STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS LEE,

Defendant-Appellant.

UNPUBLISHED
October 25, 2007

No. 274032
Wayne Circuit Court
LC No. 05-012216-01

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2)(b). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve a term of imprisonment of ten to twenty years. Defendant appeals as of right. We vacate defendant's conviction and sentence, and we remand for further proceedings.

This case arises out of the victim's discovery of defendant inside the victim's home. The victim was in the process of moving household items between his house and garage, and he found that his front door had been opened. He then found defendant on the second floor, heading toward the master bedroom. The victim confronted defendant, who immediately came down and went outside. Defendant told the victim that he had initially believed the house to be unoccupied, and then said that he had intended to offer to rake leaves on the premises. The victim called the police, who found and detained defendant. According to a police witness, after receiving his *Miranda*[1] warnings, defendant admitted that he had entered the home.

Defendant, *in propria persona*, asserts that he was denied effective assistance of counsel. We disagree. "In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

App 171, 181; 561 NW2d 463 (1997). Because defendant did not move for a new trial or a *Ginther*[2] hearing below, our review for this issue is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

We have reviewed the arguments defendant raised and find no merit in them. Defendant asserts that trial counsel should have provided more evidence that he was known in the neighborhood to have offered leaf-raking services in the neighborhood, but that evidence would not have ruled out the possibility that defendant deviated from his legitimate line of business. Although the prosecutor, in her opening argument, raised the theory that defendant had intended to steal a chandelier from the victim's home, no supporting evidence was ever introduced, and the trial court did not indicate that it had considered this theory seriously. Defendant also asserts that certain police reports should have been suppressed, even though they were not actually admitted into evidence. Defendant asserts that his confession to the police should have been suppressed, but the only confession introduced into evidence was that defendant admitted to entering the home, a fact that was not seriously in dispute. In short, we perceive no objectively unreasonable performace by trial counsel, and none of the alleged omissions would have changed the outcome of the trial.

Defendant also argues that the evidence was insufficient to support his conviction. We agree. "Generally, we review a challenge to the sufficiency of the evidence in a bench trial de novo and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002).

The prosecutor's theory of this case was that defendant had entered the victim's house intending to commit a larceny. See MCL 750.110a(2). Defendant concedes that he "used bad judgment in entering without permission," but argues that there was no evidence that he entered the home with intent to commit a larceny, or engage in any other aggravating action, for purposes of establishing the elements of first-degree home invasion. We agree.

"'Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Malach*, 202 Mich App 266, 270; 507 NW2d 834 (1993). The home invasion statute does not qualify the term "larceny," and so first-degree home invasion may be predicated on the intent to commit either misdemeanor or felony larceny. See *People v Sands*, 261 Mich App 158, 163; 680 NW2d 500 (2004). "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted).

The evidence shows that defendant, apparently believing the house unoccupied at the moment, entered the house and went to its second floor. This behavior certainly raises a suspicion that defendant intended to commit a larceny. However, in this case it would require

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

unacceptable speculation to go from that suspicion to a conclusion beyond a reasonable doubt. Mere unlawful entry into, and roaming within, a house thought to be unoccupied is not sufficient to prove the specific intent to commit a larceny. There is no evidence that defendant had even identified an object he might take, let alone taken possession of, or otherwise disturbed, any money or chattel. Although the fact that defendant was discovered on the second floor of the house does make larceny seem a more likely motive than if defendant was found just inside the entrance, we do not believe that fact is enough to prove larcenous intent beyond a reasonable doubt. Furthermore, the charge against defendant requires the specific intent at the time he entered the dwelling, not at some time after that. We conclude that the trial court thus erred in finding beyond a reasonable doubt that defendant satisfied the intent element for home invasion.

Accordingly, we vacate defendant's conviction of, and sentence for, first-degree home invasion, and we remand this case to the trial court for further proceedings consistent with this opinion, as the trial court deems appropriate. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis