STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARIUS CORNESE FITZPATRICK,

Defendant-Appellant.

UNPUBLISHED
February 14, 1997

No. 175780
Macomb Circuit Court
LC No. 93-2378 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDRICK GRADDY,

Defendant-Appellant.

No. 175781
Macomb Circuit Court
LC No. 93-2379 FH

Before: O'Connell, P.J., and Markman and M.J. Talbot,* JJ.

PER CURIAM.

Defendants were convicted by jury of breaking and entering a building with intent to commit larceny. MCL 750.110; MSA 28.305. Both were sentenced to three to ten years for the breaking and entering convictions. These sentences were vacated after each pleaded guilty to being an habitual offender, third offense. MCL 769.11; MSA 28.1083. The trial court sentenced Fitzpatrick to a term of imprisonment of forty months to twenty years for his habitual offender conviction, and sentenced Graddy to a term of imprisonment of three to twenty years for his habitual offender conviction. Defendants now appeal as of right, and we affirm.

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

A surveillance camera captured two African-American men breaking into a Speedway gas station and removing items from the store. Approximately 600 packs of cigarettes were stolen. The offense occurred in the early morning hours, and police arrived at the scene promptly. Fitzgerald, who is African-American, was apprehended shortly thereafter when police stopped his vehicle, which was the only car in the area. The officer noticed numerous packs of cigarettes in the back seat of the vehicle. Fitzgerald later, after being apprised of his *Miranda*[1] rights, incriminated himself.

Graddy, who is also African-American, was apprehended separately at approximately the same time by a different officer. Graddy smelled strongly of alcohol, and had many small scrapes on his leg. The perpetrators of the robbery of the Speedway had gained entrance by breaking the glass of the front door of the gas station. Graddy left a trail of glass shards. Both were convicted of breaking and entering with the intent to commit larceny. MCL 750.110; MSA 28.305.

Defendant Fitzpatrick, Docket No. 175780

Fitzpatrick first argues that the trial court clearly erred in denying his motion to suppress evidence of the breaking and entering and his subsequent confession because his investigatory stop and subsequent arrest were unlawful. When reviewing a trial court's decision in the context of a motion to suppress, a judge's findings of fact will not be disturbed unless the findings are clearly erroneous. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). The trial court's application of the law to its factual findings, however, is subjected to a less deferential standard of review. *People v Nelson*, 443 Mich 626, 631, n7; 505 NW2d 266 (1993).

The Fourth Amendment of the United States Constitution and Const 1963, art I, § 11, grant individuals the right to be secure against unreasonable searches and seizures. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996). Brief investigative stops short of arrest are constitutionally permitted if the police have a particularized suspicion, based on an objective observation, that the person stopped has been, is, or is about to be engaged, in criminal wrong-doing. *Id.* at 664-665. The suspicion must be reasonable and articulable. *People v Yeoman*, 218 Mich App 406, 410; 554 NW2d 577 (1996). As recently reiterated by our Supreme Court in *People v LoCicero*, ___ Mich ___; ___ NW2d ___ (Issued 12/27/96, slip op p 6), "[t]he reasonableness of an officer's suspicion is determined case by case on the basis of the totality of the circumstances." In analyzing the totality of the circumstances, common sense and everyday life experiences predominate over uncompromising standards. *Yeoman, supra*. When dealing with the investigatory stop of a vehicle, fewer foundational facts are generally necessary to support a finding of reasonableness. *Id*. at 410. Additionally, a stop of a motor vehicle for investigatory purposes may be based upon fewer facts than those necessary to support a finding of reasonableness where both a stop and a search are conducted by the police. *Id.* at 411.

Our review indicates that the trial court did not clearly err in finding that the arresting officer had a reasonable, articulable suspicion justifying his investigatory stop of Fitzpatrick. The officer was aware that a breaking and entering had occurred at approximately 4:30 a.m. He arrived at the scene of the crime mere minutes after two suspicious men had been seen near the building. The suspicious men were African-American, and the officer immediately noticed Fitzpatrick, who is African-American, pulling out

of a nearby parking lot onto an otherwise deserted street. Thus, in light of the facts that Fitzgerald was the same race as the suspects, that he was in the vicinity of the crime immediately after it occurred, and that he was the *only* person in that vicinity because of the late hour, we determine that the trial court was not mistaken when it ruled that the officer had a reasonable suspicion of criminal wrongdoing when he stopped Fitzpatrick to investigate the breaking and entering.

We also hold that Fitzpatrick's detention and subsequent warrantless arrest were constitutionally sound. Because the investigative stop was justified, the officer was permitted to detain Fitzpatrick and make reasonable inquiries aimed at confirming or dispelling his suspicions. *Id.* When the officer approached Fitzpatrick's car, he saw cartons of cigarettes lying on the back seat, which were items the officer knew had been stolen. Under these circumstances, the officer acted reasonably in detaining defendant briefly to allow him to contact other officers to ascertain what brands of cigarettes had been taken during the breaking and entering. See *People v Chambers*, 195 Mich App 118, 123; 489 NW2d 168 (1992). Finally, once the officer learned that Fitzpatrick was in possession of brands of cigarettes that had been stolen, he had probable cause, in conjunction with the other circumstances, to conduct a warrantless arrest of Fitzpatrick. See *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996); see also MCL 764.15; MSA 28.874.

Fitzpatrick further argues that the trial court should not have believed the officer's testimony at the suppression hearing because it differed from his account of the arrest in his police report. Defense counsel fully apprised the trial court of the inconsistencies between the officer's testimony and his written report. The trial court obviously found the testimony to be credible. We will not resolve the trial court's credibility determination anew on appeal. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Accordingly, we affirm the trial court's decision to deny Fitzpatrick's suppression motion.

Next, Fitzpatrick advances that the prosecutor engaged in misconduct that had the effect of denying him a fair and impartial trial. Fitzpatrick failed to object to all but one of the alleged instances of prosecutorial misconduct. Therefore, review is foreclosed as to the unpreserved allegations of prosecutorial misconduct unless the prejudicial effect of the prosecutor's remarks was so great that it could not have been cured by appropriate instructions to the jury. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). We have carefully reviewed each unpreserved instance of alleged misconduct, and determine that the prosecutor's comments were either permissible, and thus had no prejudicial effect on Fitzpatrick's right to a fair trial, or of such an innocuous nature that timely requested curative instructions could have eliminated any resulting prejudice. Therefore, we decline to address Fitzpatrick's unpreserved allegations of misconduct.

Next, Fitzpatrick argues that the prosecutor engaged in misconduct when he played for the jury a surveillance videotape of the crime. The videotape depicted two African-American males shattering the glass in the front door of the Speedway, entering the gas station, and stealing cigarettes. During his closing, the prosecutor narrated the videotape for the jury and identified the perpetrators as defendants Fitzpatrick and Graddy. The trial court overruled Fitzpatrick's objection to this tactic. On appeal, Fitzpatrick advances that the prosecutor's narration of the surveillance videotape constituted an improper argument of facts not in evidence, because no one at trial identified the two people portrayed on the surveillance videotape as either defendant.

Fitzpatrick is correct in his assertion that it is improper for a prosecutor to argue facts not in evidence. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). However, a prosecutor may argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case. *Id.* Here, it was not improper for the prosecutor in his closing to play the videotape for the jury and argue that it depicted Fitzpatrick breaking and entering the Speedway station, because facts on the record supported this argument. The trial court had previously admitted the videotape into evidence. It showed two African-American males breaking and entering the Speedway. In addition to the other circumstantial evidence of his guilt, Fitzpatrick confessed to breaking and entering the Speedway. In essence, Fitzpatrick admitted that he was one of the people depicted in the surveillance videotape. Therefore, based on the evidence adduced at trial, it was proper for the prosecutor to argue that the videotape taken from the Speedway depicted Fitzpatrick breaking and entering the gas station, notwithstanding the fact that no witness could positively identify the people shown on the surveillance videotape. Accordingly, the prosecutor's comments did not have the effect of denying Fitzpatrick's right to a fair and impartial trial.

Defendant Fitzpatrick's convictions are affirmed.

Defendant Graddy, Docket No. 175781

Defendant Graddy first argues that the evidence adduced at trial was insufficient to convict him of breaking and entering with intent to commit larceny. When reviewing a claim regarding the sufficiency of evidence, this Court examines the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt. *People v Baker*, 216 Mich App 687, 689; 551 NW2d 195 (1996). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense, including intent. *Id.* With respect to the particular crime of which Graddy was convicted, breaking and entering with intent to commit larceny requires a showing that (1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny. MCL 750.110; MSA 28.305; *People v Adams*, 202 Mich App 385, 390 (1993).

The evidence was sufficient to prove beyond a reasonable doubt that Graddy was guilty of breaking and entering with larcenous intent. The surveillance video established that a breaking, entering, and larceny had taken place at the gas station. Further evidence established that Graddy was one of the perpetrators. First, his physical appearance was consistent with the appearance of one of the men who perpetrated the crime, and he was in the vicinity of the crime when it occurred, as he admitted. Second, evidence established that the perpetrators broke the glass in the Speedway's front door to gain entry. When police apprehended him, Graddy's clothing and shoes contained shards of broken glass, thus supporting the inference that he was responsible for shattering the glass in the gas station door. The fact that Graddy's leg bore numerous fresh, bleeding cuts further supports this inference. Thus, sufficient circumstantial evidence supported the jury's decision to convict Graddy of breaking and entering with intent to commit larceny. See *People v Johnson*, 137 Mich App 295, 302; 357 NW2d 675 (1984).

Graddy further argues that his conviction was against the great weight of the evidence. In order to preserve this issue for consideration, Graddy was required to raise it in a motion for a new trial pursuant to MCR 2.116(A)(1)(e). *People v Bush*, 187 Mich App 316, 329; 466 NW2d 736 (1991). Failure to raise this issue by an appropriate motion waives the issue on appeal. *Id.*

Finally, Graddy argues that the trial court committed reversible error by failing to instruct the jury on the elements of larceny in connection with his breaking and entering charge. As explained in *People v Rabb*, 112 Mich App 430, 435; 316 NW2d 446 (1982) (internal quotation marks omitted), "[t]he trial court should instruct the jury in criminal cases as to the general features of the case, define the offense and indicate that which is essential to prove to establish the offense, even in the absence of a request." However, where one is charged with breaking and entering with the intent to commit larceny, the court need not give the elements of the larceny offense where none of the elements are placed in issue. *Rabb*, *supra*; *People v Petrosky*, 286 Mich 397, 401; 282 NW 191 (1938); see also *People v Fordham*, 419 Mich 874; 347 NW2d 702 (1984). In the present case, , the crucial issue at trial was whether Graddy was one of the men depicted in the surveillance videotape, not whether the perpetrators of the crime depicted on the videotape possessed the requisite larcenous intent. Therefore, because the elements of the crime of larceny were not in issue at trial, the court's failure to instruct the jury concerning the elements of the crime of larceny does not warrant reversal.

Defendant Graddy's convictions are affirmed.

/s/ Peter D. O'Connell
/s/ Stephen J. Markman
/s/ Michael J. Talbot

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).