

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT CLAUDE FISHER,

Defendant-Appellant.

UNPUBLISHED

January 29, 2008

No. 274580

Oakland Circuit Court

LC No. 2006-209695-FH

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of breaking and entering with intent to commit larceny, MCL 750.110. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to 30 months to 20 years' imprisonment. Because sufficient evidence existed to support defendant's conviction, defendant was not denied the effective assistance of counsel at trial or during sentencing, and the trial court properly sentenced defendant, we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that there was insufficient evidence that he broke into the Baker College building to support a conviction for breaking and entering with intent to commit larceny. This Court reviews a claim of insufficient evidence de novo. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). This Court must review the evidence 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 proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

There were two theories at trial to explain how defendant entered Baker College on Sunday, June 18, 2006. There was no dispute that Baker College was closed, locked, and empty on that day. Baker College's director of security testified that he found a broken window in an upper storage area that had been broken from the outside. Although the security director did not know when the window had been broken, he had inspected the room two weeks to one month before the thefts and it was not broken. The security director also testified that there was new construction next to the building that would have given someone access to the roof and the broken window. A surveillance tape showed defendant coming out of a storage room where the broken window led. This evidence, viewed in a light most favorable to the prosecution, was sufficient to conclude that defendant broke into the building through the broken window.

Defendant's own theory that he entered through an unlocked door also supported a finding of the breaking element of the crime. "[A]ny amount of force used to open a door or window to enter the building, no matter how slight, is sufficient to constitute a breaking." *People v Wise*, 134 Mich App 82, 88; 351 NW2d 255 (1984). Because the evidence established that defendant was not lawfully permitted to enter Baker College on the day in question, his opening of the door constituted sufficient force to satisfy the breaking element of this crime. *People v Clark*, 88 Mich App 88, 90-91; 276 NW2d 527 (1979).

Next, defendant argues that he was denied a fair trial and the effective assistance of counsel by his trial counsel's failure to request that the jury be instructed on the offense of entering without breaking with the intent to commit a larceny and larceny in a building. The offense of entering without breaking with the intent to commit a larceny is a necessarily included lesser offense of breaking and entering with the intent to commit a larceny. *People v Haner*, 86 Mich App 280, 283; 272 NW2d 627 (1978). A requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002) overruled in part on other grounds by *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003).

Again, there were two theories presented at trial explaining how defendant entered the building and neither of the theories supported entering without breaking. Even defendant's opening of the closed, but unlocked door, or the breaking of a window required sufficient force to satisfy the breaking element of this crime. *Clark, supra* at 91. Accordingly, a rational view of the evidence and defendant's own theory of the case did not support an instruction for entering without breaking with intent to commit larceny. *Cornell, supra* at 357. Thus, defendant failed to show that his counsel's performance fell below an objective standard of reasonableness by his failure to request the entering without breaking instruction. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant also argues that he was denied the effective assistance of counsel because trial counsel failed to request a jury instruction for larceny in a building. Larceny in a building is a cognate lesser included offense of breaking and entering with intent to commit a larceny. *People v Brager*, 406 Mich 1004; 280 NW2d 826 (1979); *People v Goliday*, 153 Mich App 29, 35; 394 NW2d 476 (1986). Because an instruction on a cognate lesser included offense is not permissible, *People v Smith*, 478 Mich 64, 73; 731 NW2d 411 (2007); *People v Alter*, 255 Mich App 194, 199-201; 659 NW2d 667 (2003), trial counsel was not ineffective for not requesting a timely instruction on larceny in a building. Counsel is not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant argues that his sentence as a third habitual offender was invalid because one of the offenses the sentence was based on was a misdemeanor at the time it was committed. This Court reviews a trial court's factual findings at sentencing for clear error. *Mack, supra* at 125. The trial court's construction or application of the habitual offender statute presents a question of law that is reviewed de novo. *Id.*

In 1995, defendant was convicted of attempted resisting and obstructing a police officer, MCL 750.479; MCL 750.92. At that time, resisting and obstructing a police officer, MCL 750.479, was a two-year misdemeanor. For purposes of the habitual offender statute, this Court

has held that two-year misdemeanors are deemed felonies. *People v Smith*, 423 Mich 427, 440; 378 NW2d 384 (1985). Accordingly, resisting and obstructing a police officer as a two-year misdemeanor can be considered a felony for purposes of the habitual offender statute. *Id.* Moreover, MCL 769.12(1) does not require that prior convictions for “attempts to commit felonies” must constitute felonies. It only requires that the underlying crime constitute a felony. Thus, the trial court properly sentenced defendant pursuant to MCL 769.11, because his attempted resisting and obstructing an officer conviction constituted an attempted felony to support a habitual offender sentence. For this reason, defendant’s argument that trial counsel’s failure to challenge his sentencing as a third habitual offender constituted ineffective assistance of counsel during sentencing also fails. *Carbin, supra* at 599-600; *Mack, supra* at 130.

Affirmed.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto