

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ROLAND JEWELL BARLOW,

Defendant-Appellant.

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UNPUBLISHED

April 13, 2006

No. 258924

Wayne Circuit Court

LC No. 04-006167-01

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of attempted second-degree home invasion, MCL 750.110a(3); MCL 750.92. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to thirty months to twenty years' imprisonment. We affirm.

Defendant argues that his conviction must be reversed because the prosecution failed to present sufficient evidence to establish that he intended to commit a larceny or that he performed an overt act going beyond mere preparation. We disagree.

When reviewing a claim of insufficiency of the evidence, this Court does so de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). The Court reviews the evidence "in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003), citing *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In doing so, "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of the crime." *Id.*

"A person who breaks and enters a dwelling with the intent to commit a felony or a larceny in the dwelling or a person who enters a dwelling without permission with intent to commit a felony or a larceny in the dwelling is guilty of home invasion in the second degree." *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004). To sustain a conviction for this offense the prosecution must show that defendant: (1) entered a dwelling, either by a breaking or without permission, (2) with the intent to commit a felony or a larceny in the dwelling. *Nutt, supra*, p 593. An attempt consists of (1) an attempt to commit an offense prohibited by law, and (2) any act toward the commission of the intended offense. *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). In order to prove an attempt, the prosecution must establish that

defendant had the specific intent to commit the crime of second-degree home invasion. *People v Strand*, 213 Mich App 100, 103; 539 NW2d 739 (1995). A defendant's intent can be inferred from the circumstances and facts surrounding the incident. *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995).

Viewed in the light most favorable to the prosecution, the evidence sufficiently established that defendant attempted to break into the home of Eric Prosser with the intent to commit larceny. Justin Hazemy, Prosser's neighbor, testified that he observed defendant in Prosser's backyard fidgeting with Prosser's door knob and acting as if he were knocking on the door. After Hazemy lost sight of defendant he heard a little bang and dogs barking. When Hazemy looked outside he then noticed defendant walking away from Prosser's home. Prosser testified that he had not given defendant permission to be in his backyard or his home, and that when he returned home from work, he noticed that his window had been raised slightly and the screen was pushed in as if someone had tried to gain access to his back room. Several witnesses also testified that the fireplace located in Prosser's backyard was not in its normal place but had been moved closer to the window. When defendant was arrested, he had a pair of gloves and a multi purpose tool in his possession. There was testimony that defendant was also observed knocking on the door, and walking to and from the rear, of another house in the neighborhood.

While intent to commit larceny cannot be presumed solely from proof of the breaking and entering, intent may reasonably be inferred from the nature, time and place of defendant's acts before and during the breaking and entering. *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). Given the circumstances surrounding the attempted breaking and entering of Prosser's home, it is reasonable to infer that defendant intended to commit a larceny therein and that his actions went beyond mere preparation. Defendant approached several homes within the housing community in a suspicious manner and he was carrying a pair of gloves and tool set on his person. Defendant did not approach homes where the homeowners were noticeably home but, rather, homes that appeared empty and without cars in the driveway. When the evidence is viewed as a whole, the prosecution sufficiently established the necessary elements to sustain defendant's attempted second-degree home invasion conviction, i.e., that defendant attempted to enter Prosser's dwelling, by a breaking and/or without permission, with the intent to commit a felony or a larceny in the dwelling.

Defendant further argues that the prosecution's improper statement to the jury during closing argument violated his constitutional right not to testify. Defendant argues that the trial court abused its discretion in denying his motion for mistrial based on prosecutorial misconduct. We disagree. "The grant or denial of a motion for a mistrial is within the sound discretion of the trial court, and absent a showing of prejudice, reversal is not warranted. The trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice." *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). A mere difference in judicial opinion does not establish an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). If the reasons given by the trial court are inadequate or not legally recognized, then the trial court has abused its discretion. *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997).

The trial court did not abuse its discretion in denying defendant's motion for a mistrial. Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of the defendant's argument." *People*

*v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). This Court has found that a prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but is free to argue the evidence and any reasonable inferences that may arise from the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). This Court has also found that the “propriety of a prosecutor’s remarks depends on all the facts of the case.” *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Although defendant argues that the prosecutor’s statement regarding “uncontroverted” evidence improperly focused the jury’s attention on defendant’s failure to testify, review of the record does not support defendant’s claim. A prosecutor’s statement that certain inculpatory evidence is undisputed does not constitute a comment regarding the defendant’s failure to testify. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996); MCL 600.2159. Review of the record shows that the prosecutor’s statement focused the attention of the jury on the elements of the crimes charged. The reference to “uncontroverted” evidence did not improperly focus the attention of the jury on defendant’s failure to testify, but instead, highlighted to the jury that the evidence presented by the prosecution proved the elements of the crimes charged.

Moreover, during jury instructions, the trial court properly instructed the jury regarding the presumption of innocence and burden of proof. Specifically, the court instructed the jury that “every defendant has the absolute right not to testify” and that defendant’s failure to testify must not affect its verdict in any way. The court further instructed the jury that the lawyers’ statements and arguments were not evidence and that the jury should “only accept things the lawyers say that are supported by the evidence.” Thus, the trial court’s instructions were sufficient to eliminate any possible prejudice that may have stemmed from the prosecutor’s comment. The trial court did not abuse its discretion in denying defendant’s motion for a mistrial.

Affirmed.

/s/ Helene N. White  
/s/ William C. Whitbeck  
/s/ Alton T. Davis