

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 17, 2014

v

MICHAEL KELLY SUTHERLAND,

Defendant-Appellant.

No. 314247
Monroe Circuit Court
LC No. 12-039571-FH

Before: WILDER, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals his jury conviction for second-degree home invasion, MCL 750.110a(3). For the reasons stated below, we affirm.

I. FACTS

Defendant perpetrated a failed burglary. On the day in question, a witness noticed from a distance that a window screen on his son and daughter-in-law's house was moving in an unusual manner. Assuming it had come loose, he drove to the house to repair it. When he arrived, he observed an unfamiliar blue Ford Explorer parked in the driveway. He parked his vehicle behind the Explorer to block its exit, and instructed his wife to call 911. After a short time, defendant fled the house and drove away, nearly hitting the witness's vehicle. The witness shot the rear tire of the Explorer, forcing defendant to abandon the car and flee on foot.

When the witness's daughter-in-law inspected her house with the police a few hours later, she surmised that the perpetrator had broken a window for entry and filled a pillowcase, which was found on the bedroom floor, with valuables. Later that day, her father-in-law identified defendant as the perpetrator in a photographic lineup at the police station. Consistent with this identification, he testified at trial that defendant was the man who fled the house and drove away in the blue Explorer.

Defendant requested that the trial court instruct the jury on breaking and entering without permission, MCL 750.115(1), as a necessarily lesser included offense of the charged second-degree home invasion. The trial court refused to do so because defendant never conceded that he entered the house. The jury subsequently convicted defendant of second-degree home invasion under MCL 750.110a(3). Defendant appealed his conviction to our Court, and argues that the trial court erred in refusing to instruct the jury on breaking and entering without permission.

II. ANALYSIS¹

Under MCL 768.32(1), a trial court should instruct the jury on a necessarily lesser included offense “if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and it is supported by a rational view of the evidence.” *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). “To be a lesser included offense, the elements necessary for commission of the greater offense must subsume the elements necessary for commission of the lesser offense.” *People v Heft*, 299 Mich App 69, 74; 829 NW2d 266 (2012). To determine whether an offense is a necessarily lesser included offense, we consider only the specific elements applicable to the case at hand. *Id.* at 75.

The elements of breaking and entering without permission, MCL 750.115(1), are (1) the occurrence of a breaking and entering, (2) done without the owner’s permission. *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003). The elements of home invasion in the second degree, MCL 750.110a(3), are (1) the entering of a dwelling by breaking or without permission, (2) done with the intent to commit a felony, larceny, or assault in the dwelling. MCL 750.110a(3); *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004). Because the crimes of breaking and entering without permission and second-degree home invasion are distinguished by the intent to commit a felony, larceny, or assault inside the dwelling, breaking and entering without permission is a lesser included offense of home invasion in the second degree. See *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002).²

A trial court errs when it refuses to instruct the jury on a necessarily lesser included offense if the distinguishing element is “clearly disputed at trial.” *Id.* To determine whether the distinguishing element is clearly disputed at trial, it is necessary to consider the opening statement, cross-examinations, and closing argument of the defendant. See *id.* When a trial court erroneously refuses to instruct the jury on a necessarily lesser included offense, appellate courts should reverse the conviction “only when there is substantial evidence to support the requested instruction.” *Cornell*, 466 Mich at 365. Thus, when the evidence does not clearly support a conviction for the lesser included offense, reversal is not warranted. *Id.* at 366.

Here, the trial court properly refused to instruct the jury on breaking and entering without permission because the perpetrator’s intent to commit a larceny inside the house was never a

¹ Issues of instructional errors are generally reviewed de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). However, we review “for an abuse of discretion a trial court’s determination that a specific instruction is inapplicable given the facts of the case.” *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). “An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes.” *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

² A “breaking” cannot occur unless the person enters without permission. *Heft*, 299 Mich App at 76.

disputed fact at trial.³ The evidence showed that defendant (or, in defendant’s parlance, the mystery perpetrator) entered the victim’s house with the explicit intent to commit larceny—the pillowcase of valuables found by the police indicates that defendant intended to steal these valuables but was unexpectedly interrupted. Defendant also presented no evidence to show that he illegally entered the house with innocent intent—in fact, he did not even admit he entered the house, which, as noted, is an essential element of the lesser included offense on which he claims the trial court should have instructed the jury. In sum, the requested instruction was not supported by a rational view of the evidence. See *Cornell*, 466 Mich at 366 (noting that reversal is warranted when the appellate court examines the “entire cause” and determines that a jury could have convicted on the lesser offense).

Accordingly, the trial court correctly rejected defendant’s nonsensical argument and refused his request to instruct the jury on the lesser included offense of breaking and entering without permission.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Kirsten Frank Kelly

³ Defendant argues that the intent to commit larceny was a disputed fact at trial because defense counsel stated in passing during closing argument that “there could’ve been another perpetrator that got away, we don’t know.” However, when this statement is fairly considered in context, it is apparent that defense counsel did not dispute the intent to commit larceny. Instead, defense counsel attempted to raise reasonable doubt by referencing an alternate scenario that was consistent with the evidence. The premise of defense counsel’s argument was that the lack of physical evidence linking defendant to the scene undermined the prosecution’s case—a contention that the jury ultimately found unconvincing.