STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2005
v	No. 256740 Kalamazoo Circuit Court
CARLOS DEON HORTON, Defendant-Appellant.	LC No. 04-000335-FH

Before: Bandstra, P.J., and Neff and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3), larceny in a building, MCL 750.360, using a transaction device without consent, MCL 750.157n(1), conspiracy to use a transaction device, MCL 750.157a, and resisting or obstructing a police officer, MCL 750.81d(1). He appeals as of right the convictions of home invasion, larceny in a building, and resisting or obstructing a police officer. We affirm.

Defendant's convictions arise from the theft of a cell phone, money, and a purse containing two debit cards from a dormitory room, and a subsequent attempt to use one of the stolen debit cards at a nearby mall.

Defendant first argues that the prosecution failed to introduce sufficient evidence to prove beyond a reasonable doubt that he committed second-degree home invasion, larceny in a building, and resisting or obstructing a police officer. Alternatively, defendant argues that the trial court erred in denying his motion for a directed verdict on those charges. We disagree.

In reviewing the trial court's ruling on a motion for a directed verdict, we consider the evidence presented by the prosecution, up to the time the motion was made, in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). In reviewing the sufficiency of the evidence to sustain a conviction, we 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 Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

To sustain a conviction for second-degree home invasion, the prosecution must prove that the defendant entered a dwelling, either by a breaking or without permission, with the intent to commit a felony or a larceny in the dwelling. *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004). To sustain a conviction for larceny in a building, the prosecution must prove that the defendant, with felonious intent, took and carried away the personal property of another without the consent of the owner, and that the taking occurred within the confines of a building. *People v Randolph*, 466 Mich 532, 552 n 25; 648 NW2d 164 (2002).

With regard to the home invasion charge, defendant argues that there was insufficient evidence to prove beyond a reasonable doubt that he entered the dorm room without permission. With regard to the larceny in a building conviction, defendant argues that there was insufficient evidence to prove beyond a reasonable doubt that he took stolen property from the dorm room. Specifically, defendant argues that the jury relied on impermissible inferences in concluding that he entered the dorm room without permission and took stolen goods from the dorm room. However, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The prosecutor presented evidence that defendant was in close proximity to the dorm room shortly before the theft, attempted to use one of the stolen debit cards at a nearby mall, possessed an amount of cash closely resembling the amount stolen from the dorm room at the time of his arrest, that the stolen cell phone was recovered from the area where defendant was arrested, and that the stolen purse was recovered from a car which defendant had borrowed. Viewing the evidence presented in a light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant entered the dorm room without permission and took the stolen goods from the dorm room; therefore, the trial court properly denied defendant's motion for a directed verdict on the second-degree home invasion and larceny in a building charges.

Defendant maintains that someone else could have entered the dorm room, taken the items, and given him the items. However, in cases relying on circumstantial evidence, the prosecution is not required to negate every possible theory that is consistent with the defendant's innocence, and need only introduce sufficient evidence to convince a reasonable jury in light of the contradictory evidence presented by the defendant. *Id*. at 423-424. Here, the only evidence presented by defendant to refute the prosecution's theory of the case was the testimony of his girlfriend consisting of an alternative explanation for how defendant came into possession of the money found on his person at the time of his arrest. Her testimony did not provide an alternative explanation for why defendant attempted to use the stolen debit card, why the stolen cell phone was found in the same area where defendant was arrested, or why the stolen purse was found in a car which defendant had borrowed. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of second-degree home invasion and larceny in a building were proven beyond a reasonable doubt. There was sufficient evidence to sustain defendant's convictions, and he is not entitled to relief on appeal.

A person is guilty of resisting or obstructing a police officer if he "assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties. . . ." MCL 750.81d(1). "Obstruct" includes the ". . . . knowing failure to comply with a lawful command." MCL 750.81d(7)(a). The mall

security guards testified that when they approached defendant and another male, the suspects ran away. The responding police officers testified that they were wearing police uniforms, that one of them yelled at the two suspects to stop, that they were approximately 100 to 150 feet from the two males when the officer told them to stop, and that the suspects turned and acknowledged the officers before running in different directions. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant knowingly failed to comply with a lawful command from a police officer in the performance of his duties. Therefore, the trial court properly denied defendant's motion for a directed verdict on the resisting or obstructing a police officer charge. Additionally, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of resisting or obstructing a police officer were proven beyond a reasonable doubt. There was sufficient evidence to sustain defendant's conviction, and he is not entitled to relief on appeal.

Defendant next argues that he is entitled to a new trial on the resisting or obstructing conviction because the trial court improperly instructed the jury. We disagree. We review de novo claims of instructional error. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). However, defendant failed to preserve this issue for review because his objection at trial was based on a different ground than his assertion of error on appeal. MCR 2.516(C); *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Specifically, defendant argued at trial that the jury should be instructed with CJI2d 13.1 as opposed to CJI2d 13.2, which was requested by the prosecutor, but defendant argues on appeal that the jury should not have been instructed on the resisting or obstructing charge at all. Because defendant failed to preserve this issue, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

MCL 768.29 provides that the trial court is required to instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner. *People v Mills*, 450 Mich 61, 80; 537 NW2d 909, mod 450 Mich 1212; 539 NW2d 504 (1995). "[W]hen a jury instruction is requested on any theor[y] . . . and is supported by evidence, it must be given to the jury by the trial judge." *Id.* at 81. Because both parties requested an instruction on the resisting or obstructing charge at trial, and such an instruction was supported by the evidence, the trial court was obligated to provide such an instruction to the jury.

The record reveals that the trial court carefully considered the differences between CJI2d 13.1[1] and 13.2[2], and found 13.2 more applicable to the facts of the case, where 13.1 concerns

---

[1] The version of CJI2d 13.1 in effect at the time of trial was entitled "Resisting Arrest," and provided:

(1) The defendant is charged with the crime of resisting and obstructing an officer who was making an arrest. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant resisted an officer of the law who was then making an arrest.

(3) Second, that the person the defendant resisted was then a [*state authorized person*].

(continued…)

resisting and obstructing an officer who was making an arrest, and 13.2 concerns resisting an officer who was maintaining the peace. Here, the police officer was not making an arrest when defendant engaged in the conduct allegedly constituting resisting and obstructing; rather, it occurred during the course of the police officer's investigation. Additionally, the trial court further clarified the first element of 13.2 by adding the phrase: defendant resisted an officer of the law *who was conducting an investigation*. Because a jury instruction on resisting an officer

(…continued)

(4) Third, that the defendant knew then that the person [he/she] was resisting was an officer of the law.

(5) Fourth, that the defendant knew that the officer was making an arrest.

(6) Fifth, that the defendant intended to resist the officer.

(7) Sixth, that the arrest the defendant resisted was legal.

[We note the cautionary instruction following the version of CJI2d 13.1 employed by the trial court indicating that "[t]his instruction will be updated by the committee in 2004 to reflect the statutory changes found in 2002 PA 270 . . . ." Additionally, the use note #1 for the current version of CJI2d 13.1 (updated 12/04, after defendant was convicted in this case), entitled "Assaulting, Resisting, or Obstructing a Police Officer" provides that "[t]his instruction is to be used when the defendant is charged with violating MCL 750.81d. A defendant could be charged with assaulting or obstructing an officer performing his duties under MCL 750.479. In that case, see CJI2d 13.2."]

[2] The version of CJI2d 13.2 in effect at the time of trial was entitled "Interference with an Officer Maintaining the Peace," and provided:

(1) The defendant is charged with the crime of [resisting/assaulting] an officer who was maintaining the peace. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [resisted/assaulted] an officer of the law.

(3) Second, that the person the defendant [resisted/assaulted] was then a [*state authorized person*].

(4) Third, that the defendant knew then that the person was an officer of the law.

(5) Fourth, that the officer was then carrying out lawful duties.

(6) Fifth, that the defendant knew that the officer was doing so.

(7) Sixth, that the defendant intended to [resist/assault] the officer.

(8) Seventh, that the words or actions of the defendant in fact interfered with the officer in carrying out those duties.

[We note the cautionary instruction following the version of CJI2d 13.2 employed by the trial court indicating that "[t]his instruction will be updated by the committee in 2004 to reflect the statutory changes found in 2002 PA 270 . . . ." Additionally, the use note #1 for the current version of CJI2d 13.2 (updated 12/04, after defendant was convicted in this case), entitled "Assaulting or Obstructing Officer Performing Duties" provides that "[t]his instruction should be used when the defendant is charged with violating MCL 750.479. A defendant could be charged under MCL 750.81d with assaulting, resisting, or obstructing an officer. In that event, see CJI2d 13.1."]

who was maintaining the peace was supported by the evidence, the trial court's instruction fairly presented the issues to be tried and sufficiently protected defendant's rights. *Heikkinen, supra* at 327. Accordingly, no plain error occurred and defendant is not entitled to relief on this unpreserved issue.

We affirm.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Jane E. Markey