

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN F. QUARLES,

Defendant-Appellant.

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UNPUBLISHED

May 16, 1997

No. 188014

Recorder's Court

LC No. 94-011291-FH

Before: Jansen, P.J., and Reilly and W.C. Buhl\*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305, and fleeing and eluding a police officer, MCL 740.479a; MSA 28.747(1). After trial, defendant admitted the existence of a prior conviction for purposes of sentence enhancement. Defendant was sentenced to five to fifteen years in prison for the breaking and entering conviction, and six months for the fleeing and eluding conviction, which sentences were vacated. Defendant was then sentenced to 7 to 22 ½ years' imprisonment as a second habitual offender, MCL 769.10; MSA 28.1082. Defendant appeals as of right and we affirm.

Defendant first argues that insufficient evidence was presented that he broke into and entered the complainants' (the Roberts') home. In determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The offense of breaking and entering an occupied dwelling requires proof of breaking and entering an occupied dwelling with felonious intent. *People v Ferguson*, 208 Mich App 508, 511; 528 NW2d 825 (1995). The prosecution must charge and prove some particular felony or felonious intent. *Id.* Specific intent must be proven as an element of breaking and entering. *People v Hunt (After*

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

*Remand*), 214 Mich App 313, 316; 542 NW2d 609 (1995). In Michigan, any amount of force used to open a door or window to enter the building, no matter how slight, is sufficient to constitute the breaking. *People v Wise*, 134 Mich App 82, 88; 351 NW2d 255 (1984). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of the crime. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995).

Viewing the evidence in a light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence of defendant breaking and entering into the Roberts' home with the intent to commit larceny therein. Ray Roberts, Jr. testified that all of the doors and windows were locked when he left for work that morning. Susan Baluha, the Roberts' neighbor, testified that she saw a man at the Roberts' door before 8:00 a.m. Plymouth Township police officer Dennis Wilson testified that he saw defendant at approximately 8:50 a.m. less than one-half mile from the Roberts' home in a car that was stolen and had no rear window. Defendant did not stop the car when Wilson activated his police lights, and defendant exited his car and attempted to flee. Further, the car contained items stolen from the Roberts' home. When Wilson searched defendant after apprehending him, Ray Roberts' wife's glasses were found in defendant's inside jacket pocket. Evidence was also presented that a back window at Roberts' home was pried open with a screwdriver that had a middle striation in its foreplate. Upon searching defendant's vehicle, Plymouth Township police officer Eric Mayernik found two screwdrivers. One of them was a Stanley screwdriver, which, to Mayernik's knowledge, is the only type of screwdriver with a middle striation in its foreplate.

Accordingly, taken in a light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant intentionally broke and entered the Roberts' home with the intent to commit larceny therein.

Defendant next argues that he was denied the effective assistance of counsel because his attorney strengthened the prosecutor's case by stating that a Stanley screwdriver was found in defendant's car, a fact which the prosecutor did not raise on direct examination. Defendant further argues that he was denied the effective assistance of counsel because his attorney commented on two occasions that he believed that defendant was guilty.

Because defendant did not move for a new trial or request an evidentiary hearing, this Court's review is limited to the extent that counsel's claimed mistakes are apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW 2d 667 (1996). To prove a claim of ineffective assistance of counsel mandating reversal of a conviction, the Sixth Amendment requires that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

Limiting our review to the existing record, we conclude that defendant has failed to overcome his burden of proving that defense counsel's cross-examination of Mayernik was not sound trial strategy. When reviewing the testimony complained of as a whole, it appears that defense counsel was attacking Mayernik's ability to successfully link defendant to the instrument used to break and enter the

house rather than bolster the prosecution's theory that the screwdriver found in defendant's car was the instrument used in the break-in.

Furthermore, defendant has failed to show how he was prejudiced by counsel's supposed belief in his guilt. Defendant did not allege that the judge, prosecutor, or any juror heard defense counsel's statement. The only person whom defendant claims was injured by this comment was defendant's wife, who began to cry when confronted by defense counsel with this allegation. Therefore, we hold that defendant has failed to meet his burden of proof as to ineffective assistance of counsel.

Defendant's final argument on appeal is that he was denied due process and a fair trial because the prosecutor argued facts not in evidence, vouched for his witnesses, and attributed improper relevance to defendant's flight from the police. Prosecutorial misconduct issues are reviewed on a case by case analysis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996); *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). This Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *McElhaney, supra*, p 283; *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *McElhaney, supra*, p 283.

The prosecutor properly argued facts which were presented as evidence. Although a prosecutor may not argue facts not entered into evidence, a prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). Mayernik found and seized two screwdrivers during his search of defendant's car. He testified that entry was gained into the Roberts' home by a screwdriver being forced into the window and being moved back and forth. The striations on the window had a middle striation, which, to Mayernik's knowledge, is only found on the foreplate of a Stanley screwdriver. Although Mayernik could not say with certainty that one of the screwdrivers found in defendant's car was the one used to pry the window open, he could not eliminate that possibility either.

Based upon this evidence, we hold that it was proper for the prosecutor to argue that the house was accessed by someone prying open the window with a screwdriver, that it was most likely a Stanley screwdriver because of the middle striation, that approximately one hour later, about one-half of a mile away from the Roberts' home, defendant was pulled over, and that located inside defendant's car was all of the property taken from the Roberts' home and two screwdrivers, one of them being a Stanley screwdriver. The prosecutor properly related these facts to his theory of the case, i.e., that defendant was the person who broke into, entered, and committed a larceny in the Roberts' home, and properly drew reasonable inferences from Mayernik's testimony. *Id.*

In addition, we hold that the prosecutor properly responded to defense counsel's arguments rather than vouched for the credibility of his witnesses. A prosecutor may not vouch for the character of a witness or place the prestige of his office behind a witness. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). The record must be read as a whole and the allegedly impermissible statements judged in the context in which they are made. *Id.* However, a prosecutor may properly respond to

issues previously raised by defense counsel. *People v Modelski*, 164 Mich App 337, 348; 416 NW2d 708 (1987). In this case, the prosecutor properly responded to defense counsel's argument that the Plymouth Township police tried to build a case after following defendant. Therefore, we find no reversible error in this regard.

Lastly, we reject defendant's argument that the prosecutor improperly argued that defendant's flight could be regarded as evidence of his guilt. It is well established in Michigan law that evidence of flight is admissible. The evidence of defendant's flight shows the consciousness of his guilt from breaking, entering, and stealing the items from the Roberts' home. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Wilson testified that he followed defendant through the parking lot of an industrial center. Defendant came to the end of the lot, jumped out of his car, and began running in a southerly direction. Wilson chased after defendant for approximately one-quarter or one-half of a mile before finally arresting him in front of Sovereign Industries. The prosecutor's theory was that defendant fled from Wilson because he was guilty of breaking and entering Roberts' home and stealing the items which were found in the car that defendant was driving when he was spotted and followed by Wilson. Because evidence of flight is admissible and may indicate consciousness of guilt, *Coleman, supra*, and because a prosecutor is free to comment on all reasonable inferences as they relate to his theory of the case, *Lee, supra*, we conclude that it was proper for the prosecutor to comment during his closing argument on defendant's flight.

Furthermore, defendant failed to object when the prosecutor made this comment during his closing argument. Generally, a curative instruction eliminates any possible prejudicial effect that may have resulted from a prosecutor's misconduct. *Nantelle, supra*. Since the trial court instructed the jury that the testimony that defendant fled was not enough to convict or prove that defendant committed the crime, but that it was a circumstance which the jury could consider in weighing the evidence and which it could find showed a consciousness of guilt, we find no error requiring reversal.

Affirmed.

/s/ Kathleen Jansen  
/s/ Maureen Pulte Reilly  
/s/ William C. Buhl