

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD LEON BATES,

Defendant-Appellant.

UNPUBLISHED

February 16, 1999

No. 203829

Ingham Circuit Court

LC No. 96-071365 FH

Before: Fitzgerald, P.J., and Holbrook, Jr., and O’Connell, JJ.

PER CURIAM.

Defendant was convicted following a bench trial of entry without breaking with intent to commit larceny, MCL 750.111; MSA 28.306. Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA, 28.1084, to serve not less than 120 months’, nor more than 240 months’ imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence presented at trial for a rational trier of fact to find him guilty beyond a reasonable doubt on all elements of the charged offense.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. [*People v Plummer*, 229 Mich App 293, 299; 581 NW2d 760 (1998) (citation omitted).]

We review sufficiency of the evidence questions de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

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); MCL 750.111; MSA 28.306. “Larceny is the taking and carrying away of the

property of another, done with felonious intent and without the owner's consent." *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996), citing *People v Malach*, 202 Mich App 266, 270; 507 NW2d 834 (1993).

Viewing the evidence in the light most favorable to the prosecutor, we conclude that there was sufficient direct and circumstantial evidence presented at trial for a rational trier of fact to find defendant guilty beyond a reasonable doubt. The testimony revealed that a figure dressed in dark clothing was observed by an officer running through the school building. A short time later, an individual was observed crawling out a broken window. When the individual attempted to flee, he was immediately apprehended by police officers, and later identified as defendant. There was no evidence presented that any other person was in the building or was seen leaving the building. Other testimony revealed that the classroom with the broken window was in disarray, and that a computer had been moved out of its original position and unplugged, and that its cord was wrapped around it. Given that the computer appeared ready to be carried away, coupled with defendant's exit through a broken window in that classroom, a reasonable inference can be made that defendant intended to take the computer. See *People v Johnson*, 167 Mich App 168, 171; 421 NW2d 617 (1988).¹

Defendant next argues that he was denied the effective assistance of counsel. To establish that he did not receive effective assistance of counsel, defendant must show that "(1) the performance of counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Plummer, supra* at 307. Further, "defendant must overcome the presumption that the challenged action might be considered sound trial strategy." *Id.* at 308. Because defendant did not move for a new trial or request an evidentiary hearing, this Court's review is limited to those errors apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

Defendant bases his claim on three alleged errors. First, defendant argues that his counsel asked him questions during trial that tended to impeach defendant's credibility by alluding to the fact that defendant was out on parole on the night in question. Specifically, defendant testified on redirect examination that he was taking a circuitous route back to his home from a convenience store on the night in question because he did not want to be stopped by police given that he was violating the terms of his parole by being out after his 10:00 p.m. curfew. At trial, defense counsel indicated that he was aware this evidence would allude to a prior conviction but, on balance, thought it was important to elicit this information because it tended to explain why defendant was trying to avoid the police. We conclude that defendant has failed to establish that the alleged error did not constitute sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Furthermore, defendant has failed to establish that it is probable that the outcome of the trial would have been different had this strategy not been pursued. *Id.*

Second, defendant claims that defense counsel failed to object to hearsay testimony at defendant's preliminary examination. Even if there was error, "such an evidentiary deficiency at the preliminary examination is not ground for vacating a conviction where the defendant received a fair trial and was not otherwise prejudiced by the error." *People v Hall*, 435 Mich 599, 601; 460 NW2d 520

(1990). There is nothing in the record before us that suggests that defendant was prejudiced by the alleged error or was denied a fair trial. Therefore, we see no error requiring reversal.

Finally, we disagree with defendant's claim that defense counsel was ineffective in failing to file a motion to suppress an on-scene identification of defendant.² Initially, we note that defendant has failed to identify in his brief on appeal the specific identification procedure he finds objectionable. MCR 7.212(C)(7). In any event, the record reveals that no proper or improper on-scene identification took place in this case. Given that defense counsel was not required to file a meritless motion, *People v Darden*, ___ Mich App ___; ___ NW2d ___ (No. #196697, rel'd 7/10/98), slip op, p 3, we see no error requiring reversal.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Donald E. Holbrook, Jr.

/s/ Peter D. O'Connell

¹ Defendant's question presented for this first issue also includes an allegation that the verdict was against the great weight of the evidence. However, because defendant fails to either argue the merits of this allegation or to cite to any supporting legal authority, this argument is not properly before this Court. *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 817 (1994); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

² A "prompt on-the-scene identification" involves a situation where the defendant is apprehended and immediately returned to the scene of the crime for a corporeal identification by the victim or someone who witnessed the crime. *Russell v United States*, 408 F2d 1280, 1284 (DC Cir, 1969).