STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RECO FITZGERALD POWELL,

Defendant-Appellant.

UNPUBLISHED
March 26, 2002

No. 227955
Genesee Circuit Court
LC No. 00-005495-FH

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Defendant was convicted of second-degree home invasion, MCL 750.110a(3), and was sentenced as a fourth habitual offender, MCL 769.12, to six to thirty years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to identify him as the perpetrator of the home invasion. When reviewing the sufficiency of the evidence in a criminal case, the reviewing 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." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997) (citation omitted). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Further, this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Id.* Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *People v Watson*, 245 Mich App 572, 595; 629 NW2d 411 (2001).

While we agree with defendant that possession of stolen property alone is insufficient to sustain a conviction of home invasion, possession of stolen property may be evidence from which a jury can draw an inference that the defendant is guilty of breaking and entering.[1] *People v Barker*, 101 Mich App 599, 602; 300 NW2d 648 (1980).

[1] The home invasion offenses, MCL 750.110a, entail conduct covered by the former offense of breaking and entering a dwelling. *People v Warren*, 228 Mich App 336, 347-348; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000).

> Possession of stolen property, immediately subsequent to a larceny, may sometimes be almost conclusive evidence of guilt, but the presumption weakens with the time which has elapsed, and may scarcely arise at all if others besides the defendant have had equal access to the place where it was discovered, but the unexplained possession of stolen property is some evidence of guilt. [*People v Benevides*, 71 Mich App 168, 174; 247 NW2d 341 (1976), quoting 4 Gillespie, Michigan Criminal Law and Procedure (2d ed), § 2271, p 2484.]

In *People v McDonald*, 13 Mich App 226, 236-237; 163 NW2d 796 (1968), this Court stated:

> [U]nexplained possession of property recently stolen, unaccompanied by other facts or circumstances indicating guilt, will not sustain a conviction for *breaking and entering*, even though it is some evidence that the possessor is guilty of *theft*. [Emphasis in original.]

In *McDonald*, the Court found that muddy tire tracks showing that the defendant's vehicle was in the parking lot of the building in question was an additional circumstance that justified sending the case to the jury. *Id.* at 237. The question is whether the additional circumstances in the case justify sustaining a defendant's placement at the scene of the home invasion. See *Benevides, supra* at 175.

In the present case, the strong circumstantial evidence, viewed in a light most favorable to the prosecution, supports the jury's verdict. There was evidence that an eyewitness saw a person dressed in dark clothes, wearing a skullcap, enter the complainant's house. The person exited the house carrying a white bag. The eyewitness watched the suspect walk east on McClellan Street until she lost sight of him between Martin Luther King Drive and Alexander Drive; during this time, the eyewitness was on the telephone relaying this information to a 911 operator. Officers responding to the information were one-half mile away and drove immediately to McClellan Street. They observed a man walking east on McClellan, less than four blocks away from the complainant's home, who matched the eyewitness's description and carried a white bag. He ran when the police called out to him and as he fled, he dropped the white bag, found to contain items stolen from the complainant's house, and a video camera identical to the one missing from the house. When apprehended, the suspect, identified as defendant, was wearing the complainant's blue Tommy Hilfiger coat and had a very fresh cut on the palm of his hand. There was evidence that the porch and front door windows of the complainant's house were broken, and the complainant testified that he saw blood around the area in front of his home.

Contrary to defendant's argument, the prosecution did not rely solely on the unexplained possession of the stolen property to obtain defendant's conviction as the perpetrator of the home invasion. The overwhelming circumstantial evidence and reasonable inferences drawn from it were sufficient to sustain defendant's conviction.

On appeal, defendant also argues that the trial court improperly refused to instruct the jury on the crime of receiving or concealing stolen property as a lesser offense of home invasion. Specifically, defendant requested that the jury be instructed on misdemeanor receiving or concealing stolen property. We hold that the trial court did not err in refusing to give the requested instruction.

> The court's duty to instruct on the law applicable to the case depends on the evidence presented at trial. . . . The test to determine whether an instruction on a cognate lesser included offense must be given is as follows: The record must be examined, and if there is evidence which would support a conviction of the cognate lesser offense, then the trial judge if requested, must instruct on it. . . . *Under this standard, there must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense.* Only then does the judge's failure to instruct on the lesser included offense constitute error. . . . If the evidence presented could not support a conviction of the lesser offense, then the judge should not give the requested instruction. [*People v Pouncey,* 437 Mich 382, 387; 471 NW2d 346 (1991) (emphasis added and citations omitted).]

See also *People v Hendricks*, 446 Mich 435, 442; 521 NW2d 546 (1994) (whether a trial judge must instruct on a lesser included offense is determined by whether the evidence presented will support the lesser offense and whether the lesser offense is of the same class or category, or is closely related to the charged offense.)

In *People v Malach,* 202 Mich App 266, 276; 507 NW2d 834 (1993), this Court indicated that, when properly requested, the trial court should instruct the jury on an appropriate lesser included misdemeanor if a rational view of the evidence could support a guilty verdict on the misdemeanor, if the defendant requested the instruction, and if the instruction would not result in confusion or injustice. See also *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982).

The elements of receiving or concealing stolen property (RCSP) are:

> (1) that the property was stolen; (2) the value of the property; (3) the receiving, possession or concealment of such property by the defendant with the knowledge of the defendant that the property had been stolen; (4) the identity of the property as being that previously stolen; and (5) the guilty constructive or actual knowledge of the defendant that the property received or concealed had been stolen. [*People v Harris*, 82 Mich App 135, 137; 266 NW2d 477 (1978), overruled in part on other grounds in *Hendricks*, *supra* at 450-451, n 20 (citation omitted).]

In this case, there was no evidence to support the value of the stolen property. While the store receipt for stolen toys was admitted into evidence and the victim testified that one of the stolen items cost eight dollars, no evidence was introduced regarding the value of the other property stolen, including the video camera and the Tommy Hilfiger coat. Certainly, there was no evidence to suggest that the value of the items was less than two hundred dollars such that the jury could convict defendant of misdemeanor RCSP. At trial, defendant conceded that there was "[n]o evidence of value" presented. In *People v Kamin*, 405 Mich 482, 496; 275 NW2d 777 (1979), overruled in part on other grounds in *People v Beach,* 429 Mich 450; 418 NW2d 861 (1988), the Court affirmed the trial court's decision to deny the defendant's request for an instruction on RCSP as a lesser offense to breaking and entering:

> Neither receiving and concealing stolen goods nor larceny are necessarily included offenses of breaking and entering. Receiving and concealing, a cognate lesser included offense of breaking and entering, is unsupported by the evidence presented at this trial due to the lack of any proof as to the value of the stolen goods. Proof of value is a necessary element for conviction on that charge.

Because there was no proof of the value of the stolen property to support a conviction for misdemeanor RCSP in this case, the trial court properly denied defendant's request for an instruction on that offense.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin