

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD LEE GREEN,

Defendant-Appellant.

---

UNPUBLISHED

April 1, 2008

No. 273329

St. Clair Circuit Court

LC No. 06-001258-FH

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of second-degree home invasion, MCL 750.110a(3), and resisting and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced by the trial court as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 12 to 25 years for home invasion, and 2 to 15 years for resisting arrest, to be served consecutively to the sentence imposed for the crime for which he was on parole, MCL 768.7a. We affirm.

Around 9:00 a.m. on April 24, 2006, the victim's neighbor, Mr. O'Conner, saw a car drive up their dead-end road, stop in front of the victim's house, back-up, and pull into the victim's driveway. O'Conner saw a man, whom he identified at trial as defendant, get out of the car, approach the victim's house, knock on the door, look in the window, knock several more times, and then kick-in the door and enter the home. O'Conner's wife called 9-1-1.

A state police trooper, officer Libstaff, arrived promptly. Defendant fled. Libstaff yelled for defendant to stop approximately six to eight times, but defendant continued to flee. Libstaff gave chase, and lost sight of defendant when he went around the corner of a barn. Because he did not see defendant outside of the barn and there was only one door to enter and exit the barn, Libstaff assumed defendant was hiding in the barn. About 20 minutes later, a canine unit arrived and conducted a building search. During the search, defendant emerged from the hay and surrendered. A search of the victim's home found drawers open and items therefrom on the floor in several rooms. The victim had not given anyone permission to enter his house, and did not know defendant. To the victim's knowledge, nothing was taken from the home.

Defendant first claims that the prosecutor improperly commented on his failure to give a reasonable explanation for his presence at the residence in issue. We disagree. Because defendant did not object to the introduction of the testimony, or to the prosecution's closing

arguments, we review this unpreserved constitutional issue for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

During Libstaff's testimony, the state trooper in charge of the investigation, the following exchange took place:

*Q.* Prior to interviewing Mr. Green, did you read to him what are commonly referred to as Miranda Warnings?

*A.* Yes, I did.

*Q.* After having read those warnings . . . did Mr. Green agree to speak with you?

*A.* Very briefly.

*Q.* What was it that Mr. Green said to you during the interview?

*A.* Mr. Green stated to me that he does not know anything about what happened today.

*Q.* Did he have anything other than, did you, did you have any other duties with respect to this case?

*A.* No sir.

Contrary to defendant's assertion, this testimony does not infringe on his right to remain silent. He made the statement after being advised of his *Miranda*<sup>1</sup> rights. By not remaining silent and choosing to speak, defendant did not invoke his right to remain silent. *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999); *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991). Thus, there was no infringement on defendant's right to remain silent.

Moreover, defense counsel elicited similar testimony on cross-examination:

*Q.* Back at the jail, you gave the suspect approximately at 11:20 a.m. his so-called Miranda Warnings; is that correct?

*A.* Correct.

*Q.* And he essentially elected not to talk to you after those warnings, isn't that correct?

---

<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

A. Correct. He advised me that he knows nothing about this and that was the end of his conversation.

A defendant may not introduce and use evidence, and then argue on appeal the evidence prejudiced him and resulted in an unfair trial. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

We conclude from the record that the prosecutor's reference to this testimony was also proper. During his closing argument, the prosecutor stated:

And then last, but not least, but very important, he made a statement and his statement was or wasn't that he was there for some other reason. His statement was he don't know nothing about what happened. And we know from the evidence, from the testimony, from the eyewitnesses that he knew, and the evidence because of the, you know, as well.

"The prosecution is free to relate to the jury the facts adduced at trial and all reasonable inferences arising therefrom." *People v Rice (On Remand)*, 235 Mich App 429, 437; 597 NW2d 843 (1999). The testimony having been properly admitted, the prosecution was free to draw inferences based on that statement to the jury. *Id.* Additionally, a prosecutor may properly question and comment on a defendant's failure to assert a defense to the police when a defendant has chosen not to remain silent. *Davis, supra* at 34-36. The prosecution argued that defendant failed to offer a defense such as being at the home for some other reason. Under *Davis*, this was proper. *Id.* Accordingly, defendant has not shown plain error. *Carines, supra* at 763.

Defendant next argues that the prosecution failed to prove he had the intent to commit larceny. We review de novo whether there is sufficient evidence to support a conviction. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The evidence is viewed in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

The trier of fact determines what inferences should be drawn from the evidence, and the weight those inferences are given. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Although "[a] presumption of an intent to steal does not arise solely from the proof of breaking and entering," *People v Palmer*, 42 Mich App 549, 551-552; 202 NW2d 536 (1972) (citation and internal quotation marks omitted), the felonious intent for a breaking and entering crime may be established by inferences from circumstantial evidence, *People v Riemersma*, 104 Mich App 773, 780; 306 NW2d 340 (1981), including the nature, time, and place of the defendant's acts, *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). Because it is difficult to prove a defendant's state of mind, minimal circumstantial evidence is sufficient. *People v Fetterley*, 229 Mich App 511, 518; 583 NW2d 199 (1998).

Defendant argues that had he intended to commit larceny, there was sufficient time for him to have done so, and the fact that he had no stolen property on his person proved that larceny was not his intent. We disagree. The evidence established that defendant looked into the victim's front window, knocked on the front door, and receiving no answer, kicked in the door. Defendant had gone through many drawers and cupboards in the victim's bedroom, kitchen, and

living area, including containers inside kitchen cabinets. Items in the drawers were tossed onto the floor and papers had been gone through. Credit cards and a checkbook were found on the floor. It was reasonable for a jury to infer that defendant was looking for something in particular, like cash, but that he had not yet located it. “The fact that defendant was interrupted before he was able to steal does not mean that there was insufficient evidence of breaking and entering with intent to steal.” *Bowers, supra* at 298. Viewing the evidence in the light most favorable to the prosecution, the jury could reasonably find that defendant entered the victim’s home with the intent commit larceny. *Robinson, supra* at 5.<sup>2</sup>

Defendant’s claim regarding the trial court’s jury instruction on the lesser offense of breaking and entering without permission is equally without merit. Because defendant did not object to the jury instruction, the issue is unpreserved, and “this Court will grant relief only when necessary to avoid manifest injustice.” *People v Sabin (On Second Remand)*, 242 Mich App 656, 657-658; 620 NW2d 19 (2000). Not only is defendant’s claim precluded by the fact that the instruction was requested by his own trial counsel, *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995), but breaking and entering without permission has been explicitly permitted as a lesser included offense of breaking and entering with intent to commit larceny, *People v Cornell*, 466 Mich 335, 360-361; 646 NW2d 127 (2002).

Defendant’s next claim of error is that the trial court erred in using certain felony convictions to enhance his sentence because the convictions were allegedly used to enhance a sentence in 1993 by an Alabama court, making the cited convictions ineligible for use here. Reviewing this unpreserved issue for plain error, *Carines, supra* at 764, we find no error.

Defendant relies on MCL 769.12(3), which provides that “[a] conviction shall not be used to enhance a sentence under this section if that conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further enhancement under this section.” Defendant argues that this means that his prior convictions that were previously used to enhance a sentence under a habitual offender statute may not be once again used as an enhancement in this case. However, courts may rely on previous felonies each time a subsequent felony is committed, and there is no limit on the number of subsequent applications. *People v Heard*, 178 Mich App 692, 704; 444 NW2d 542 (1989). Instead, the statute did not preclude the use of a felony more than once to enhance the same sentence,<sup>3</sup> which did not occur here. The fact that an Alabama court utilized his prior felony convictions to enhance a sentence in Alabama is irrelevant. A Michigan court may use those same felony convictions to enhance a sentence for a later felony committed in Michigan. MCL 769.12(1); *Heard, supra* at 704.

---

<sup>2</sup> Contrary to defendant’s assertion, he could not have been sentenced for third-degree home invasion, because he was charged with second-degree home invasion and third-degree home invasion contains an element not present in second-degree home invasion. *People v Nyx*, 479 Mich 112, 121; 734 NW2d 548 (2007).

<sup>3</sup> See, e.g., *People v Fetterlay*, 229 Mich App 5111, 540; 583 NW 2d 199 (1998), where the defendant had his sentence properly enhanced under both the controlled substance provisions and the habitual offender provisions.

Defendant next argues that the prosecution did not meet its burden to show beyond a reasonable doubt that defendant was guilty of resisting and obstructing an officer, because evidence at trial showed merely that defendant was running from a crime scene. As noted above, we review de novo whether there is sufficient evidence to support a conviction, *Lueth, supra* at 680, viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt, *Robinson, supra* at 5.

After reviewing the record, we find there was sufficient evidence to find defendant guilty. First, defendant is incorrect that fleeing on foot does not constitute resisting and obstructing. In *People v Pohl*, 207 Mich App 332; 523 NW2d 634 (1994), this Court held that prearrest flight that actively interferes with a police officer's investigation, will support a conviction of resisting and obstructing. *Id.* at 333. As in *Pohl*, defendant was aware that he was fleeing from the scene of a crime, as conceded in his supplemental brief,<sup>4</sup> and he engaged in conduct that "under all the circumstances hindered an officer conducting a police investigation—a police function covered by the resisting and obstructing statute." *Id.*

Officer Libstaff testified that as he initially approached the residence, he had his weapon out, pointed it at defendant, and told him to put his hands up. There was also testimony that after officer Libstaff discovered defendant was running, he gave him lawful commands to stop. Officer Libstaff testified that defendant turned around after he first shouted for him to stop. Defendant was also given multiple commands by two troopers to surrender and come out of the barn in which he was hiding. Viewed in the light most favorable to the prosecution, there was sufficient evidence that defendant knowingly failed to comply with a lawful command, thereby supporting his conviction for resisting and obstructing. *Robinson, supra* at 5.

Defendant's final claim of error is that the trial court erred in using his 2002 conviction, which resulted from a plea agreement, to enhance his current sentence under the habitual offender statute. Defendant relies on *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 552 (2005). We find no plain error in this unpreserved constitutional claim, because defendant has not shown that *Halbert* applies to his 2002 conviction.

The holding in *Halbert* explicitly states that "the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, *who seek access to first-tier review* in the Michigan Court of Appeals." *Id.* at 610 (emphasis added). Defendant has provided no evidence that he ever sought leave to appeal his 2002 conviction, or that he requested appellate counsel and was denied it. Thus, defendant did not "seek access to first-tier review" of his 2002 conviction, and there was no denial of counsel.

Additionally, given the unsettled nature of whether *Halbert* applies retroactively, see, e.g., *People v James*, 272 Mich App 182, 192 n 9; 725 NW2d 71 (2006) (declining to make that

---

<sup>4</sup> Defendant writes, "evidence and testimony presented at trial showed merely that the Defendant ran away from a crime scene."

determination), we fail to see how the trial court's inclusion of the 2002 conviction was clearly and obviously error. *Carines, supra* at 764.

Affirmed.

/s/ Patrick M. Meter  
/s/ David H. Sawyer  
/s/ Kurtis T. Wilder