STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK Z. HOAG,

Defendant-Appellant.

UNPUBLISHED

No. 182196
Recorder's Court
LC No. 94-001962

Before: Markman, P.J., and McDonald and Cavanagh, JJ.

MARKMAN, J. (dissenting).

I respectfully dissent. I disagree with the majority's conclusion that there is a reasonable probability that the outcome of the proceedings would have been different if defendant's trial counsel had been aware that the complainant, Willie Howard, on behalf of "Willie & Sons," no longer owned the property at issue at the time of the underlying incident.

Here, defendant was convicted of entering without breaking, MCL 750.111; MSA 28.306. The elements of this offense are "(1) entering without breaking (2) a building for public or private use (3) with the intent to commit larceny." *People v Jackson*, 71 Mich App 487, 490; 247 NW2d 382 (1976). I do not understand the majority to disagree that sufficient evidence was produced at trial to prove each of these elements beyond a reasonable doubt.

However, the majority concludes that defense counsel's performance was deficient because counsel failed to discover that "Willie & Sons" no longer had a legal interest in the property at the time of the alleged criminal offense. Apparently, such interest had earlier been transferred to the State as the result of non-payment of taxes by "Willie & Sons."[1]

People v Brownfield (After Remand), 216 Mich App 429, 432; 548 NW2d 248 (1996), citing *People v Rider*, 411 Mich 496, 498, 307 NW2d 690 (1981), states:

> 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.

Having the right to enter a building, e.g., by permission, would constitute an affirmative defense to the charge at issue. But lack of permission to enter is not an element of the offense that the prosecution must prove beyond a reasonable doubt. Neither the statute nor the case law setting forth the elements of this offense state that lack of permission to enter is an element. Because the question of permission constitutes an affirmative defense, defendant had the burden to come forward with evidence that he had permission to enter the building from whomever did, in fact, have authority to grant such permission. See *People v Mezy*, 453 Mich 269, 283, 286; 551 NW2d 389 (1996); *People v D'Angelo*, 401 Mich 167, 183; 257 NW2d 655 (1977), both citing *Patterson v New York*, 432 US 197; 97 S Ct 2319; 53 L Ed 2d 281 (1977) for the proposition that it does not violate the Due Process Clause to burden a defendant with proving an affirmative defense, so long as the burden of persuasion to negate an element of an offense is not placed on defendant. Here, there is no indication in the record that defendant alleged in any manner that he had permission to enter the building at the time of the offense; he did not assert that he had permission either from "Willie & Sons" or the State.[2] Thus, defendant did not raise any affirmative defense of permission to enter.[3] Accordingly, the evidence that the complainant did not grant defendant permission to enter the building was simply immaterial; it was neither relevant to any of the elements of the charged offense nor to any affirmative defense raised by defendant. While it was improper for the complainant to testify regarding this issue when he apparently did not have authority to grant such permission,[4] any error in the admission of this evidence was harmless because defendant did not raise the affirmative defense that he had permission to enter the building from anyone else.[5] Because defendant did not make allegations that implicated such an affirmative defense, any error relating to who had authority to grant such permission is harmless. Accordingly, I disagree with the majority's conclusion that defendant's trial counsel's lack of preparation requires reversal of defendant's conviction. I would affirm defendant's conviction because there is no reasonable probability that any errors of his trial counsel regarding this issue affected the outcome of the proceedings.

/s/ Stephen J. Markman

[1] That "Willie & Sons" was the actual complainant in this case seems irrelevant to whether the prosecution could have proceeded. Criminal actions are brought on behalf of the "People of the State of Michigan," not an individual complainant.

[2] MCL 750.111; MSA 28.306 makes no distinction between private and public property. Accordingly, the same elements and affirmative defenses apply to both private and public property. In order to raise the affirmative defense of permission to enter here, defendant would have been required to allege that he had permission from the State to enter the property. He made no such allegation.

[3] Defendant's defense was that he thought the building was abandoned and that he merely entered it to use the bathroom.

[4] The extent to which Willie Howard was aware that he was no longer in a position to assert authority over the property at issue is unclear from the record. At the time of the offense, there was a "Willie & Sons" sign in front of the building. Howard testified that, at the time of the offense, he kept a chain and pad lock on the back door and that he kept rotors and alternators in the building. This evidence suggests that Howard continued to assert authority over the building after his interest had been

transferred to the State for non-payment of taxes. In any event, contrary to defendant's contention, any damage to Howard's credibility that might have been raised by cross-examination indicating that he no longer had an interest in the property at the time of the offense would not have been serious enough to undermine the sufficiency of the evidence to support defendant's conviction.

[5] It was unfortunate that defense counsel apparently conducted a title search of the wrong address. However, in the absence of any allegation by defendant that would raise the possibility of asserting an affirmative defense on the basis of permission to enter the building, any error regarding the title search is harmless, in my judgment.