also notes that basing a 25-point score on three offenses committed in a single incident would ignore the statutory requirement that the pattern of criminal behavior be "continuing." Both the title ("Scoring offense variable 13; continuing pattern of criminal behavior") and first subsection ("Offense variable 13 is continuing pattern of criminal behavior") of the statute refer to the requisite pattern as a "continuing" one. MCL 777.43(1). A reviewing court must keep in mind the "Legislature's focus" expressed by the title and first subsection of a statute. *People v Cannon*, 481 Mich 152, 157 (2008). Those words—the statute's "central subject"—condition what follows. *Id.* Particular provisions of the statute must be read in the context of that central subject. Thus, OV 10 (whose central subject, as expressed in the title and first subsection, is "exploitation of a vulnerable victim") requires proof of vulnerable-victim exploitation even when considering a provision of the statute ("predatory conduct was involved") that makes no mention of vulnerable victims. *Id.* at 156-59. Here, likewise, OV 13 must be read to require proof of a "continuing pattern"—in other words, "*repeated* felonious conduct." *People v Shane Joseph Smith*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2003 (Docket No. 229137) (attached) at p 6 (emphasis added).

SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant the relief requested herein.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Douglas W. Baker

BY:_____

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Dated: June 14, 2017

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v MYRON GREGORY JESSIE, Defendant-Appellant.	UNPUBLISHED April 24, 2018 No. 335736 Wayne Circuit Court LC No. 16-005646-01-FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DAVON LAMONT MILLER, Defendant-Appellant.	No. 335738 Wayne Circuit Court LC No. 16-005653-02-FC

Before: BOONSTRA, P.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this consolidated appeal,[1] defendants Myron Jessie (Docket No. 335736) and Davon Miller (Docket No. 335738) appeal by right their convictions and sentences entered after a joint trial before a single jury. The jury convicted Jessie of two counts of armed robbery, MCL 750.529, and one count of first-degree home invasion, MCL 750.110a(2),[2] and convicted Miller of two counts of armed robbery, and single counts of first-degree home invasion, carrying a weapon with unlawful intent, MCL 750.226, and possession of a firearm during the commission of

[1] See *People v Jessie*, unpublished order of the Court of Appeals, issued December 6, 2017 (Docket Nos. 335736 & 335738).

[2] The trial court granted Jessie's motion for a directed verdict on additional charges of carrying a weapon with unlawful intent, MCL 750.226, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.

a felony (felony-firearm), MCL 750.227b. The trial court sentenced Jessie as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 24 to 50 years for each robbery conviction, and 9 to 30 years for the home invasion conviction. The court sentenced Miller to concurrent prison terms of 18 to 40 years for each robbery conviction, 7 to 20 years for the home invasion conviction, and one to five years for the carrying a weapon with unlawful intent conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. We affirm in both appeals.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Jessie and Miller were charged with offenses related to the home invasion and armed robbery of Jessie's neighbors, Daniel and Terry McNamara, on May 23, 2017, in Detroit. The prosecution's theory was that Jessie was the linchpin of this criminal episode because he used his personal relationship with the McNamaras to induce them into opening their door for Miller and a third participant, Delond Matlock,[3] knowing that Miller and Matlock intended to commit a robbery. The victims testified that Jessie knocked on their front door and engaged Daniel in a conversation about Daniel mowing someone's lawn. Jessie then left and entered a white car with two other men. Moments later, Miller knocked on Daniel's front door, had a similar exchange with Daniel, and asked if he could return and use the side door. Miller then walked away toward the white car, although Daniel did not see whether he entered the car. Shortly thereafter, Miller and Matlock knocked on the side door of the house and again engaged Daniel in another similar lawn-related conversation. Matlock then pointed a pistol at Daniel and Miller demanded Daniel's rings. Matlock ordered Daniel into the basement, where Matlock held both Daniel and Terry at gunpoint and demanded their gold and wedding rings. Miller remained upstairs and searched the premises. Matlock stated that he would have to kill the McNamaras because they had seen his face, but when he attempted to fire the gun, it jammed. Daniel managed to retrieve his own gun, which he fired at Matlock as Matlock fled. Miller fled from the house as well, but left a sweatshirt behind. Both Daniel and Terry identified Jessie as the person who had originally approached the house, and from photographic lineups they identified Matlock and Miller as the robbers.

At trial, Jessie and Miller both denied involvement in the offense. The sweatshirt left at the scene contained Miller's DNA as well as that of two other unknown individuals (not Jessie or Matlock). DNA analysis of bloodstains found at the scene revealed Matlock's DNA, with Miller and Jessie excluded as possible contributors.

II. DOCKET NO. 335736 (DEFENDANT JESSIE)

A. SUFFICIENCY OF THE EVIDENCE

Jessie first argues that the prosecution failed to present sufficient evidence that he knew of the codefendants' criminal intent or that he did anything to assist in the crimes being committed

[3] Matlock pleaded guilty to two counts of armed robbery, one count of first-degree home invasion, and one count of felony-firearm. He is not a party to this appeal. We will sometimes refer to Miller and Matlock together as Jessie's codefendants.

such as would support his conviction for first-degree home invasion and his two convictions for armed robbery on an aiding and abetting theory. We disagree. We review de novo a challenge to the sufficiency of the evidence. *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015). When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. See *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). "[A] reviewing 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).

Jessie's sufficiency argument does not focus on any specific element of the offenses for which he was convicted, but asserts that it is speculative to conclude that he participated in committing the offenses. At trial, the prosecution advanced the theory that Jessie was guilty of first-degree home invasion and armed robbery as an aider or abettor.

The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010); MCL 750.110a(2). The elements of armed robbery are (1) an assault, and (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a dangerous weapon or with an article used or fashioned in such a way as to lead a reasonable person to believe that it is a dangerous weapon. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004); MCL 750.529.

A person who aids or abets the commission of a crime may be convicted and punished as if he or she directly committed the offense. MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant [either] intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement[,]" *People v Izarraras-Placante*, 246 Mich App 490, 496-497; 633 NW2d 18 (2001) (citation omitted), "or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense," *People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006). "Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider or abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Carines*, 460 Mich at 757; *People v Bennett*, 290 Mich App 465, 474; 802 NW2d 627 (2010).

Viewed in a light most favorable to the prosecution, the evidence was sufficient to show that Miller and Matlock committed the crimes of first-degree home invasion and armed robbery by forcing their way into the McNamaras' home while Matlock was armed with a pistol and taking their rings and other belongings. And there was sufficient circumstantial evidence that Jessie assisted his codefendants in the commission of the crimes by using his personal relationship with the McNamaras to lay the groundwork for his codefendants to subsequently force their way into the house to rob the McNamaras. Specifically, the evidence showed that Jessie approached the McNamaras' front door and engaged Daniel in a bogus conversation about lawn services,[4] thereby causing Daniel to let down his guard when, moments later, Miller, whom Daniel did not know but reasonably associated with Jessie, came to the front door, engaged Daniel in the same conversation, and acquired permission from Daniel to return and use the side door, ultimately allowing Miller and Matlock the opportunity to force their way into the McNamaras' home and rob them.

Finally, the evidence also was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that Jessie knew that his codefendants intended to commit armed robbery and home invasion at the time he gave aid and encouragement, or to at a minimum conclude that he was aware that Miller and Matlock intended to commit armed robbery and that the commission of a home invasion was a natural and probable consequence of the intended armed robberies. Jessie's conduct before the home invasion, the conspicuous similarities in the conversations with Daniel by both Jessie and Miller, the close temporal proximity in their appearances at the McNamaras' door, and the fact that Jessie entered the same white car that Miller approached supports the inference that Jessie and his codefendants acted in concert to commit the crimes. Accordingly, the evidence was sufficient to support Jessie's convictions of first-degree home invasion and two counts of armed robbery under an aiding and abetting theory. *Izarraras-Placante*, 246 Mich App at 496-497; see also *Reese*, 491 Mich at 139.

B. OFFENSE VARIABLE SCORING

Jessie also argues that he is entitled to be resentenced because the trial court erroneously assessed points for offense variables (OV) 8, 10, and 13. Although we agree that OV 8 was improperly assessed 15 points, we disagree regarding the other two variables and conclude that resentencing is not required. When reviewing a trial court's scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

1. OV 8

[4] Daniel testified that he did not mow lawns for money, that his lawn mower was broken, and that he found the conversation "strange."

MCL 777.38(1)(a) directs the trial court to assess 15 points if "[a] victim was asported to another place of greater danger or to a situation of greater danger[.]" The "asportation" element of OV 8 is satisfied "[i]f a victim was carried away or removed to another place of greater danger or to a situation of greater danger[.]" *People v Barrera*, 500 Mich 14; 892 NW2d 789 (2017).

Jessie argues that OV 8 should not have been assessed points because he was not a participant in the asportation of either victim. We agree. No evidence was presented that Jessie was present during the victims' asportation, moved either victim into the basement, or directed that either victim be moved there. "[A] defendant shall not have points assessed solely on the basis of his or her co-offenders' conduct unless the OV at issue specifically indicates to the contrary." *People v Gloster*, 499 Mich 199, 206; 880 NW2d 776 (2016). In contrast to some other offense variables, OV 8 does not specifically direct the trial court to assess a defendant points based on the conduct of a codefendant. MCL 777.38. In light of the foregoing, the trial court clearly erred in finding that Jessie's conduct warranted the assessment of 15 points for OV 8.

Although the trial court erred in assessing 15 points for OV 8, the error does not entitle Jessie to resentencing. The trial court scored the guidelines for Jessie's convictions of armed robbery, which is a class A offense. MCL 777.16y. Jessie received a total OV score of 96 points, which combined with his 52 prior record variable points, placed him in the E-V cell of the applicable sentencing grid, for which the minimum sentence range is 171 to 356 months for a second-offense habitual offender. MCL 777.62; MCL 777.21(3)(a). Reducing Jessie's OV score by 15 points would make his OV score 81 points and would not alter his placement in OV Level V (80-99 points), and thus would have no effect on his guidelines range. Because the alleged scoring error did not affect the appropriate guidelines range, Jessie is not entitled to resentencing on this basis. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); *People v Biddles*, 316 Mich App 148, 156; 896 NW2d 461 (2016).

2. OV 10

OV 10 addresses exploitation of a vulnerable victim, and the trial court must assess 15 points if "[p]redatory conduct was involved." MCL 777.40(1)(a). " 'Predatory conduct' means preoffense conduct directed at a victim . . . for the primary purpose of victimization." MCL 777.40(3)(a). Predatory conduct encompasses "only those forms of 'preoffense conduct' that are commonly understood as being 'predatory' in nature . . . as opposed to purely opportunistic criminal conduct or 'preoffense conduct' involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection." *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011) (citation omitted). In order to find that a defendant engaged in predatory conduct, a trial court must conclude that (1) the defendant engaged in preoffense conduct, (2) the defendant directed that conduct toward "one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation[,]" and (3) the defendant's primary purpose in engaging in the preoffense conduct was victimization. *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008).

The trial court did not err in concluding that Jessie engaged in preoffense conduct directed at Daniel, with the intent to victimize both Daniel and Terry by having their home invaded and robbing them. There was evidence that the McNamaras had known Jessie, their neighbor, for approximately three years, and had paid him to perform odd jobs around their house to help him

out. They trusted Jessie because he was their neighbor and considered him a friend. Using this trusted relationship, Jessie went to the McNamaras' front door and engaged Daniel in a strange conversation about lawn services, causing Daniel to let down his guard and ultimately allowing Miller and Matlock to take advantage of Daniel, invade the McNamaras' home, and rob both Daniel and Terry. Thus, the McNamaras were not random victims who were merely the subject of "opportunistic criminal conduct." 489 Mich at 462. Rather, the evidence showed that (1) Jessie engaged in preoffense conduct as demonstrated by his using his trusted relationship with the McNamaras to entice Daniel into trusting Jessie's associate, (2) Jessie's conduct was directed specifically toward Daniel, who was particularly vulnerable and susceptible to persuasion considering his relationship with Jessie, and (3) Jessie's primary purpose in engaging in the preoffense conduct was to lay the groundwork for his associates to invade the McNamaras' home and rob them. In light of the foregoing, the trial court did not clearly err in finding that Jessie's conduct warranted a 15-point score for OV 10. *Hardy*, 494 Mich at 438.

3. OV 13

OV 13 addresses a "continuing pattern of criminal behavior." The trial court must assess 25 points for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). Jessie argues that he has no qualifying offenses because his only prior felony was in 2007, and there were no other offenses that did not result in a conviction. However, all crimes within a five-year period, including the sentencing offense, must be counted, MCL 777.43(2)(a), and a pattern of criminal activity may be based on multiple offenses arising from the same event or from a single criminal episode. See *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001), and *People v Gibbs*, 299 Mich App 473, 487; 830 NW2d 821 (2013). Jessie was convicted of two separate counts of armed robbery—one for each victim, which are crimes against a person, MCL 777.16y, and he was also convicted of first-degree home invasion, which likewise is designated as a crime against a person, MCL 777.16f. Because Jessie was convicted of three qualifying offenses resulting from separate criminal acts, the trial court correctly assessed 25 points for OV 13. See *People v Carll*, ___ Mich App ___ ,___; ___ NW2d ___ (2018) (Docket No. 336272); slip op at 6, citing *People v Gibbs*, 299 Mich App 473, 487; 830 NW2d 821 (2013) (stating that OV 13 is properly assessed at 25 points when a defendant commits separate criminal acts that arise out of "a single criminal episode" and noting that defendant Gibbs was convicted of the armed robbery of two individual victims as well as the unarmed robbery of a jewelry store.)[5] Accordingly, Jessie has not identified any scoring error that warrants resentencing.

II. DOCKET NO. 335738 (DEFENDANT MILLER)

A. SUFFICIENCY OF THE EVIDENCE

[5] Although Jessie was convicted on an aiding and abetting theory rather than as the principal perpetrator of the criminal acts, once convicted the trial court was directed to punish him as though he had directly committed the offenses. MCL 767.39.

Miller argues that the prosecution failed to present sufficient evidence to establish his identity as a participant in the criminal episode. We disagree.

Identity is an essential element in a criminal prosecution, see *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt, *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Positive identification by a witness or circumstantial evidence and reasonable inferences arising from it may be sufficient to support a conviction of a crime. See *Nowack*, 462 Mich at 400; *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony is for the trier of fact to resolve and this Court will not resolve it anew. See *Nowack*, 462 Mich at 400.

Two eyewitnesses unequivocally identified Miller. Both Daniel and Terry selected Miller from photographic lineups, and identified him at trial as one of the criminal actors. Daniel testified that he "was one hundred percent certain [of Miller's identity as such] at the time [of the photographic lineup] and [was] still one hundred percent certain [at the time of trial]." Terry testified that she is good with faces and that Miller's face "stood out to her." She "just remembered his face, the way his eyes were." The detective who conducted the photographic lineup for Terry testified that she selected Miller "quick[ly]" and "was confident" in her identification. These witnesses' testimony, if believed, was sufficient to establish Miller's identity as one of the participants. *Davis*, 241 Mich App at 700. Additionally, apart from Daniel's and Terry's positive and unequivocal identifications of Miller, the prosecution presented evidence that the perpetrator identified as Miller fled from the house, leaving his sweatshirt behind, and that Miller's DNA was found on the sweatshirt. This DNA evidence enhanced the reliability of the eyewitness identifications. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support a finding beyond a reasonable doubt that Miller was one of the participants in the criminal episode. See *Nowack*, 462 Mich at 400.

Miller argues that the McNamaras' identification testimony was not reliable, and that he was found to be only one of three contributors of the DNA found on the sweatshirt. This challenge goes to the weight of the evidence rather than its sufficiency. *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). Indeed, these same challenges were presented to the jury during trial. This Court "will not interfere with the jury's determinations regarding weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008); see also *Nowack*, 462 Mich at 400. Even where a witness's identification of the defendant is less than positive, the question remains one for the trier of fact. *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972). Applying these standards, we will not disturb the jury's determination that the evidence established Miller's identity as one of the perpetrators.

B. JUDICIAL FACT-FINDING

Miller also argues that the trial court erred by engaging in impermissible judicial fact-finding in assessing points for OVs 4, 8, and 10. We disagree. Because Miller did not object on this basis at sentencing, this claim is unpreserved and our review is limited to plain error affecting substantial rights. *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015).

Miller acknowledges that the trial court imposed sentences within the guidelines range that was calculated using judicially-found facts. His only argument—that the trial court was required to consider a guidelines range that was not based on judicial fact-finding—is meritless. In *Lockridge*, our Supreme Court held that Michigan's sentencing guidelines were constitutionally deficient, in violation of the Sixth Amendment, to the extent that they "require judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range . . . ." *Id.* at 364. To remedy this deficiency, the Court held that the guidelines are advisory only. *Id.* at 365. Under *Lockridge*, however, trial courts are still required to "continue to consult the applicable guidelines range and take it into account when imposing a sentence," and are permitted, to score the guidelines using judicially-found facts. *Id.* at 392 n 28. In fact, the *Lockridge* Court was clear that its opinion "does nothing to undercut the requirement that the highest number of points *must* be assessed for all OVs, whether using judge-found facts or not." *Id.* As this Court explained in *Biddles*, 316 Mich App at 158,

> [t]he constitutional evil addressed by the *Lockridge* Court was not judicial fact-finding in and of itself, it was judicial fact-finding in conjunction with *required* application of those found facts for purposes of increasing a mandatory minimum sentence range, which constitutional violation was remedied in *Lockridge* by making the guidelines *advisory*, not by eliminating judicial fact-finding.

More recently, in *People v Steanhouse*, 500 Mich 453; 902 NW2d 327 (2017), our Supreme Court reaffirmed its holding in *Lockridge* that "the sentencing guidelines are advisory only." *Id.* at 466. The Court articulated that, "[w]hat made the guidelines unconstitutional, in other words, was the combination of the two mandates of judicial fact-finding and adherence to the guidelines." *Id.* at 467.

In this case, Miller was sentenced more than one year after *Lockridge* was decided. The trial court expressed its awareness that the guidelines were "only advisory." There is nothing in the record to suggest that the trial court sentenced Miller in a manner inconsistent with *Lockridge*. Because the guidelines were advisory, and the trial court was permitted to rely on judicially-found facts in assessing points for OVs 4, 8, and 10, Miller has not demonstrated that an "unconstitutional constraint on judicial discretion actually impaired his Sixth Amendment right." *Lockridge*, 498 Mich at 395. Accordingly, Miller is not entitled to resentencing.

Affirmed in both docket numbers.

/s/ Mark T. Boonstra
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause