STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 1, 2008
v	No. 277417 Wayne Circuit Court
ANTHONY EDGE, Defendant-Appellant.	LC No. 06-006628-01

Before: Markey, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of first-degree home invasion, MCL 750.110a(2)(b), and receiving and concealing stolen property (RCSP) less than $200, MCL 750.535(5). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to three to twenty years in prison for the home invasion conviction and 163 days time served for the RCSP conviction. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction of first-degree home invasion. We disagree. This Court reviews claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. Further, this Court must defer to the fact finder's role in determining the weight of the evidence and the credibility of the witnesses. *People v Fletcher*, 260 Mich App 531, 559, 561; 679 NW2d 127 (2004). "[C]onflicts in the evidence must be resolved in favor of the prosecution." *Id.* at 562.

The elements of the offense, as applied to this case, are: 1) breaking and entering a dwelling, or entering a dwelling without permission, 2) committing a felony while entering, present in, or exiting, the dwelling, 3) while another person is lawfully present in the dwelling. MCL 750.110a(2)(b); *People v Musser*, 259 Mich App 215, 222; 673 NW2d 800 (2003). Defendant argues that there was insufficient evidence that he entered the house, and that someone was lawfully present in the house. We disagree.

The evidence in this case is circumstantial. James Olko saw defendant walking down his street, asking for money. Less than five minutes later, when he returned from inside his house, Olko saw defendant walking down the street in the opposite direction with a blue bicycle. Defendant offered to sell the bicycle to Olko. Olko suspected that the bicycle was stolen and

called the police. After the police detained defendant, the bicycle was discovered to have come from inside a house on Olko's street, owned by Pashko Kalmandi. The door to that house was ajar. Kalmandi had been inside the house for approximately two hours prior to the incident and had not given anyone permission to enter the house. He had seen the bicycle approximately ten hours earlier.

This Court must view the evidence in the light most favorable to the prosecution and defer to the credibility judgments of the trier of fact. *Fletcher*, *supra*, 260 Mich App at 562. The trial court did not question the credibility of Olko's or Kalmandi's testimony. Defendant merely raised the argument that there was a reasonable doubt presented by the possibility that defendant *could* have obtained the bicycle from someone else during the five minutes Olko was in his house. Defendant highlighted the fact that nobody actually saw him enter Kalmandi's house. However, the prosecutor need not disprove every possible theory of innocence. *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). It is for the trier of fact to determine whether *reasonable* theories of innocence have been negated. *People v Wolfe*, 440 Mich 508, 533; 489 NW2d 748 (1992). The evidence is sufficient for a rational trier of fact to conclude that defendant entered Kalmandi's house without permission and stole his bicycle, while Kalmandi was inside the house.

Defendant also argues that the trial court erred in its factual findings. Defendant claims that the trial court erroneously concluded that Kalmandi saw the bicycle shortly before it was stolen. The court only stated that Kalmandi testified that he saw it "later in the day," in response to defense counsel's incorrect assertion that he saw it at 7:00 a.m. Kalmandi, in fact, saw the bicycle around 11 a.m. He did not recall seeing it when he returned home around 7 p.m., and explained: "It's not that I didn't see it. I didn't look for it because there was no reason. I opened the door to go upstairs." The court did not clearly err in its findings of fact.

Defendant next argues that the prior recorded preliminary exam testimony of Kalmandi was improperly admitted at trial. We disagree. A trial court's decision to admit or deny evidence is reviewed for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Preliminary questions of law are reviewed de novo. *Id.* A trial court's findings of fact are reviewed for clear error. *People v Rodriguez*, 251 Mich App 10, 25; 650 NW2d 96 (2002); MCR 2.613(C).

Kalmandi did not appear for trial and the trial court admitted the transcript of his testimony from defendant's preliminary examination because it found that Kalmandi was unavailable. In support of its ruling, the court stated, "Well there has been at least a minimum showing of due diligence. There's been a serving. They've gone out. He's unavailable. The court will entertain the transcript. And might I add that . . . the witness was subject to cross-examination at the time." Defendant argues that the prosecutor did not show due diligence and, thus, the trial court erred in admitting the preliminary examination testimony.

Prior recorded testimony is admissible under MRE 804(b)(1) if the party against whom the testimony is offered had "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination," and the witness is unavailable. *People v Meredith*, 459 Mich 62, 66-67, n 7; 586 NW2d 538 (1998). Unavailability, as relevant to this case, requires that Kalmandi was absent and that the prosecutor was unable to procure his attendance by process or other reasonable means, and due diligence is shown. *People v Bean*, 457 Mich 677, 683-684;

580 NW2d 390 (1998); MRE 804(a)(5). The test is one of reasonableness and requires only that a diligent good-faith effort was made to procure the witness. *Bean*, *supra* at 684.

In this case, the prosecutor served Kalmandi with a subpoena and a police officer was sent to his house on the morning of the trial. The prosecutor did not have any reason to suspect that Kalmandi would not appear. In fact, Kalmandi had attempted to make an appearance the week before, when the trial was postponed and he was sent home. Further, defense counsel declined an opportunity to briefly adjourn to allow the police to make further efforts to procure Kalmandi's presence. Similarly, although defendant also contends that the trial court was required to hold an evidentiary hearing in order to determine whether Kalmandi was unavailable, defendant never requested an evidentiary hearing. Under these circumstances, we find no error in the court's conclusion that Kalmandi was unavailable and that his preliminary examination testimony was admissible under MRE 804(b)(1).

Defendant argues that his constitutional right of confrontation was violated, although he presents no substantive argument in this regard. Generally, the admission of preliminary examination testimony does not violate a defendant's right of confrontation. *People v Meredith*, 459 Mich 62, 67-71; 586 NW2d 538 (1998) (evidence properly within the former testimony hearsay exception is, by definition, not vulnerable to a challenge based on the Confrontation Clause). Defendant has not shown why this is not true in the instant case.

Affirmed.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Kurtis T. Wilder