

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRAVIS WILLARD BALLARD,

Defendant-Appellant.

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UNPUBLISHED

November 25, 2003

No. 241583

Lenawee Circuit Court

LC No. 01-009495-FH

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for breaking and entering with intent to commit larceny, MCL 750.110, entry without permission, MCL 750.115, and carrying a concealed weapon (CCW), MCL 750.227. The trial court sentenced defendant to nine months in jail for the breaking and entering with intent to commit larceny conviction, ninety days in jail for the entry without permission conviction, and nine months in jail for the CCW conviction. We affirm defendant's entry without permission and CCW convictions, but reverse defendant's breaking and entering with intent to commit larceny conviction and remand for entry of a judgment for the lesser included offense of breaking and entering without permission.

I. Facts and Procedure

On February 15, 2002, defendant, who was an attorney, called his secretary from a hearing in Howell. Defendant's secretary told him that his wife, Linda Ballard, who also worked in defendant's office managing finances, had taken some boxes of files and left the office after seeing a valentine addressed to defendant from another woman in the newspaper. After trying unsuccessfully to contact Linda, defendant drove home. When defendant arrived home, neither Linda nor their children were there. At this point, Janet Harsh, an attorney who was the opposing counsel to defendant on a case, called defendant. Defendant was suicidal because he thought his wife had taken the children and was going to leave him. Because of defendant's condition, Harsh went to defendant's house, where defendant was handling two guns and contemplating suicide. By listening to Linda's voice mail messages, defendant discovered that Margaret Noe, a divorce lawyer, had called Linda. After unsuccessfully trying to contact Noe by phone, defendant and Harsh decided to look for Noe. Defendant testified that when he got into his car, he felt a gun in his pocket and decided to put the gun into the saddlebag of his motorcycle. Defendant testified that, as he was putting the gun in the saddlebag, he told Harsh,

“I better not have this.” After defendant left, defendant’s father retrieved a gun from the saddlebag and put it in the trunk of his own car.

At one point when defendant and Harsh were looking for Noe, they stopped at Noe’s house to see if she was there. The trunk opened<sup>1</sup> and Harsh saw defendant transfer what looked like a small gun from his pocket to the trunk of his car and say, “I better put this away.” Harsh testified that she was not positive that it was a gun she saw in defendant’s hands, but that “it looked like a gun.” Because Noe was not home, defendant and Harsh went to her office. When they arrived at about 8:00 p.m., a light was on in the office and a car, which defendant thought belonged to Noe, was parked in the lot. Defendant parked his car, left it running with the headlights shining into the office, walked up to the front door (the public entrance), opened it, called Linda and Noe’s names, and walked in.<sup>2</sup> Despite the fact that defendant did not see anybody in the office, he proceeded to open the door to Noe’s private office and went in. Inside Noe’s office, defendant recognized the boxes from his office that Linda had taken. Defendant testified that he took the boxes because they contained confidential records belonging to his clients. Defendant also opened one of the desk drawers to look for the backup tapes for his computer. When he did not find it, defendant took two boxes and carried them to his car. He then reentered the office and took two more boxes and a bag of documents from Noe’s office to his car. Defendant and Harsh then drove around for a while looking for Linda’s car, but did not find it and returned to defendant’s house.

After visiting Noe’s office, defendant called Noe’s husband and told him that he had entered Noe’s office, taken the boxes of files, and was burning them. When Noe found out from her husband that defendant had been to her office, she went to her office. As she was going in, she noticed that the lock on the door to the private entrance had been “jimmied” and called the police. Inside, Noe found that the shopping bag and boxes of files Linda had brought in were missing. She also noticed that the papers on her desk were mixed up, one of the drawers was open, and her phone had been moved. Later, she discovered that several other miscellaneous documents were missing.<sup>3</sup>

Meanwhile, defendant was at home burning folders to trick Linda into believing that he had burned the records. When the police began to gather outside of defendant’s house, defendant called Ric Hooten to go in his house and take the guns from his motorcycle saddlebag and the kitchen and put them in his safe in the basement. Hooten found one gun and put it in the safe, but he did not find a gun in the motorcycle saddlebag.

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<sup>1</sup> Defendant testified that, because of his size, he frequently opened the trunk of his car by accidentally triggering the trunk release with his knee.

<sup>2</sup> The last person to leave Noe’s office that night testified that the doors to the office were locked when she left and that the only light that was left on was a nightlight by the public entrance.

<sup>3</sup> These missing documents included a rough draft of a midterm examination Noe was preparing to give to her business law students, a piece of paper with the Ballards’ full names and dates of birth, and the contents of a file concerning one of Noe’s clients.

Defendant was charged with breaking and entering with intent to commit larceny for his first entry of Noe's office through the front door, entry without permission with intent to commit larceny for his second entry of Noe's office through the front door,<sup>4</sup> and CCW for carrying a pistol in the trunk of his car. The jury convicted and sentenced defendant as outlined above.

## II. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to support his convictions for CCW and breaking and entering with intent to commit larceny. In reviewing a claim of insufficient evidence, this Court must determine whether, taking the evidence in the light most favorable to the prosecution, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

### A. Carrying a Concealed Weapon

Defendant first argues that the evidence presented at trial was insufficient to support his CCW conviction because there was insufficient evidence to prove the presence of a weapon in his vehicle. We disagree. To support a conviction for carrying a concealed weapon in a vehicle, MCL 750.227(2), the prosecution must show: "(1) the presence of a weapon in a vehicle operated or occupied by the defendant, (2) that the defendant knew or was aware of its presence, and (3) that he was 'carrying' it." *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999). Defendant argues that, in addition to the elements set forth in *Nimeth*, the prosecution should also have to prove that the pistol was operable in order to convict defendant. However, this Court has held that it is the defendant's burden to prove that the pistol was *not* operable: "An affirmative defense to carrying a concealed pistol can be made by the presentation of proof that the pistol would not fire and could not readily be made to fire." *People v Gardner*, 194 Mich App 652, 655; 487 NW2d 515 (1992). Here, because defendant argued at trial that was not carrying a pistol, he presented no evidence at trial that the alleged gun was inoperable. Therefore, the jury was entitled to conclude that the pistol was operable. *People v Parr*, 197 Mich App 41, 45; 494 NW2d 768 (1992).

Defendant also argues that the evidence was insufficient to show that he was carrying a pistol in his car. Both defendant and Harsh agree that defendant got out of the car and removed the gun from his pocket. However, Harsh testified that it happened at Noe's house, and defendant testified that it happened in his garage, before they left his house. Although the testimony of defendant and Harsh differed about whether defendant had the gun while he was driving his car, and Harsh testified that she was "not positive" that it was a gun that defendant put in the trunk, issues of witness credibility are for the jury, absent exceptional circumstances. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). In further support of the jury's conclusion that defendant was carrying a gun, Harsh testified that before defendant put the gun in

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<sup>4</sup> The jury acquitted defendant of the charge of entry without permission with intent to commit larceny, but convicted him of the lesser included offense of entry without permission.

the trunk, he said, “I better put this away.” “This Court will not interfere with the role of the trier of fact of determining the weight of the evidence or the credibility of witnesses.” *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003). “[A]ppellate courts of this state refuse to interfere with jury verdicts where sufficient although weak evidence has been presented.” *Cassette v General Motors Corp*, 73 Mich App 225, 228; 251 NW2d 275 (1977), citing *Tuttle v Dept of State Highways*, 397 Mich 44, 46-47 n 3; 243 NW2d 244 (1976). While Harsh admitted she was not positive that what she observed defendant put in the trunk was in fact a gun, she believed that it was in fact a gun. Further, Harsh was not equivocal that defendant said, “I better put this away” before going to the trunk that defendant alleges was opened accidentally. The jury was free to reject defendant’s testimony and conclude that Harsh was correct in her belief that defendant possessed a gun while driving his car outside the curtilage of his home. We conclude that, viewed in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant knowingly carried a concealed weapon in his vehicle.

#### B. Breaking and Entering With Intent to Commit Larceny

Defendant also argues that there was insufficient evidence to support his breaking and entering with intent to commit larceny conviction. Specifically, defendant argues that there was insufficient evidence of his intent to commit larceny. “The elements of breaking and entering with 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 therein.” *People v Cornell*, 466 Mich 335, 360-361; 646 NW2d 127 (2002). “Intent to commit larceny cannot be presumed solely from proof of the breaking and entering. However, 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) (citations omitted).

In the present case, both defendant and Harsh testified that defendant went to Noe’s office for the purpose of looking for Linda. However, at the time they went to Noe’s office, defendant knew that Linda had taken boxes of files from their office and had contacted Noe, who he knew was a divorce lawyer. Therefore, a rational juror could assume that defendant believed that there was a chance that Linda had taken the boxes of files to Noe’s office, and that defendant had entered Noe’s office with the intent to retrieve those files.

However, even if defendant entered Noe’s office with the intent to retrieve the boxes of files, such intent does not constitute intent to commit larceny if the files belonged to him and he had the right to their possession. “Larceny requires an intent to take and carry away someone else’s property without that person’s consent.” *People v Pohl*, 202 Mich App 203, 205; 507 NW2d 819 (1993), remanded on other grounds 445 Mich 918 (1994). For purposes of the crime of larceny, the property must be taken from a person who holds title to that property or has rightful possession and control of the property. *People v Sheldon*, 208 Mich App 331, 334; 527 NW2d 76 (1995). In other words, the “owner” of the property means the actual owner of the property or any other person whose consent was necessary before the property could be taken. *Id.*, citing CJI2d 22.2.

“[I]f the defendant in good faith believed that the [property] . . . was his . . . and that he was entitled to its possession, he could not be guilty of . . . larceny in

taking it, because there would be no felonious intent, ‘and if the defendant, for any reason whatever, indulged no such intent, the crime cannot have been committed.’ ” *People v Holcomb*, 395 Mich 326, 333; 235 NW2d 343 (1975) (emphasis added), quoting *People v Walker*, 38 Mich 156 (1878). [*Pohl, supra* at 205-206.]

Here, there is no evidence, circumstantial or otherwise, that defendant entered Noe’s office with the intent to take anything other than the boxes of files that Linda had taken from their office.<sup>5</sup> Because defendant had rightful possession to these boxes of files, he could not have had any felonious intent when he entered Noe’s office with the intent to take them.<sup>6</sup> Therefore, the evidence was insufficient to show that defendant entered Noe’s office with intent to commit larceny and his conviction for breaking and entering with intent to commit larceny must be reversed.<sup>7</sup>

When the evidence is insufficient to support a conviction for the greater offense, an appellate court may remand for entry of judgment of a necessarily included lesser offense. *People v Bearss*, 463 Mich 623, 631; 625 NW2d 10 (2001). This remedy is available in cases “ ‘when a conviction for a greater offense is reversed on grounds that affect only the greater offense.’ ” *Id.*, quoting *Rutledge v United States*, 517 US 292, 306; 116 S Ct 1241; 134 L Ed 2d 419 (1996). Breaking and entering without permission, MCL 750.115,<sup>8</sup> is a lesser included offense of breaking and entering with intent to commit larceny. *Cornell, supra* at 360. Here, although defendant is correct that there is insufficient evidence that he had the intent to commit

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<sup>5</sup> Noe testified that several miscellaneous documents were missing from her office, but there is no evidence that defendant even knew of the existence of these documents before he entered or that he entered the office with the intent to take these documents.

<sup>6</sup> This case is distinguishable from situations where the defendant, although the rightful owner of the property, had no right to possession of the property when the alleged larceny occurred. See *Sheldon, supra* at 336 (the defendant committed larceny when he took his vehicle from the impound lot before paying the required fees or posting a bond); *Pohl, supra* at 208 (the defendant committed breaking and entering an occupied dwelling with intent to commit larceny when he broke into the marital home and took his own property when he knew there was a court order that prohibited him from entering the marital home and removing his own property).

<sup>7</sup> Because we reverse defendant’s conviction for breaking and entering with intent to commit larceny, we need not address defendant’s other argument regarding this count.

<sup>8</sup> We recognize that both the offense of breaking and entering without permission and the offense of entering without permission are governed by the same statutory section, MCL 750.115(1), and have the same punishment. The difference is that a suspect may not be convicted of entering without breaking if the entry was open to the public, unless the entry was expressly denied. MCL 750.115(2). In Issue III, *infra*, defendant argues that the trial court erred in failing to instruct the jury regarding this statutory exception to the charge that defendant entered without permission (Count II). However, in challenging defendant’s conviction for breaking and entering with intent to commit larceny (Count I), defendant does not challenge the breaking and entering elements of the offense and, thus, the statutory exception does not apply. For purposes of clarity, we differentiate between the offense of breaking and entering without permission and the offense of entering without permission.

larceny when he entered Noe's office, defendant does not dispute that there was evidence supporting the breaking and entering without permission elements of the offense. Therefore, we remand to the trial court for entry of judgment for breaking and entering without permission, MCL 750.115, and for resentencing.

### III. Jury Instructions

Next, defendant argues that the trial court erred in failing to instruct the jury regarding the statutory exception to the charge for entry without permission. As an initial matter, we conclude that defendant failed to properly preserve this issue for appeal. "A party may assign as error the giving of or the failure to give an instruction only if the party objects *on the record before the jury retires to consider the verdict . . .*" MCR 2.516(C) (emphasis added). Defendant objected on the record to the trial court's failure to give this instruction only after the jury retired for deliberations.<sup>9</sup> Therefore, this issue is reviewed for plain error affecting defendant's substantial rights. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003).

Defendant argues that the trial court should have instructed the jury that he could not be found guilty of entry without permission if the office was open to the public when he entered, as provided in MCL 750.115(2). The entry without permission statute, MCL 750.115, provides, in pertinent part:

(1) Any person who breaks and enters or enters without breaking, any . . . office . . . without first obtaining permission to enter from the owner or occupant, agent, or person having immediate control thereof, is guilty of a misdemeanor.

(2) Subsection (1) does not apply to entering without breaking, any place which at the time of the entry was open to the public, unless the entry was expressly denied. . . .

In *People v McKinney*, 258 Mich App 157, 162-163; \_\_\_ NW2d \_\_\_ (2003), this Court set forth the standard for reviewing jury instructions:

Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001). Accordingly, jury instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "The determination whether a jury instruction is

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<sup>9</sup> From the context of defendant's objection, it appears that defendant might have requested this instruction earlier in the proceedings. However, neither defendant's earlier request for this instruction nor an earlier objection to the trial court's refusal to give the instruction were made on the record.

applicable to the facts of the case lies within the sound discretion of the trial court.” *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

Here, defendant’s entry without permission conviction stemmed from his second entry into Noe’s office. When defendant went through the main entrance and the doorway of Noe’s private office for the second time, he knew that the office was unoccupied and that Noe was not in her private office. Nonetheless, he entered the office and went back into Noe’s private office to retrieve the rest of the boxes of files. These facts do not support the theory that defendant believed that the office building, including Noe’s private office, was open to the public when he entered for the second time. Therefore, we conclude that the trial court did not commit a plain error that affected defendant’s substantial rights by refusing to give a jury instruction regarding MCL 750.115(2).

#### IV. Prosecutorial Misconduct

Finally, defendant argues that he was denied a fair trial by prosecutorial misconduct. We review claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Because defendant failed to preserve his allegations of prosecutorial misconduct, our review regarding this issue is for plain error that affected defendant’s substantial rights. *Id.* We will not find error requiring reversal where a curative instruction could have alleviated any prejudice. *Id.* at 449.

Defendant first argues that the prosecutor attempted to shift or change the burden of proof during his closing argument by stating that he did not have to prove that defendant attempted to break into Noe’s office building through the private entrance. “The prosecutor may not suggest in closing argument that defendant must prove something or present a reasonable explanation for damaging evidence as this argument tends to shift the burden of proof.” *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), overruled in part on other grounds *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995). However, the prosecutor’s statement did not change or shift the burden of proof with regard to the crimes charged. In fact, the prosecutor’s statement that he did not have to prove that defendant entered Noe’s office building through the private entrance was correct, because defendant was not charged for breaking into this private entrance—he was only charged for his entry into the front public entrance of the office. The prosecutor raised the evidence that the private door lock had been “jimmied” in order to help prove defendant’s intent to commit larceny by showing that he or somebody else at his behest had earlier entered the office through the private entrance to see what was in the office. Prosecutors are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). The prosecutor did not have to prove beyond a reasonable doubt the theory that defendant had entered the private door earlier in the night because defendant was not charged with a crime for allegedly committing this act. Furthermore, the trial court properly instructed the jury that defendant is presumed to be innocent and that the prosecution must prove defendant’s guilt of the crimes charged beyond a reasonable doubt. The trial court also instructed the jury that the lawyers’ statements are not evidence. These instructions dispelled any prejudice caused by the prosecutor’s statements. *Id.* at 721-722.

Defendant also argues that the prosecutor engaged in misconduct by telling the jury to convict defendant based on his character and for ruining Harsh's reputation and career. During his closing argument, the prosecutor made the following relevant statements:

And the saddest case, probably, Janet Harsh. What do you think her professional life is going to be like in this county from now on and why?

\* \* \*

Ms. Harsh was acting out of the kindness of her heart for someone who she thought was in great despair and who wasn't. He was using her. She's done in this county. I mean, yeah, she can still go on about her business, but she testified she is not treated the same as other lawyers, she does not have the same privileges as other lawyers. Because she's been painted forever by this. And why? Because she tried to help this guy. And what does he do in return? Ruins her. Why? Because that's the kind of person he is, and that's why he's here today. That's why he's on trial and that's why he should be convicted.

There are givers in this world and there are takers in this world. Clearly, he's a taker, but he's more than a taker; he's a destroyer. Anybody who comes in contact with him gets destroyed.

We've heard all sorts of medical terms, all of his maladies, all of these things that might be wrong with Travis Ballard. There's a non-medical term; he, quite simply, is a spoiled brat. He has spent his whole life having his own way with everything. And he's got all the biggest and the best toys. He's got the biggest handgun ever made. He's got the nicest gun collection anybody's ever seen. He's got his Cadillac STS. And all these other people that come into contact with him and their lives get ruined, oh, that's just too bad.

But the day has come now. The time has come for Mr. Ballard to finally be held accountable for his actions. Thank you.

Assuming, without deciding, that the prosecutor's arguments were improper, we nevertheless conclude that defendant has failed to show that he was prejudiced by these comments or that the outcome of the trial would have been different. The trial court instructed the jury that the lawyers' statements are not evidence and that the facts of the case should be decided from the evidence. Furthermore, the evidence supported defendant's convictions for two counts of entering without permission and CCW. Defendant has not shown that the jury would have acquitted him of these charges had it not been for the prosecutor's comments during his closing argument.

## V. Conclusion

Defendant's conviction for breaking and entering with intent to commit larceny is reversed and the matter is remanded to the trial court for entry of a judgment for the lesser included offense of breaking and entering without permission. Accordingly, resentencing is required. Defendant's convictions for entry without permission and CCW are affirmed.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Pat M. Donofrio