STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY C. RIVERS,

Defendant-Appellant.

UNPUBLISHED
August 4, 1998

No. 197631
Recorder's Court
LC No. 95-013426

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

PER CURIAM.

Defendant was found guilty by a jury of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and possession of burglar's tools, MCR 750.116; MSA 28.311. He was sentenced as an habitual offender - fourth felony, MCL 769.12; MSA 28.1084, to a term of twelve to thirty-two years' imprisonment, and now appeals as of right. We affirm.

On the afternoon of November 20, 1995, defendant approached a home and rang the front doorbell. One of the residents, Monteal Moss, went to answer the door but because she was not expecting anyone and did not recognize defendant, she changed her mind. Defendant rang the bell for two minutes, then stood on the side of the porch looking around. He again rang the bell and, after a few more minutes, tried the doorknob. When the door did not open, he went to the driveway and stood there looking around. Defendant then went around back, entered the enclosed back porch, and roamed around "just like he was looking around." He then attempted to enter the house. He damaged one of the doors and cut the screen on the door leading into the house, but was unable to gain entry and finally left.

Moss called the police and gave the responding officers defendant's description. They found defendant six blocks away, dress as Moss had described. They stopped him and found pliers and a utility knife in his pocket. Defendant was arrested and ultimately charged with possession of burglar's tools and first-degree home invasion. The jury found him guilty as charged.

Defendant first contends that the prosecutor failed to prove first-degree home invasion. We review a claim regarding sufficiency of the evidence by reviewing the evidence in a light most favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

At issue here is the element that, at the time of the breaking and entering of a dwelling, the defendant must have intended to commit a larceny or other felony therein. MCR 750.110a(2); MSA 28.305(a)(2). "Intent generally may be inferred from the facts and circumstances of a case." *In Re People v Jory*, 443 Mich 403, 419; 505 NW2d 228 (1993).

> The jury may draw the inference as to the intent with which a particular act was done as they draw all other inferences, from any fact in evidence which to their minds fully proves its existence. [*People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985).]

In *People v Mattison*, 444 Mich 934; 512 NW2d 582 (1994), Justice Mallett, writing separately regarding an application for leave to appeal, articulated a rational behind this rule:

> [I]ntent, which reflects defendant's state of mind rather than a more concrete element of the offense, will rarely be proven directly by evidence. Instead, intent will most often have to be inferred from the circumstances by the trier of fact.

See also, *People v Vinokurow*, 322 Mich 26, 30-31; 33 NW2d 647 (1948). The *Jory* Court cited with approval *Seeney v United States*, 563 A2d 1081, 1083-1084 (DC App, 1989), which states, "Where a defendant's acts are of themselves commonplace or equivocal, and are as consistent with innocent activity as they are with criminal, it will be necessary for the government to adduce objective facts to establish criminal intent." *Jory*, *supra* at 419.

In the context of charges of breaking and entering with intent to commit larceny, a line of cases including *People v Hughes*, 27 Mich App 221, 222; 183 NW2d 383 (1970); *People v Hill*, 99 Mich App 427, 431; 297 NW2d 691 (1980); and *People v Riemersma*, 104 Mich App 773, 780; 306 NW2d 340 (1981) indicate that intent may be sufficiently established on the basis of inferences from the circumstances surrounding the breaking and entering. The *Hughes* Court held, at 222, that "the requisite intent to commit larceny can be reasonably inferred from the nature, time, and place of his acts before and during the attempted breading and entering." The *Riemersma* Court stated at 780:

> Assuming that defendant was the person who broke into complainant's house, . . . a logical inference may be drawn that he did so, while the occupants were away, for the purpose of committing a larceny, but was interrupted by complainant before he could remove anything.

It specifically held that defendant's contention that he broke into the home for shelter or to use the bathroom was inconsistent with evidence that he was staying at a nearby house and took a circuitous route home. *Id*. at 780-781. It concluded that a reasonable factfinder could find that the intent element was established beyond a reasonable doubt. *Id*. at 781.

Defendant cites several cases in which evidence was held insufficient to establish intent to commit larceny. *People v Palmer*, 42 Mich App 549; 202 NW2d 536 (1972), *People v Frost*, 148 Mich App 773; 384 NW2d 790 (1985) and *People v Uhl*, 169 Mich App 217; 425 NW2d 519 (1988) set forth law that is consistent with the authority cited above but concluded that the specific evidence in each case was insufficient to support a reasonable inference of intent to commit larceny. However, only *Uhl* involved circumstances similar to those in the present case. In *Uhl*, this Court reversed a jury conviction because it found that the evidence presented at the preliminary examination was insufficient to establish intent to commit larceny. The Michigan Supreme Court subsequently held that "evidentiary error committed at the preliminary examination stage of [a] case does not require automatic reversal of the subsequent conviction absent a showing that [the] defendant was prejudiced at trial." *People v Hall*, 435 Mich 599, 602-603; 460 NW2d 520 (1990). In light of *Hall*, *Uhl* is questionable authority. Moreover, we specifically disagree with its conclusion that the evidence was insufficient to support a reasonable inference of intent to commit larceny.

Intent to commit larceny is an element of the crime of first-degree home invasion that must be proved beyond a reasonable doubt. A presumption of intent to commit larceny does not arise solely from proof of breaking and entering. *Frost*, *supra* at 776-777. But reasonable inferences from circumstantial evidence may be sufficient to prove an element beyond a reasonable doubt. *Jory, supra* at 419; *Strong, supra* at 452. The *Jory* Court indicated that objective evidence of intent, i.e., evidence beyond inferences from circumstantial evidence, is only required when the defendant's actions are commonplace or equivocal. *Jory, supra* at 419. Breaking and entering another's home is not a commonplace event nor is a defendant's intent in doing so generally equivocal. Therefore, except where evidence makes a defendant's intent in breading and entering equivocal (e.g., there is reasonable evidence of an alternative intent), objective evidence of intent is not *required* to prove the intent element.

Here, a factfinder could reasonable infer that defendant attempted to ascertain whether anyone was home by repeatedly ringing the front doorbell and walking around the perimeter of the house and that he then attempted to gain entrance to the home from the back porch because he was less likely to be observed by neighbors. No evidence suggested any alternative purpose for the breaking and entering (e.g., shelter from bad weather, medical emergency, shelter from imminent danger from a third party). We hold that a factfinder could reasonably infer from defendant's actions as described above that he intended to commit larceny.

Defendant next contends that he was denied his constitutional right to counsel by the trial court's refusal of his request to discharge his attorney and appoint him a new attorney.

> An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. The decision regarding substitution of counsel is within the sound discretion of the trial court and will not be upset on appeal absent a showing of an abuse of that discretion. [*People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991); citations omitted.]

A demonstration that an attorney was "inadequate, lacking in diligence, or disinterested in [defendant's] case" may also constitute good cause entitling a defendant to substitution of counsel. *People v Meyers (On Remand)*, 124 Mich App 148, 166; 335 NW2d 189 (1983).

Here, the trial court properly questioned counsel and defendant regarding the problem. See *People v Ceteways*, 156 Mich App 108, 117-119; 401 NW2d 327 (1986). Defendant stated that he wanted to attack Moss' description of the intruder and was concerned that counsel would be unable to pursue this defense because she had not obtained a copy of the police report for use at the preliminary examination. Defendant has not shown that the description of the intruder provided by Moss and her great-uncle at trial differed from that they initially provided to the police. In any event, the police officer indicated that the police report contained his description of defendant at the time of arrest, not the description provided to the officers by Moss. Therefore, even assuming that counsel did not have the police report, defendant has not demonstrated that its absence affected his counsel's ability to represent him. Defendant also complained that counsel had not moved for a *Wade* hearing. *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). A request for a *Wade* hearing would have been futile because, as the trial court noted, defendant was not the subject of a corporeal or photographic pretrial identification procedure. Finally, defendant complains about his counsel's inability to impeach a police officer with testimony from the suppression hearing. At most, such impeachment might have raised a question regarding the color of defendant's coat. In the context of unrebutted evidence that defendant was wearing a black cap and black pants and Moss' unequivocal identification of defendant as the intruder, it is unlikely that successful impeachment regarding the color of defendant's jacket would have affected the outcome of the trial. Accordingly, defendant has not shown that he was prejudiced by his counsel's alleged lack of preparedness. Therefore, we find no abuse of discretion in the trial court's denial of defendant's request for substitute counsel.

For these reasons, we affirm defendant's judgment of sentence.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Mark J. Cavanagh