STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JAMES JENKINS, also known as,
JAMES JENKIN,

Defendant-Appellee.

UNPUBLISHED
October 18, 1996

No. 184100
LC No. 94-009447

Before: Michael J. Kelly, P.J., and Markman and J. L. Martlew,* JJ.

PER CURIAM.

The prosecution appeals by right from the March 3, 1995, order granting defendant's motion for a directed verdict of acquittal, after a jury convicted defendant of breaking and entering a building with the intent to commit larceny. MCL 750.110; MSA 28.305. We reverse.

Defendant was charged with breaking and entering a building with the intent to commit a larceny, MCL 750.110; MSA 28.305, and felonious assault. MCL 750.82; MSA 28.277. A jury trial ensued. At the close of the prosecution's case in chief, defendant made a motion for a directed verdict of acquittal. The trial court took the motion under advisement. The jury convicted defendant of breaking and entering a building with the intent to commit a larceny, but acquitted defendant of the felonious assault charge. Defendant made motions for a judgment notwithstanding the verdict, new trial, and directed verdict. In granting defendant's motion for a directed verdict, the trial court expressly stated that it was doing so based on defendant's previous motion which the court had taken under advisement.

The prosecutor argues that the trial court erred when it reserved its decision on defendant's motion for a directed verdict brought at the close of the prosecution's case in chief. We agree. Pursuant to MCR 6.419(A), a trial court may not reserve decision on such a motion. In addition, even if this Court were to consider the trial court's decision as judgment on defendant's renewed motion for a directed verdict, the trial court erred, nonetheless, because it failed to conditionally rule on defendant's

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

motion for a new trial pursuant to MCR 6.419(C). Finally, because the trial court weighed the evidence in granting defendant's motion for a directed verdict, as opposed to viewing the evidence in the light most favorable to the prosecution, we find that the trial court erred in considering the substance of defendant's motion, and in granting the same. See *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Mehall*, 213 Mich App 353, 362-363; 539 NW2d 593 (1995); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1993).

The essential elements of the crime of breaking and entering with the intent to commit a larceny are: (1) breaking; (2) entering; and (3) felonious intent (here to commit a larceny). *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993). The prosecutor claimed that it provided sufficient evidence for a rational trier of fact to conclude that these elements were proven beyond a reasonable doubt because : (1) the store owner who was victimized testified that the drywall on the back of his store was not broken through before he found defendant inside of his store; (2) the store owner testified that he found defendant in his store after hearing a big noise from that vicinity; and (3) the store owner testified that defendant told him that he was inside the store in order to take "junk," i.e. things inside which did not belong to defendant The prosecutor argues and we agree that a rational trier of fact could --and did-- reasonably infer and conclude that defendant was guilty from this testimony.

Specifically, we note that the trial court found that the store owner's testimony that he heard a noise in the back of his store was insufficient to establish a breaking. The court reasoned that if defendant had, in fact, broken through the dry wall in order to enter the store that the owner should have heard a louder noise. However, such a determination by the court was improper when ruling on a motion for a directed verdict and reviewing the sufficiency of the evidence. *Wolfe*, *supra*; *Mehall*, *supra*. Although the court may assess the weight of the evidence in deciding a motion for a new trial, the court here specifically stated that it was not going to address defendant's motion for a new trial. See *People v Harris*, 190 Mich App 652, 658-59; 476 NW2d 767 (1991). In addition, because defendant's motion was made at the close of the prosecution's case, the trial court erroneously considered evidence presented by defendant. See *Hammons*, supra at 556.[1]

Reversed.

/s/ Michael J. Kelly
/s/ Stephen J. Markman
/s/ Jeffrey L. Martlew

[1] Parenthetically, we note that, even by defendant's own version of what occurred, he broke through the back drywall of the store and thereby caused at least some noise.