

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW HERBERT OONK,

Defendant-Appellant.

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UNPUBLISHED

January 18, 2005

No. 250161

Allegan Circuit Court

LC No. 02-012886-FH

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of first-degree home invasion, MCL 750.110a(2), unlawful driving away of an automobile (UDAA), MCL 750.413, and operating a vehicle under the influence of intoxicating liquor (OUIL), MCL 257.625(1). The trial court sentenced defendant to concurrent terms of 7 to 40 years in prison for the home invasion conviction, 46 to 120 months for the UDAA conviction, and ninety-three days for the OUIL conviction. We affirm.

The charges in the instant case arose from allegations that defendant took a van from the garage attached to the complainant's residence and drove it to the home of his acquaintance, Bernie Bachos. The complainant testified that on November 28, 2002, he went to bed sometime between 10:30 and 11:30 p.m.. Before retiring for the night, the complainant checked the premises and noted that his 2001 Chevrolet van was parked in the garage attached to his house. He left the garage door open and the keys inside the van. When the complainant awoke the next morning, he noticed that the van was missing. He contacted both the police and OnStar, the makers of an anti-theft tracking device installed in the van.

Between approximately 2:30 a.m. and 3:00 a.m. on November 29, 2002, Bernie Bachos, an acquaintance of defendant's, noticed a van in his driveway with its lights on and the engine running. Because he did not recognize the van, Bachos went outside to determine why it was in his driveway. Bachos saw defendant bent over at the waist sleeping on the back seat of the van. Bachos attempted to open the van's doors, but they were locked. Defendant continued to sleep even after Bachos yelled and banged on the doors and windows of the van. Bachos decided to let defendant continue to sleep in the van until morning. Later that morning, at around 7:00 a.m., the police arrived at Bachos's home. Defendant was asleep at the wheel of the van. Defendant denied to the police that he had been the driver of the van and asserted that another individual had been the driver.

Defendant first contends that the trial court erred in denying his motion for a directed verdict on the first-degree home invasion charge. When ruling on a motion for a directed verdict:

a trial court must consider the evidence presented by the prosecution to the time the motion is made and in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. [*People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003).]

Circumstantial evidence and the reasonable inferences arising from it may constitute sufficient evidence of the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

In order to establish first-degree home invasion, the prosecution must establish that the accused either (1) broke and entered a dwelling or entered a dwelling without permission with the intent to commit a felony, larceny, or assault or (2) broke and entered a dwelling or entered a dwelling without permission and while entering, present in, or leaving the dwelling, committed a felony, larceny, or assault. MCL 750.110a(2). In addition, the prosecution must prove either that the accused was armed with a dangerous weapon or that another person was lawfully present in the dwelling at the time of the offense. MCL 750.110a(2)(a)-(b). The underlying offense of larceny consists of “the taking and carrying away of the property of another, done with felonious intent and without the owner’s consent.” *People v Malach*, 202 Mich App 266, 270; 507 NW2d 834 (1993).

Defendant argues that breaking is an essential element of first-degree home invasion and that absent proof of this element, defendant’s guilt cannot be established. We disagree. MCL 750.110a(2) requires that the prosecution prove either a breaking and entering *or* that a person enter a dwelling without permission. MCL 750.110a(2). In the instant case, the prosecution presented evidence establishing that someone entered the complainant’s home without the complainant’s permission and committed larceny by removing the complainant’s van. Consequently, a rational jury could conclude from the circumstantial evidence presented at trial that a home invasion occurred.

Defendant next argues that the prosecution failed to present evidence identifying him as the person who committed the larceny that was the underlying offense to the home invasion offense. Defendant is correct that a conviction for this crime requires proof of more than mere possession of recently stolen property. See *People v Hutton*, 50 Mich App 351, 357-358; 213 NW2d 320 (1973). “The unexplained possession of property recently stolen is *prima facie* evidence of larceny[.]” *Id.* at 357, quoting *People v McDonald*, 163 Mich 552, 555; 128 NW 737 (1910). However, defendant’s conviction can only be sustained if there are also “other facts and circumstances indicating guilt.” *Id.*, quoting *McDonald, supra* at 556.

The defendant in *Hutton* was convicted of breaking and entering a store with intent to commit larceny. *Id.* at 354. Police officers found the defendant and another man in possession of several pieces of electronic equipment missing from a repair shop that had been burglarized. *Id.* at 355. When stopped, Hutton’s codefendant initially stated that he was the rightful owner of the equipment. *Id.* at 358-359. This Court held that this apparently fabricated story regarding

the codefendant's interest in the equipment "could properly be considered by the jury as circumstantial evidence that defendants committed the breaking and entering." *Id.* at 359. In addition, this Court also held that the close time proximity of the defendants' possession of the stolen goods to the crime was circumstantial evidence that the defendants committed the crime when the defendants possessed the stolen goods approximately five hours after the repair shop closed. *Id.* This Court held that although it was conceivable that the defendants acquired the goods from some third party, "the close time proximity involved could reasonably support an inference by the jury that defendants committed the breaking and entering." *Id.*

In the instant case, the facts and circumstances similarly provide evidence from which the jury could reasonably infer that defendant was the individual who committed the offense. Just as the defendants in *Hutton* were found in possession of property taken during a break-in five hours earlier, defendant was also found in possession of the complainant's van between 3 and 4½ hours after the van was taken from the complainant's garage. Furthermore, like the defendants in *Hutton*, defendant appears to have fabricated the story he initially told the police. When he was arrested, defendant told police that a friend who was giving him a ride home had been driving the van. He further stated that when he and the friend arrived at the Bachos residence, his friend missed the driveway, got the van caught on a tree stump, and decided to walk to Holland to get a wrecker. However, defendant later told a detective that the driver went to get a friend who lived down the street to help him free the van. Bachos's testimony contradicted defendant's statement to the police. According to Bachos, when he first noticed the van, it was parked in his driveway and was not stuck on the stump. Bachos further stated that the van's lights were on, the engine was running, and the doors were locked and that defendant, who was sleeping on the van's back seat, was the only person in or near the van. Defendant also gave conflicting details concerning the driver's name and where he lived. He told the arresting officer that the driver's first name was Tim or Jim, that his last name was either Jacobs or Jacobsy, and that he lived in Holland, Pullman or Fennville. However, defendant told the detective that the driver's name was Jacoby. The police searched the Michigan Secretary of State's records for the variations of the driver's name as provided by defendant, but were unable to find a match.

After reviewing the evidence, we conclude that, in addition to defendant's possession of the recently stolen van, there were sufficient "other facts of circumstances indicating guilt" to support defendant's conviction of first-degree home invasion. *Id.* at 357, quoting *McDonald*, *supra* at 556. The relatively close proximity of defendant's possession of the van to the time the van was stolen coupled with the fact that defendant fabricated a story to the police about a different driver supplies the facts and circumstances necessary to sustain defendant's conviction. See *id.* at 358-360. The trial court did not err in denying defendant's motion for directed verdict.

Defendant also asserts that the prosecution failed to present sufficient evidence to sustain his UDAA conviction. In order to establish UDAA, the prosecution must establish that the accused willfully and without authority took possession of and drove away with a motor vehicle belonging to another. MCL 750.413. Defendant claims that there was insufficient evidence that he was the one who drove the van away. As we explained above, sufficient circumstantial evidence existed for a rational jury to conclude that defendant was the person who took the van from the complainant's garage. Thus, a rational jury could find defendant guilty of UDAA beyond a reasonable doubt.

Defendant next raises several claims of prosecutorial misconduct. When reviewing claims of prosecutorial misconduct, this Court examines the pertinent portion of the lower court record and evaluates the alleged misconduct in context to determine “whether the defendant was denied a fair and impartial trial.” *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

Defendant first contends that it was improper for the prosecutor to ask the arresting officer if he had contacted defense counsel regarding the person defendant claimed had been driving the van because the prosecutor admitted that his intent in asking the question was to ascertain whether defense counsel provided information to the police regarding the identity of the driver of the van. Defense counsel objected as soon as the question was asked, and the trial court excused the jury and ruled that the prosecutor could not ask the arresting officer if he thought defense counsel had done everything possible to help the investigation. Because defendant objected and the trial court sustained the objection, the arresting officer did not answer the prosecutor’s question. Even if the officer had answered the question, however, the trial court repeatedly instructed the jury that defendant did not have to prove his innocence or produce any evidence. Therefore, the prosecutor’s question did not deny defendant a fair trial.

Defendant next argues that, during opening and closing arguments, the prosecutor improperly shifted the burden of proof and violated defendant’s right to remain silent by arguing that defendant failed to provide any further information about the identity of the driver after telling the police that someone else had been driving the van. We disagree. Prosecutors are “free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). In the instant case, both the arresting officer and a detective testified that defendant told them that another person had been driving the van and that he was merely getting a ride from a friend. Thus, the prosecutor’s comments regarding the falsity of defendant’s claims that another person, not him, was driving the van were fair and based on the evidence. We therefore reject defendant’s claim that the prosecutor’s comments were improper.

We also reject defendant’s claims that the prosecutor’s comments violated defendant’s rights under the Fifth Amendment. US Const, Am V; Const 1963, art 1, § 15. The protections of the Fifth Amendment cannot be used to limit “the area of legitimate comment by the prosecutor on the weaknesses in the defense case.” *People v Fields*, 450 Mich 94, 109; 538 NW2d 356 (1995), quoting *United States v Hastings*, 461 US 499, 515; 103 S Ct 1974; 76 L Ed 2d 96 (1983) (Stevens, J., concurring). Because this right protects only against “compelled self-incrimination, fair comment does not violate the Fifth Amendment, even where the defendant does not take the stand.” *Fields, supra* at 110. Rather, a prosecutor may comment on a defendant’s failure to call or ask particular questions of a witness as long as such comments do not impermissibly refer to the defendant’s silence. *Id.* at 111.

After being informed of and waiving his right to remain silent, defendant told the police that he was an innocent passenger in the van and that another person had been driving the van. Under *Fields*, the prosecution did not violate defendant’s rights by focusing on his failure to produce the driver at trial. The prosecutor’s comments, which did not impermissibly refer to defendant’s silence, were a fair response to defendant’s argument that another individual was driving the van. See *id.* at 110-111.

Furthermore, we reject defendant's contention that the prosecutor's comments improperly shifted the burden of proof to defendant. In *Fields*, the defendant admitted at the time of his arrest that he shot and wounded his wife, but at trial he testified that a third person, his former lover, was the shooter. *Id.* at 97-98. The prosecutor cross-examined the defendant concerning his efforts to locate this person and argued during closing argument that she did not exist. *Id.* at 99-103. Our Supreme Court rejected the defendant's argument that the prosecutor's comments and conduct impermissibly shifted the burden of proof, stating:

[W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*Id.* at 115.]

Like the defendant in *Fields*, defendant's theory was that a person other than himself committed the charged crimes. We reject defendant's contention that the prosecutor's comment regarding defendant's failure to produce the alleged driver and the prosecutor's comments regarding his belief that another driver did not exist shifted the burden of proof. It was not improper for the prosecutor to comment on the validity of defendant's claim that another person drove the van. See *id.*

In sum, none of the prosecutor's conduct complained of by defendant constituted prosecutorial misconduct. Consequently, defendant was not denied a fair and impartial trial.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Richard Allen Griffin  
/s/ Stephen L. Borrello