

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 18, 2013

v

RAND D. TUBBS,

Defendant-Appellant.

No. 311203
Wexford Circuit Court
LC No. 2011-010031-FH

Before: BECKERING, P.J., AND METER AND RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced to 21 months to 20 years. We affirm.

I. FACTUAL BACKGROUND

Jeffrey and Donna Schifler rented a house from defendant located in Mesick, Michigan. Before renting the house, the Schiflers had been living in a travel camper, which they parked behind the residence. While Jeffrey and Donna testified that the camper was not hooked up to the water at the house, defendant's high school friend, Bruce MacEachern, testified that he saw the water and electricity hooked up from the house to the camper.

Jeffrey and Donna sparsely furnished the house with a table,¹ lawn chairs, and a mattress taken from the camper. Michael Hermatz, a friend of defendant's, testified that he was at the residence a month before the home invasion and did not recall seeing any mattresses. Joseph Burnett, another friend of defendant's, likewise testified that he did not recall seeing any mattresses in the house when he was there a couple of months before the home invasion. According to the Schiflers, the first bedroom in the residence was used to grow marijuana, as Jeffrey had lung cancer and possessed a medical marijuana card. Both Jeffrey and Donna testified that the second bedroom was not used to grow marijuana but was instead where they

¹ Donna testified that at the time of the home invasion, the table was outside of the residence because they had a cookout.

slept. Hermatz, however, testified that both bedrooms were being used to grow marijuana, which he observed a month before the home invasion.

Because of an alleged dispute over rent and the purchase of a truck, defendant placed a “notice to quit” sign on the door of the residence when Jeffrey and Donna were out of town. After arriving home and seeing the notice, Jeffrey called defendant, they argued about the notice, and Jeffrey eventually hung up the telephone on defendant. Approximately 10 to 20 minutes later, defendant arrived at the house and according to Jeffrey, four or five men accompanied him. The door was locked, and Jeffrey told defendant he could not come inside. Despite this warning, defendant entered the house and pushed Jeffrey. Jeffrey’s brother also was present and he, along with one of defendant’s friends, entered into the fray. The fight continued and Jeffrey’s dog eventually took hold of defendant. Donna called 911 and Jeffrey’s brother retrieved a firearm, causing defendant and the other men to run out of the house.

At trial, defendant testified that the encounter did not go as the Schifflers described. Defendant claimed that he informed Jeffrey on the phone that he was coming over to retrieve some of the “growing equipment” that he had loaned to the Schifflers. When defendant arrived at the residence, he claimed that he knocked and when he tried the door, it was unlocked. He went through the sunroom and then knocked on another door. According to defendant, when the Schifflers opened, “they said you’re not coming in, and [defendant] just tried to walk in.” Defendant claimed that he only was trying to walk between Jeffrey and his brother when “they jumped” him. After they jumped him, defendant claimed that he reacted in self-defense and tried to retrieve his equipment. Dennis Belford, one of defendant’s friends present during the altercation, testified that he saw defendant step between two people at the door but did not see any contact being made. Belford testified that he viewed the interaction from a distance of 15 yards.

After the police arrived, defendant was transported to the hospital because of complaints of a dog bite. At the emergency room, defendant told an officer that he went to the residence to retrieve his equipment and “he was tired of being taken advantage of, so he was going to get his [equipment] one way or the other.” Defendant denied making that statement “in that . . . demeanor.” He was convicted of first-degree home invasion and was sentenced to 21 months to 20 years. Defendant now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

“Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt.” *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). This Court reviews “de novo a challenge on appeal to the sufficiency of the evidence.” *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). “In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor” to ascertain “whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotations and citations omitted). “All conflicts in the evidence must be

resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

B. Dwelling

Defendant argues that there was insufficient evidence to support his conviction because the evidence did not establish that the residence was actually a dwelling. Pursuant to MCL 750.110a(1)(a), a dwelling is "a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." Defendant contends that rather than living in the house, the Schifflers lived in a trailer and only used the house to grow marijuana. Defendant presented witnesses at trial who testified about the lack of furniture in the house and about seeing utilities hooked up to the camper.

Yet, the Schifflers testified that they lived in the house, and denied that they were living in the camper. They adamantly denied that marijuana was being grown in the second bedroom and insisted that the second bedroom was where they slept. Further, while the furnishings in the house may have been meager, that was all the Schifflers professed to have. This evidence sufficiently demonstrated that the house was a "dwelling" pursuant to MCL 750.110a(1)(a). While there may have been conflicting evidence, all conflicts in the evidence are resolved in favor of the jury's verdict and we defer to the jury's credibility decisions at trial. *Unger*, 278 Mich App at 222. Further, this Court has held that "the intent of the inhabitant to use a structure as a place of abode is the primary factor in determining whether it constitutes a dwelling[.]" *People v Powell*, 278 Mich App 318, 321; 750 NW2d 607 (2008). Thus, the jury could have found that the Schifflers' representations that they lived in the house were at least sufficient to prove their intent to reside in the house, rendering it a dwelling.

C. Assault

Defendant also claims that the evidence was insufficient to establish that he committed an assault or had the intent to commit an assault. See *People v Baker*, 288 Mich App 378, 384; 792 NW2d 420 (2010) (an element of first-degree home invasion is that defendant either "intends when entering to commit a[n] . . . assault in the dwelling" or "at any time while entering, present in, or exiting the dwelling commits a[n] . . . assault.").

When Jeffrey and Donna arrived home and observed a "notice to quit" on their front door, Jeffrey called defendant, and an argument ensued. Shortly thereafter, defendant and several of his friends arrived at the house. According to the Schifflers, the door was locked but defendant entered the house and pushed Jeffrey, causing a fight to break out. Both Schifflers testified that defendant initiated the physical contact. Thus, a reasonable jury could have concluded that defendant, who initiated the physical contact, committed an assault.²

² An assault is "either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Meissner*, 294 Mich App 438, 454; 812 NW2d 37 (2011) (quotation marks and citation omitted).

Furthermore, defendant and Jeffrey were arguing on the phone right before defendant arrived at the residence. Rather than going alone to the residence, defendant also took several men with him. Further, the police officer testified that at the emergency room, defendant confessed that he went to the residence to retrieve his equipment and that “he was tired of being taken advantage of, so he was going to get his [equipment] one way or the other.” Thus, a reasonable jury could have concluded that based on defendant’s conduct and statements, he at least intended to commit an assault when entering the residence.

Defendant, however, claims that he only made contact with Jeffrey in self-defense, after Jeffrey and his brother jumped him.³ Defendant also produced a witness, his friend, who was 15 yards away and who testified that he did not see any contact being made between defendant and the two individuals when defendant was entering the residence. However, this evidence directly conflicts with the Schifflers’ testimony that defendant forced his way into the house and pushed Jeffrey. As stated above, it is for the jury to decide issues of credibility, and conflicts of the evidence are resolved in favor of the prosecution. *Unger*, 278 Mich App at 222. Considering the Schifflers’ clear testimony that defendant initiated the physical contact, we find that there was sufficient evidence proving that defendant did not act in self-defense.

III. CONCLUSION

There was sufficient evidence produced at trial to support defendant’s conviction for first-degree home invasion. We affirm.

/s/ Jane M. Beckering
/s/ Patrick M. Meter
/s/ Michael J. Riordan

³ “Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.” *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005) (quotation marks and citation omitted).