STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL J. WASHNOCK,

Defendant-Appellant.

UNPUBLISHED
March 20, 1998

No. 201058
Oakland Circuit Court
LC No. 95-143234 FH

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a; MSA 28.305(a), and pleaded guilty to being a third-offense habitual offender, MCL 769.11; MSA 28.1083. Defendant was sentenced to an enhanced term of two to forty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence of the elements of first-degree home invasion. When reviewing the sufficiency of evidence in a jury trial, this Court must consider the evidence in a light most favorable to the prosecution in order to determine whether a 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).

A conviction for first-degree home invasion requires proof beyond a reasonable doubt that defendant broke and entered a dwelling. MCL 750.110a(2); MSA 28.305(a)(2). Circumstantial evidence and reasonable inferences therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994). In the present case, the prosecution presented testimony that there were water spots on the kitchen floor, the storm door slammed shut, and the interior kitchen door was open. Viewed in the light most favorable to the prosecution, we find that this evidence, although circumstantial, could have allowed the jury to reasonably infer that defendant broke and entered a dwelling.

A conviction for first-degree home invasion also requires proof beyond a reasonable doubt that defendant had the specific intent to commit a felony or a larceny at the time of the breaking

and entering. MCL 750.110a(2); MSA 28.305(a); *People v Uhl*, 169 Mich App 217, 221; 425 NW2d 519 (1988). The intent to commit a felony cannot be presumed solely from proof of the breaking and entering. *Id*. at 220. This intent may reasonably be inferred from the nature, time, and place of the defendant's acts before and during the breaking and entering. *Id*. Given the difficulty in proving the actor's state of mind, minimal circumstantial evidence may be sufficient to sustain a conclusion that the defendant had the requisite intent. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

In the present case, the breaking and entering occurred at 2:00 a.m. Although defendant now claims he only wanted to use the phone, snow tracks indicated that he did not approach the house directly, but instead went from the front porch, past two large windows, around the side to the back of the house where he encountered the only unlocked door in the house. No one inside the home heard a knock at the door or a ringing doorbell. Moreover, defendant ran from the police and hid in the woods behind the victims' home. When he was finally apprehended, he lied about being at the home. The jury could have properly considered all these factors in determining whether defendant intended to steal. *Id*. The fact that defendant may not have had time to actually take anything is also not determinative, and there was evidence presented at trial that defendant may have been frightened off by the victims' family dog. Viewed in the light most favorable to the prosecution, we find that this evidence was sufficient to allow the jury to reasonably infer that defendant had the specific intent to commit a larceny at the time of the breaking and entering. Therefore, we conclude that the trial court did not err in denying defendant's motion for a directed verdict.

Next, defendant argues that he was denied a fair trial because evidence was introduced indicating that defendant refused to be fingerprinted and attempted to strike a police officer while being processed at the jail. Contrary to defendant's argument on appeal, this issue does not involve prosecutorial misconduct. Rather, it is concerned with the admission of evidence. Normally, a trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). However, in this case, defendant did not object to the admission of this evidence at trial. Thus, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). Here, our review reveals no miscarriage of justice. In particular, we find without merit defendant's argument that the admission of this evidence infringed on his constitutional rights to remain silent and to refuse to consent to a "search." See *Nuriel v YWCA of Metro Detroit*, 186 Mich App 141, 146; 463 NW2d 206 (1990).

Finally, defendant argues that he was denied his right to counsel at the on-the-scene identification and that his attorney's failure to move to suppress the testimony regarding the identification constituted ineffective assistance of counsel. However, because defendant did not raise issues concerning the identification procedures at trial, they will not be reviewed by this Court unless refusal to do so would result in manifest injustice. *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1996). We find that the prompt on-the-scene identification of defendant was clearly proper and acceptable police practice. The police identified defendant by two common articles of clothing, and

defendant initially denied being at the victims' home. A prompt on-the-scene identification by the victim, while the information was fresh in his mind, allowed the police to reasonably decide whether defendant was a likely suspect or a victim of circumstance as contemplated. Under the facts of this case, the identification procedure was not unreasonably suggestive and did not violate defendant's right to due process. See *People v Winters*, 225 Mich App 718, 720-723; ___ NW2d ___ (1997).

Moreover, defense counsel's failure to move to suppress the testimony regarding the on the scene identification did not constitute ineffective assistance of counsel at trial. Defense counsel was not required to argue a frivolous or meritless motion to suppress properly admissible evidence. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Affirmed.

/s/ Gary R. McDonald
/s/ Peter D. O'Connell
/s/ Michael R. Smolenski