STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY ALAN ADAMS,

Defendant-Appellant.

UNPUBLISHED
November 10, 2005

No. 254489
Alpena Circuit Court
LC No. 03-005909-FH

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering with the intent to commit a larceny, MCL 750.110, and was sentenced to a prison term of thirty-four months to twenty years. He appeals as of right, challenging the propriety of the jury instructions. We affirm.

We reject defendant's claim that the trial court erred by denying his request for an instruction on the necessarily included lesser offense of breaking and entering without permission. See CJI2d 25.4. Generally, claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

> [A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. [*People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).]

Breaking and entering without permission is a necessarily included lesser offense of breaking and entering with intent to commit a larceny; the distinguishing element differentiating the greater offense from the lesser offense is the intent to commit a larceny. *Id.* at 360-361. Consequently, defendant was entitled to an instruction on this lesser included offense if there was evidence rationally supporting a finding that defendant broke and entered the shed without permission, but lacked the intent to commit a larceny. *Id*. at 361.

We agree with the trial court that an instruction on breaking and entering without permission was not warranted because a rational view of the evidence did not support it. Simply put, there was no evidence that defendant entered the shed for a purpose other than to commit a larceny. After the complainant left her home, a witness saw defendant walk through some trees,

go behind the complainant's shed, and enter the shed through a door. When defendant did not emerge after approximately five minutes, the witness notified the complainant's son, who lived nearby. When the complainant's son confronted defendant in the shed, defendant was holding a cooler that was filled with tools and fishing lures. The evidence indicated that those items were not kept in a cooler and that defendant had no permission to remove anything from the shed. The evidence further indicated that, after being confronted, defendant "broke out" one of the doors to the shed and fled. The trial court properly denied defendant's request for an instruction on breaking and entering without permission, because a rational view of the evidence did not support it.

We also reject defendant's claim that the trial court erred by failing to instruct the jury on the necessarily included lesser offense of entering without breaking with the intent to commit a larceny. See CJI2d 25.3. Because defendant failed to request the instruction below, we review his unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Although the offense of entering without breaking with the intent to commit a larceny is a necessarily included lesser offense of breaking and entering with the intent to commit a larceny, see *People v Haner*, 86 Mich App 280, 283; 272 NW2d 627 (1978), a rational view of the evidence did not support the disputed element of "breaking." To constitute "a breaking, some force, no matter how slight, must be used to gain entry," *People v Kedo*, 108 Mich App 310, 318; 310 NW2d 224 (1981), and the force used to gain entry must be unauthorized. *People v Rider*, 411 Mich 496, 497-498; 307 NW2d 690 (1981). Here, a witness observed defendant open a door and enter the shed. Both the complainant and her son testified that before the incident, the shed was securely closed and locked with a padlock on both doors. After the incident, the complainant noticed that her spare key to one of the padlocks was missing from the cabinet on her patio. No one other than the complainant, her son, and his wife had authority to enter the shed. There was no evidence suggesting that defendant entered the shed "without breaking," and, thus, a rational view of the evidence did not support an instruction on entering without breaking with the intent to commit a larceny. Consequently, the trial court's failure to instruct this jury with regard to that offense was not plain error.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter