STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ANTONIO POWE, JR,

Defendant-Appellant.

UNPUBLISHED
September 16, 2003

No. 240584
Washtenaw Circuit Court
LC No. 00-001711-FC

Before: Whitbeck, C.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), armed robbery, MCL 750.529, and carjacking, MCL 750.529a. He was sentenced to eight years and three months to twenty years' imprisonment for the home invasion offense, eighteen years and nine months to twenty-five years for the armed robbery offense, and eighteen years and nine months to twenty-five years for the carjacking offense. The terms were to be served concurrently with credit for 180 days already served. Defendant appeals as of right. We affirm defendant's convictions, but remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I

On July 26, 2000, Herbert Sandridge and his girlfriend Kelly Porter were robbed in Sandridge's home in Ypsilanti. At the time of the robbery, Sandridge was the only permanent resident. In the last two years, however, the large house was usually filled with boarders referred by a social service agency. Defendant lived at the house for two weeks before the boarders were evicted earlier in July. Sandridge identified defendant Powe as "Tone", a former border.

Between 4 and 5 a.m. on July 26, Sandridge was sleeping in his bedroom with Porter when he heard someone knocking on the back door. Sandridge saw defendant standing outside with another man. Defendant told Sandridge that he and his friend were stranded because their car had a flat tire. Sandridge offered his help and turned around to retrieve his shoes. According to Sandridge, he did not explicitly allow defendant and his friend to come in, but Sandridge did not object when defendant and his friend followed him into the house.

After the group talked for a little while, defendant's friend pointed a gun at Sandridge's head. Sandridge stated that defendant and his friend handcuffed him and put duct tape on his

face and legs. Sandridge heard running water and then he was hit over the head, dragged into a bathroom, and dunked in the bathtub repeatedly. Porter testified she saw two men come into the bedroom with a gun. They duct taped her hands, eyes and mouth, and took her jewelry. She could hear furniture being moved and water running. At some point, Sandridge and Porter heard Sandridge's car alarm.

The building caretaker, Joe Golder, lived next door to Sandridge's home and testified that he saw Sandridge's car trunk sitting open early that morning. Sandridge's car was parked in a lot right outside the house. There were no lights on in Sandridge's home, and Golder felt that something was wrong. He saw defendant outside the house and called out to him; Golder recognized defendant as a former tenant of the house.

Porter testified that at some point she heard at least one car drive away. Sandridge heard Porter calling him and she was able to locate him sometime later. The couple disentangled themselves from the duct tape and left to contact the police. Sandridge and Porter testified that the following items were missing from Sandridge's house after the incident: Sandridge's car and car keys, a stereo, a DVD player, a television, and clothes. At the scene, the police observed that objects were lying around haphazardly, furniture drawers were lying on the floor, water filled two bathtubs and spilled onto the floor, and duct tape was found in the dining area.

Sandridge identified defendant as one of the intruders in a lineup at the police station. At trial, defendant's motion for a directed verdict following the prosecution's presentation of its case was denied. Defendant's mother testified on his behalf that he was at a Detroit family gathering during the evening of July 25 until at least 2:30 a.m. on July 26.

II

Defendant first claims that there was insufficient evidence to convict him of first-degree home invasion because the prosecution did not prove that defendant entered Sandridge's home "without permission," MCL 750.110a(2). We disagree.

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*; *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

MCL 750.110a provides in pertinent part:

> (1) As used in this section:
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> * * *
>
> (c) "Without permission" means without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling.

> (2) A person . . . who breaks and enters a dwelling *or enters a dwelling without permission* and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree . . . . [Emphasis added.] [See also CJI2d 25.4(3) (instructing that permission to enter must come from someone in authority).]

The parties correctly note that there is no explicit law in Michigan further defining "without permission." However, formal interpretation is not necessary because the plain language of this phrase is apparent. Because the phrase defines a criminal act prohibited by statute, we opine that the phrase means explicit permission, not implied permission, as defendant argues here. See *People v Petty*, ____ Mich ____; 665 NW2d 443, 447 (2003) (plain language of statute generally controls if a statute is unambiguous); or *People v Morris*, 450 Mich 316, 326; 537 NW2d 842 (1995) (if ambiguous, criminal statutes should be strictly construed in favor of Legislature's plain language).[1]

The first definition of "permit" in Black's Law Dictionary (7th ed) is "[t]o consent to formally." See also *Random House Webster's College Dictionary* (2001) ("permission" means "formal consent"). Clearly, Sandridge did not formally consent to defendant's entrance into Sandridge's home. Sandridge merely said he would retrieve his shoes so he could assist defendant with his disabled car outside, and defendant walked in. Defendant no longer lived at the house; therefore, his entrance was not permitted. Thus, the evidence on the permission element was sufficient. *Lueth*, *supra*.

III

Defendant next contends that there was insufficient evidence to convict him of carjacking because the prosecution did not prove that defendant stole the car "in the presence" of Sandridge, MCL 750.529a. Again, we disagree.

The statute provides:

> A person who by force or violence, or by threat of force or violence, or by putting in fear robs, steals, or takes a motor vehicle as defined in section 412 from another person, in the presence of that person or the presence of a passenger or in the presence of any other person in lawful possession of the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years. [MCL 750.529a(1).]

The "presence" element was explained in *People v Green*, 228 Mich App 684, 695-696; 580 NW2d 444 (1998):

[1] Plaintiff points to the case of *People v Fisher*, 83 Ill App 3d 619, 623; 404 NE2d 859 (1980) (permitted social guests were "without authority" to enter victim's home and commit a crime).

> When called on to interpret the "presence" requirement of the carjacking statute, this Court adopted the definition of "presence" applied in armed robbery, MCL 750.529 . . . .[2] See *People v Raper*, 222 Mich App 475, 482; 563 NW2d 709 (1997). Under this definition, a thing is in the presence of a person if it is so within the person's "reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." See *Raper*, *supra* at 482. In other words, whether the taking of a motor vehicle occurs within the presence of a person, depends on the effect of violence or fear on that person's ability to control his possession of the motor vehicle at the time of its taking. See *Raper*, *supra* at 482-483. Consistent with this definition of "presence" is the notion that a thing is taken from a person at the time the person loses possession of the thing because of the effect of violence or fear. Moreover, in larceny cases, a taking occurs when the wrongdoer acquires dominion and control (i.e., possession) over the subject property. See 3 Wharton's Criminal Law (15th ed), § 357, pp 412-413 . . . ; Black's Law Dictionary (6th ed) (defining "take"). Accordingly, for purposes of the crime of carjacking, we conclude that a defendant "takes" a motor vehicle "from" another when he acquires possession of the motor vehicle through force or violence, threat of force or violence, or by putting another in fear. This definition is consistent with our interpretation of the "presence" requirement and with the other crimes in the robbery section of the Michigan Penal Code. See *Raper*, *supra* at 482. [Quotations and citations omitted.]

What occurred in the present case easily fits into the definition of carjacking indicated above. Sandridge could have retained control over his car if he had not been bound and gagged, or "overcome by violence or prevented by fear, [to] retain his possession of" the car. See *id*., cited in *Green*, *supra* at 695. Sandridge's keys were in the home, see *People v Davis*, 109 Mich App 521, 526; 311 NW2d 411 (1981) (car keys give constructive possession of a car), and if Sandridge had not been subdued, he could have retained control over the keys and the car. At the time of the theft of the keys and the car, Sandridge was restrained by defendant and his companion. See *Green*, *supra*. Thus, the evidence was sufficient on the presence element also. See *Lueth*, *supra*.

IV

Finally, defendant contends that his sentences are erroneous. We agree, but not on the ground that defendant claims error.

Generally, the imposition of a sentence is reviewed for an abuse of discretion, but where, as here, the defendant failed to preserve the issue by objection at sentencing, review is limited to whether there was plain error which affected substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). Michigan's indeterminate sentence scheme requires a maximum set by statute and a minimum set by the sentencing judge. MCL 769.8; *People v*

[2] Note that defendant was convicted of armed robbery, MCL 750.529.

Legree, 177 Mich App 134, 139; 441 NW2d 433 (1989). Indeterminate means a sentence must have an interval between the minimum and maximum terms sufficient to allow corrections authorities to exercise their discretion. *People v Tanner*, 387 Mich 683, 689-690; 199 NW2d 202 (1972). A sentence that has a minimum that exceeds two-thirds of the maximum is improper. *Id*. at 690; *People v Thomas*, 447 Mich 390, 392; 523 NW2d 215 (1994). The two-thirds rule of *Tanner* applies to sentences imposed under the statutory sentencing guidelines. MCL 769.34(2)(b).

In the present case, defendant was sentenced to eighteen years and nine months to twenty-five years for the armed robbery offense, and eighteen years and nine months to twenty-five years for the carjacking offense.[3] Contrary to defendant's argument, the corrected sentencing information report states that the statutory guidelines' minimum range for these offenses is 225 to 375 months, or eighteen years and nine months to thirty-one years and three months. The statutory maximums for these offenses were life in prison.

Consequently, the sentences handed down by the trial court did not set the proper maximum sentences. While the minimum set by the court was proper because the minimum guideline range was 225 to 375 months, the maximum set by the trial court had to be at least one and a half times the minimum, or 337 and one-half months (twenty-eight years and two months). Cf. *Tanner*, *supra*. Therefore, the trial court erred in imposing defendant's sentences for robbery and carjacking, and we remand this case for correction of the sentences. *People v Daniel*, 462 Mich 1, 8; 609 NW2d 557 (2000).

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

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper

[3] There were no reasons articulated for departure.