

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID C. MALINAO,

Defendant-Appellant.

UNPUBLISHED

March 27, 1998

No. 195694

Oakland Circuit Court

LC No. 95-142664-FH

Before: Saad, P.J., and Wahls and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering with intent to commit a felony, MCL 750.110; MSA 28.305. Defendant subsequently pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. The trial court sentenced defendant to five to ten years' imprisonment for the breaking and entering conviction. However, the sentence was vacated and defendant was sentenced to ten to thirty years' imprisonment for the habitual offender conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion by failing to instruct the jury as requested on the misdemeanor offense of illegal entry. A court must give the jury instructions concerning a lesser included misdemeanor offense where (1) there is a proper request, (2) there is an inherent relationship between the greater and lesser offense, (3) the requested misdemeanor is supported by a rational view of the evidence, (4) the defendant has adequate notice, and (5) no undue confusion or other injustice would result. *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996). If the charged offense and the lesser misdemeanor offense relate to the protection of the same societal interests and if the offenses are related in an evidentiary manner, such that proof of the misdemeanor is necessarily presented in proving the greater offense, the offenses will be deemed inherently related. *Id.* at 263. The failure to give an appropriate instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

In the present case, defendant requested a jury instruction on the misdemeanor crime of entry without the owner's permission, MCL 750.115; MSA 28.310. There is an inherent relationship between the greater offense of breaking and entering with the intent to commit a larceny and the lesser offense of entry without the owner's permission. It is impossible to break and enter with intent to commit larceny without having entered without permission. See *People v Welch*, 158 Mich App 87, 94; 404 NW2d 226 (1987).

Although the record failed to reveal the trial court's reasoning behind its refusal to instruct the jury on the misdemeanor offense, we believe that the requested misdemeanor instruction was not supported by a rational view of the evidence. There was ample evidence on the record to support the conviction of breaking and entering with the intent to commit a larceny. Because a reasonable jury could not have found that defendant failed to possess the requisite intent to commit a larceny at the time he broke into the bakery, the failure to instruct the jury on the misdemeanor offense was not an abuse of discretion.

Next, defendant argues that the trial court committed reversible error by allowing the prosecution to use evidence of his "poverty" to establish his motive to commit the crime charged. Because defendant failed to object to the admission of the evidence, appellate review is waived in the absence of manifest injustice. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Generally, evidence of poverty or unemployment is inadmissible to prove a motive for a larceny offense. *People v Jensen*, 162 Mich App 171, 179; 412 NW2d 681 (1987). However, evidence of temporary or unusual financial conditions that might lead a person to engage in an economic crime could be admissible depending on the circumstances of a particular case. *Id.*

In the present case, evidence of defendant's lack of cash provided a factual link necessary to further the jury's understanding of the events in this case. Because of defendant's inability to pay the cab fare, a chain of events ensued that led police to arrest defendant for the offense. Defendant was not able to flee the scene before officers began investigating. When the cab driver requested cab fare in advance, defendant informed him that he had no money. After leaving defendant, the cab driver confronted the police officer who was in the neighborhood investigating the break-in. The driver reported the incident with defendant and gave police a description of defendant that matched the description of the suspect and defendant's address. The cab driver also gave the police a description of the female passenger who accompanied defendant, which enabled the police to question her for more details. Evidence concerning defendant's attempts to sell meat was also offered for a proper purpose because it tended to prove that defendant was the individual responsible for breaking and entering a store which sold deli meats. Given the circumstances of this case, we do not believe manifest injustice occurred because of the admission of this evidence.

Defendant next contends that the prosecutor's misconduct mandates that he be granted a new trial. We disagree. Appellate review of improper prosecutorial comments is generally precluded absent an objection because it deprives the trial court of an opportunity to cure the error. *People v Messenger*, 221 Mich App 171, 179-180; 561 NW2d 463 (1997). An appellate court will reverse in the absence of an objection only if a curative instruction could not have eliminated the prejudicial effect of the remarks or where failure to review will result in manifest injustice. *Id.* Because defendant

objected on the record to two of the prosecutor's comments, the issue is preserved for our review as to those comments. In the instances that defendant failed to object, we will review the evidence only if manifest injustice will occur if we fail to consider the issue. The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Where defendant objected on the record, the trial court issued a curative jury instruction in one instance to eliminate any possible unfair prejudicial effect. In the other instance, the trial court overruled defendant's objection because the prosecutor was using his closing argument to interpret defense counsel's remarks and was not offering the statement as a direct quote from the defense counsel. Defendant failed to object at trial to the remaining of the challenged prosecutorial statements. We find that defendant was not denied a fair trial because of any of the challenged prosecutorial statements and no manifest injustice will occur because of our failure to more fully review defendant's claims of error.

Next, defendant argues that evidence in the instant case was insufficient to sustain his conviction, and the trial court abused its discretion by failing to grant his motion for a directed verdict. We disagree. When ruling on a motion for a directed verdict, the court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *Id.* When reviewing a trial court's ruling on a motion for directed verdict, this Court tests the validity of the motion by the same standard as the trial court. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992).

The elements of breaking and entering with the intent to commit larceny are: (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 or felony therein. *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993). Defendant challenges the sufficiency of the evidence with respect to the third element – that at the time of the breaking and entering he intended to commit a larceny or other felony. Intent can be inferred from all the facts and circumstances surrounding the offense. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence of intent is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Whether defendant intended to commit larceny when he broke and entered was a question of fact for the jury. While no presumption of intent to steal arises solely from proof of a breaking and entering, *People v Frost*, 148 Mich App 773, 777; 384 NW2d 790 (1985), the time of night, the furtiveness of the defendant, and the defendant's flight from the scene are all factors which the jury might consider in determining whether the defendant intended to steal. *Bowers, supra* at 298. To establish an intent to commit larceny, the jury may consider the nature, time and place of the defendant's acts before and during the breaking and entering. *Id.*

Approximately one-half hour after the break-in occurred, the victim positively identified defendant as the intruder. Defendant matched the description of the intruder given by the anonymous 911 caller. There was evidence that defendant attempted to sell meat to a cab driver fifteen minutes after the break-in at the bakery. The bakery sells a line of meat products and its deli display was closest to the store's front window. There was testimony by the cab driver and defendant's female companion that defendant wanted to go to Detroit to sell the meat shortly after midnight. A search of defendant's apartment revealed a jean jacket and a pair of shoes which were both wet. It had been raining intermittently throughout the evening and into the early morning hours. After testing at the Michigan State Police Crime Lab, trace evidence of glass was discovered on defendant's jean jacket and embedded in the sole of defendant's shoes. An expert witness testified that the glass fragments from defendant's jean jacket and the glass fragments discovered on defendant's shoes could have come from the same source, the shattered glass at the bakery. Based on all the facts and circumstances surrounding this crime, a reasonable jury could conclude that defendant broke into the bakery with the intent to commit a larceny. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a directed verdict.

Defendant next argues that he was denied a fair trial and fundamental due process based on the cumulative effect of the individual errors noted in his appeal. While a single error in a case may not provide the basis for reversal, the cumulative effect of a number of minor errors may require reversal. *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987). The test to determine whether reversal is required is not whether there are some irregularities, but whether defendant has had a fair trial. *Id.* Because we fail to find numerous individual errors in defendant's trial, the argument that the cumulative effect of such errors denied defendant a fair trial is without merit.

Finally, defendant asserts that he is entitled to resentencing because the trial court violated the principle of proportionality. In reviewing sentences imposed for habitual offenders, the reviewing court must determine whether there has been an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). A sentence must be proportionate to the seriousness of the crime and to the defendant's criminal record. *People v Phillip (On Rehearing)*, 203 Mich App 287, 290; 512 NW2d 62 (1994). The sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 660; 461 NW2d 1 (1990). However, the sentencing guidelines do not apply to the sentencing of habitual offenders. *Hansford, supra* at 323.

To facilitate appellate review, the trial court articulated on the record the reasons for the sentence imposed. Not including the instant offense, defendant has been convicted of seven prior felonies and three misdemeanors. At the time of the present offense, defendant was on parole status. Defendant had violated three probations and two paroles throughout his lifetime. Considering defendant's extensive criminal history, we find that the trial court did not abuse its discretion in imposing sentence.

Affirmed.

/s/ Roman S. Gibbs
/s/ William B. Murphy
/s/ Hilda R. Gage