

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARWIN PATRICK BOAK,

Defendant-Appellant.

UNPUBLISHED

October 9, 2007

No. 270728

Ingham Circuit Court

LC No. 05-001002-FH

Before: Jansen, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering with the intent to commit larceny, MCL 750.110, and was sentenced to two years' probation. He appeals as of right. We affirm.

I

The complainant testified that he lives in a home directly behind defendant's home in Lansing. The complainant's detached garage was closed on the night of the instant offense. At about 4:00 a.m., the complainant was awakened by a sound in his driveway. When he stepped out the door, the complainant saw defendant in the driveway. Defendant was attempting to remove several items of the complainant's personal property, all of which had been kept in the garage. The complainant confronted defendant, who paused temporarily. However, defendant then fled. After the complainant went back into his house, he told his wife to call the police because he had caught defendant stealing their items.

The police arrived at the complainant's home and the complainant identified defendant as the perpetrator. When police officers subsequently knocked on defendant's door, defendant slammed his hands on the inside of the door and looked through a small window on the door. Defendant then opened the door wearing underwear or shorts and was "quite agitated" and "hyper." Defendant denied the officers entry, indicating that his mother was asleep. When the officers asked defendant where he had been, he became angry. Defendant then went back into the house and slammed the door. Defendant ultimately returned and was arrested.

The defense denied any wrongdoing. Defendant's wife testified that she was "sure" that defendant did not leave the house on the night of the incident. Defendant's mother testified that she sleeps on the first floor, can hear when people move in the house, and did not hear defendant

leave the house on the night of the incident. In contrast, however, an officer testified that on the night of the incident, defendant's wife had said that it was possible that defendant left the house while she was sleeping.

II

Defendant argues that there was insufficient evidence to establish his identity as the perpetrator and to show that he "broke and entered the garage." We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, we view the evidence in a light most favorable to the prosecution 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). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime, including the identity of the perpetrator. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996); *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). We will not interfere with the trier of fact's role in determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

"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."¹ *People v Cornell*, 466 Mich 335, 360-361; 646 NW2d 127 (2002). To constitute "a breaking, some force, no matter how slight, must be used to gain entry," *People v Kedo*, 108 Mich App 310, 318; 310 NW2d 224 (1981), and the force used to gain entry must be unauthorized, *People v Rider*, 411 Mich 496, 498; 307 NW2d 690 (1981); see also *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998).

Identity is an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of the charged offense beyond a reasonable doubt. *Kern, supra* at 409. Positive identification by a witness may be sufficient to support a conviction for a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

Viewed in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of breaking and entering with the intent to commit larceny were proven beyond a reasonable doubt. Defendant asserts that there was insufficient evidence that he was the actual perpetrator. But when the evidence is viewed in a light most favorable to the

¹ "Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996).

prosecution, defendant's claim fails because it requires this Court to ignore the testimony of the complainant, who was unwavering in his identification of defendant. The complainant testified that when he went outside, he saw defendant in possession of his items. At the complainant's direction, defendant briefly "froze" and was eight to ten feet from the complainant. Although it was night, the complainant testified that he could see defendant's face because the area was illuminated by two streetlights and the moonlight. The complainant indicated that he could easily recognize defendant, explaining that they had been neighbors for more than three years, that he saw defendant outside regularly, and that he had spoken to defendant on three or four occasions "at length for more than 20 minutes to a half hour." The complainant further indicated that when defendant spoke, he recognized his voice. The complainant noted that when defendant fled, he ran "right past [him]" and "right under the streetlight." Also, immediately after the incident, the complainant told his wife and the police that defendant was the perpetrator. The complainant provided a detailed description of defendant, including a description of his hair and clothing. The complainant testified that he "knew exactly who [defendant] was," and had "no doubt in his mind that it was the Defendant in [his] driveway."

From this evidence, the jury could reasonably have concluded that defendant was the perpetrator. It is well established that absent compelling circumstances, which are not present here, the credibility of identification testimony is for the jury to determine. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); see also *Davis*, *supra* at 700.

Although no one saw defendant open the garage door or enter the garage, there was also sufficient circumstantial evidence that defendant broke into and entered the garage. The complainant and his wife testified that the garage doors were closed before the incident. After the incident, the side door was partially opened, a garbage can in front of the side door had been moved, and items that had been behind that door inside the garage had also been moved. The complainant explained that all of the items seen in defendant's possession had previously been stored in the garage. Defendant did not have authority or permission to enter the garage.

From this evidence, the jury could reasonably have inferred that defendant broke into and entered the complainant's garage. Although defendant argues that "there are other rational possibilities," it was solely for the jury to determine which explanation was most credible. *Nowack*, *supra* at 400. The evidence was sufficient to sustain defendant's conviction.

III

We reject defendant's claim that the trial court erred by granting the prosecutor's motion to excuse a prospective juror for cause. We acknowledge that a juror is presumed qualified. *People v Collins*, 166 Mich 4, 9; 131 NW 78 (1911). But a prospective juror may be removed for cause if the challenging party shows that the juror has a bias for or against a party, a state of mind that would prevent the juror from rendering a just verdict, a preconceived opinion on what the outcome should be, or an opinion that would otherwise improperly influence the juror's verdict. MCR 6.411(D); MCR 2.511(D)(2), (3), and (4). "Although, as a general matter, the determination whether to excuse a prospective juror for cause is within the trial court's discretion, once a party shows that a prospective juror falls within the parameters of one of the grounds enumerated in MCR 2.511(D), the trial court is without discretion to retain that juror, who must be excused for cause." *People v Eccles*, 260 Mich App 379, 383; 677 NW2d 76 (2004).

During voir dire, the prosecutor indicated to the jury that only one witness would identify defendant as the perpetrator and asked whether that would be sufficient evidence. The prospective juror at issue here stated that he had “a problem with only having one witness.” The prosecutor asked, “If you believe the witness, though, beyond a reasonable doubt, do you feel that you can find somebody guilty?” The prospective juror responded that he could not find defendant guilty based on the testimony of only one eyewitness. The prospective juror further stated that he “need[ed] two or three witnesses” in order to convict a defendant. In turn, the prosecutor asked, “If only one witness was presented today, you’re at this point telling me, ‘I can’t decide this case?’” The prospective juror responded, “Yes . . . I could not say he was guilty.”

The prosecutor moved to dismiss the juror for cause, arguing that because the juror could not decide the case without more than one eyewitness and because there was only one eyewitness in this case, the juror was biased against the prosecution. In granting the prosecutor’s motion, the trial court explained that the prospective juror’s position that “without more than one witness, then there is no proof beyond a reasonable doubt . . . is a bias against the prosecution because . . . sometimes there is just one witness.”

After the prosecutor indicated that there was only one eyewitness, the challenged juror made an unequivocal declaration that he could not find defendant guilty if only one eyewitness were presented. The juror further stated that to find defendant guilty, he required two or three witnesses. Under these circumstances, it was not an abuse of discretion for the trial court to conclude that the juror had a bias against one party, had formed an opinion on what the outcome should be, and had opinions that would improperly influence his verdict. See MCR 2.511(D)(2), (3), and (4). Consequently, the trial court did not err by excusing the prospective juror for cause. *Eccles, supra* at 383.

IV

Defendant lastly argues that the trial court abused its discretion by refusing to reopen the proofs to allow the introduction of a photograph of defendant’s front door. We disagree.

On the first day of trial, the two responding police officers testified that when they knocked on defendant’s front door, defendant slammed his hands against the inside of the door and looked through a small window “that was high on the door” before opening it. One officer indicated that the window was a “little square window,” that defendant was about 5’9” tall, and that defendant’s face appeared in the window. The other officer explained that because of the height of the window, a person “may have to stand on his tip-toes.” Defendant’s wife testified that the window on the door was 5’8” to 5’10” in height, was too high for anyone to look through without standing on something, and that the shape of the window was a “half moon” with “little triangles around it.” The proofs were closed on the first day of trial.

On the second day of trial, defendant moved to reopen the proofs to introduce a photograph of his front door to “assist the triers of fact in establishing exactly what the door looks like.” The prosecutor objected, arguing that the proofs were closed, that “what the door looks like” was irrelevant to the charge against defendant, that it was unclear when the door in the photograph was installed, and that the prosecution would have to recall a witness if the proofs were reopened. In denying defendant’s motion, the trial court stated:

[T]his is the second trial in this matter,^[2] and I don't really believe whether or not there is some discrepancy as to the front door of [defendant's] house is relevant. I mean, it's just—it's really not an issue, I don't believe, as far as whether or not the crime was committed at the neighbor—at the house [where] it's alleged to have been committed.

We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). We also review a trial court's decision whether to permit the reopening of proofs for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 419; 633 NW2d 376 (2001). Relevant considerations for reopening the proofs are whether the moving party would take any undue advantage and whether the nonmoving party can show surprise or prejudice. *Id.* at 420.

Although the prosecutor did not claim surprise or prejudice, these are not exclusive considerations governing this issue. Rather, the trial court retained the discretion to determine the admissibility of the proposed testimony as a threshold issue. See *id.* We agree with the trial court that the proffered evidence was not relevant.³ Defendant sought to demonstrate that the police witnesses were not credible because of discrepancies in their description of a small window in his front door. Defendant's defense was that he did not commit the charged crime. The crux of the case was whether the complainant's identification of defendant as the perpetrator was credible. Whether there was a discrepancy in the police witnesses' description of the shape or height of a small window in defendant's front door did not have any tendency to make it more or less likely that the complainant's identification of defendant was not credible and that defendant did not commit the crime. In short, defendant has not demonstrated that the photograph of his front door was relevant to whether he broke into the complainant's garage. MRE 401. Moreover, the inference that defendant was apparently attempting to support with the photograph was too tenuous, may have confused the issues, and would have been a waste of time. MRE 403. Consequently, the trial court did not abuse its discretion in denying defendant's motion to admit the photograph and to reopen the proofs.

Affirmed.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

² Defendant had been tried once previously, but the court declared a mistrial after the jury was unable to reach a verdict.

³ Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. Even if relevant, evidence may be excluded if its probative value is substantially outweighed by, inter alia, confusion of the issues, undue prejudice, or waste of time. MRE 403.