STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN KING ZMARLEY,

Defendant-Appellant.

UNPUBLISHED
December 5, 1997

No. 195287
Muskegon Circuit Court
LC No. 96-138848 FH

Before: Griffin, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Defendant was convicted of breaking and entering with the intent to commit larceny, MCL 750.110; MSA 28.305. He was sentenced to three to forty years' imprisonment as a fourth-felony habitual offender. He appeals as of right. We reverse.

The issue on appeal is whether there was sufficient evidence to support a conviction for breaking and entering with the intent to commit larceny, when defendant used a key given to him by his employer to enter the premises and steal money. Defendant, an assistant co-manager of a car wash and quick-oil-change store, used his key to enter the store office after business hours and take $200 from the safe. His employer had given him the key to the building as well as the combination to the safe, and had placed no restrictions or qualifications on defendant's use of that key. The trial judge reasoned that because defendant entered after business hours with the intent to commit a larceny, the prosecution had proven the element of "breaking" sufficient to survive a motion for directed verdict. However, Michigan law dictates that the element of unlawful intent is separate and distinct from the element of breaking, and that there can be no breaking when the force used to enter the premises is authorized.

Due process requires the prosecution in a criminal case to introduce sufficient evidence to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW 2d 452 (1992). In reviewing the sufficiency of the evidence, this Court must view 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. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Jacques*, 215 Mich App 699, 702-703; 547 NW2d 349 (1996).

Our Supreme Court has addressed the precise issue of whether entry by key constitutes "breaking" when one has the authority to use that key for business purposes. In *People v Rider*, 411 Mich 496; 307 NW2d 690 (1981), the defendant admitted to using a key given to him by his employer to enter the premises after hours and steal money. A panel of this Court had affirmed the defendant's conviction in a two-to-one decision. *Id.* at 497. Our Supreme Court reversed, adopting the following passage from then Judge Riley's dissent:

> While it is clear that only a minimum amount of force is necessary to establish a breaking [citations omitted], it is equally clear that *some* unauthorized force must be exerted. [Citations omitted.] The facts of this case indicate that the defendant obtained entry to the gas station where the larceny occurred, by using a key given to him by the management. Although the issue of entry by key has never been addressed by the courts of this state, I agree with other jurisdictions that an unrestricted use of a key cannot constitute a breaking. *Stowell v People*, 104 Colo 255; 90 P2d 520 (1939), *Ealey v State*, 139 Ga App 110; 227 SE2d 902 (1976). See also *People v Woods*, 182 Colo 3; 510 P2d 435 (1973), *People v Carstensen*, 161 Colo 249; 420 P2d 820 (1966). When a person is given a key with no qualifications on its use, any subsequent exercise should not be considered a breaking. (Emphasis in original.) [*Rider*, *supra* at 497-498, quoting *People v Rider*, unpublished memorandum opinion of the Court of Appeals, issued 7/10/80 (Docket No. 479160) (Riley, J., dissenting) (brackets in original).]

The Supreme Court also adopted additional language from *Stowell*. In *Stowell*, the court held that a defendant who used a key given to him by his employer with the authority to enter the premises was not guilty of burglary simply because he entered the building with an unlawful intent:

> [I]ntent alone is not always sufficient for that purpose. There is no burglary, if the person entering has a right so to do, although he may intend to commit, and may actually commit a felony, and although he may enter in such a way that there would be a breaking if he had no right to enter. [*Rider*, *supra* at 498, quoting *Stowell*, *supra* at 257 (internal quotation marks omitted).]

This Court has since clarified that "[e]ntry . . . is an element separate and apart from the element of intent." *People v Brownfield (After Remand)*, 216 Mich App 429, 432; 548 NW2d 248 (1996). "Under Michigan law, even if a defendant enters a building and commits a larceny, he has not committed a burglary when he has the right to enter the building." *Id.*

Even when viewed in a light most favorable to the prosecution, the evidence in the present case was insufficient to allow a reasonable trier of fact to conclude that there was a policy restricting defendant's use of his key. Defendant's immediate supervisor testified that there was no written policy with respect to after-hours entry onto the premises by those individuals who had been given keys. The

fact that there was a policy restricting access for some employees suggests that, had there been such a restriction on defendant's use of his key, there would have been some form of written or oral policy.

These facts fall squarely within the limitations set by our Supreme Court in *Rider, supra*, in that "when a person is given a key with no qualifications on its use, any subsequent exercise should not be considered a breaking." *Id*. at 498. Though defendant admits to taking the money, and likely could have been convicted of larceny on these facts, the evidence adduced at trial was insufficient to support a guilty verdict for the crime of breaking and entering with the intent to commit larceny. The trial court erred in denying defendant's motion for directed verdict.

The parties raise the question whether double jeopardy bars retrial on the same or other charges. Clearly, retrial is barred on the same charge. *People v Setzler*, 210 Mich App 138, 139-140; 533 NW2d 18 (1995); *People v Killingsworth*, 80 Mich App 45, 51-52; 263 NW2d 278 (1977). We will not attempt to anticipate what other charges the prosecutor might bring against defendant. We simply note that, in Michigan, the prosecutor must join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction. *People v White*, 390 Mich 245, 254, 258; 212 NW2d 222 (1973). Where a prosecutor has failed to join such charges, later prosecutions may be barred. See conflicting opinions in *People v Garcia*, 448 Mich 442, 459-460, n 23 (Riley, J.), 474-475, 487-489 (Cavanagh, J.); 531 NW2d 683 (1995). See also *Setzler, supra* at 140-141. We leave the initial resolution of this issue, if it should arise, to the trial court.

Reversed.

/s/ Richard Allen Griffin
/s/ Myron H. Wahls
/s/ Roman S. Gribbs