

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MITCHELL LEE BAKER,

Defendant-Appellant.

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UNPUBLISHED

May 11, 2004

No. 242144

Emmet Circuit Court

LC No. 01-001839-FH

Before: Murray, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant Mitchell Lee Baker appeals as of right his convictions of breaking and entering with intent to commit larceny, MCL 750.110, and larceny in a building, MCL 750.360. Defendant was sentenced as an habitual offender, fourth offense or higher, MCL 769.12, to concurrent terms of 46 months' to 30 years' imprisonment for the breaking and entering with intent to commit larceny conviction and 32 months' to 15 years' imprisonment for the larceny in a building conviction. Defendant argues there was insufficient evidence to convict him of breaking and entering with intent to commit larceny because the prosecution failed to provide evidence that an actual breaking had occurred. Defendant also contends that the sentence imposed for breaking and entering is disproportionate to the offense committed. Because the record does not support defendant's arguments, we affirm.

Defendant first argues that there was insufficient evidence to prove the elements of breaking and entering with intent to commit larceny because the prosecution failed to provide evidence that an actual breaking had occurred, and failed to produce evidence to support a reasonable inference that defendant gained access to the store via the spare key. We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). To determine sufficiency of the evidence, this Court "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Conflicts in evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant was an employee at the Gelato Café. The café is adjacent to a retail store, and the businesses share a common interior door located in the basement. On July 12, 2001, a stereo receiver and CD player were installed in the café. Defendant worked at the café that day. The owner of the café also owned the adjoining store. At the close of business, he followed his nightly routine of checking the rooms to make sure everyone had left the building, and then closed his businesses. The following day, the new stereo equipment was missing. It was later discovered that \$250 from the cash register of the adjoining retail store was also missing. There were no signs of forced entry into either establishment. Subsequently, it was learned that aside from the keys in the possession of the owner and the café manager, a construction company representative had hidden a key on a nail above a back door of the building that led into the basement. Upon questioning by the police, defendant admitted to possessing the stereo and to having taken the \$250. Defendant's father-in-law returned the stereo to the police and inquired about making restitution for the stolen \$250.

“Breaking and entering requires a showing that (1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny or felony therein.” *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993). Defendant states specifically that the prosecution never demonstrated he actually broke into the store or the café at the center of the crimes. He also points out that unexplained possession of stolen property cannot sustain a breaking and entering conviction, absent other facts or circumstances indicating guilt. *People v McDonald*, 13 Mich App 226, 236-237; 163 NW2d 796 (1968).

After reviewing the record, we find that other facts and circumstances indicated defendant's guilt wholly apart from the fact that he was in possession of the stolen stereo, and that a reasonable inference exists that he gained entrance into the building via the spare key. Defendant admitted to the police that he took the \$250 from the store. As an employee of the café, defendant had knowledge of the layout of the store and, because he worked in the basement, was aware of the common door linking the two businesses. Defendant also would have had the opportunity to discover the location of the spare key hanging outside the outer entrance allowing him to gain access to the café and store without leaving behind any signs of forced entry. Also, defendant's time card indicated he left the café at 8:30 p.m. on the night in question. The café owner testified that he checked to make sure everyone had left the building before he locked up the café at approximately 8:45 p.m. Because the evidence indicated defendant left the café before the owner left, and the owner did not see anyone in the building before he left, a reasonable trier of fact could conclude that defendant returned later that night, broke into the building, and stole the stereo and the money. Thus, these factors, entirely aside from the fact that he was in possession of the stolen stereo convince us that there was sufficient evidence from which a jury could find defendant's guilt beyond a reasonable doubt.

Defendant also argues that the sentence imposed for the charge of breaking and entering of 46 months to 30 years as a habitual offender is disproportionate. He argues specifically that the offense and offender characteristics of his case were not the most serious form of breaking and entering and, thus, the maximum minimum sentence should not have been imposed.

Because the offense was committed on or after January 1, 1999, the legislative sentencing guidelines, rather than the Supreme Court's sentencing guidelines apply to offenses committed. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). This Court

must affirm sentences within the guidelines' range absent an error in scoring the sentencing guidelines or inaccurate information relied on in determining the defendant's sentence. *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2000), citing MCL 769.34(10). Our Supreme Court has explained that the legislative guidelines subscribe to the principal of proportionality. *Id.* at 263.

Our review of the record indicates that defendant's sentence was within the guidelines' range. Thus, because his sentence was within the legislative guidelines, it is necessarily proportionate, and defendant's sentencing challenge must fail. *Babcock, supra*, 469 Mich 261.

Affirmed.

/s/ Christopher M. Murray  
/s/ Janet T. Neff  
/s/ Pat M. Donofrio