STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARREN ANTHONY FOX,

Defendant-Appellant.

UNPUBLISHED
January 6, 2009

No. 282603
Kalkaska Circuit Court
LC No. 07-002801-FH

Before: Zahra, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a(2), and was sentenced as a fourth habitual offender, MCL 769.12, to fifteen to thirty years' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The prosecution presented evidence that on or about January 8, 2007, defendant broke open the rear garage door to a residence in Kalkaska County in search of money. The garage was attached to the residence. Defendant fled when he heard a woman's voice coming from inside the home. Two witnesses, one a police officer and the lead investigator of the incident and the other the victim's son-in-law, testified that snow had been tracked in through the open back garage door.

On appeal, defendant argues that the trial court abused its discretion when it denied his requested jury instruction on attempted first-degree home invasion. Defendant argues that a rational view of the evidence supported an attempt theory because the lead investigator's police report did not mention tracks coming into the garage through the back door, and because defendant's written statement likewise made no mention of entry into the garage. We disagree.

A "trial court's determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2003). The trial court abuses its discretion when its decision results in an outcome falling outside the principled range of outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008), citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Jury instructions must clearly present applicable law to the jury. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). When an accused is charged with an offense

consisting of different degrees, the fact-finder may find the accused not guilty of the offense charged but guilty of an inferior offense, or of an attempt. MCL 768.32(1); *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007). Accordingly, "a trial court, upon request, should instruct the jury regarding any necessarily included lesser offense, or an attempt, . . . 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 Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002) (Taylor, J., joined by Young, J., and Taylor, J.), citing *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002) (internal quotation marks and citation omitted), overruled in part on other grds in *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003). To be supported by a rational view of the evidence, "proof on the element or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser . . . ." *Cornell, supra* at 352 (internal quotation marks and citation omitted).

In this case, the disputed differentiating element between first-degree home invasion and attempted first-degree home invasion was entry. At issue then is whether the question concerning entry was sufficiently in dispute to allow a jury consistently to find defendant innocent of first-degree home invasion yet guilty of attempt. We agree with the trial court that a rational view of the evidence did not support the attempt theory.

The victim's son-in-law and the lead police investigator testified to finding that snow had been tracked into the garage. The investigator further testified that defendant had orally admitted to such entry. The son-in-law testified that he did not disturb the back of the garage, dispelling any question concerning whether he had created the tracks. The evidence of entry is countered only by the lack of any mention of tracks in the garage in the lead investigator's police report, and the absence of such a specific admission of entry in defendant's written statement. These omissions might cast doubt upon whether the prosecution established the element of entry, but do not by themselves indicate a lack of entry.

To find defendant guilty of mere attempt, one would have to believe defendant's written statement, and presumably the testimony of the investigator and son-in-law that directly comported with it, then disbelieve the investigator's testimony about discovering footprints inside the garage, and about defendant's having admitted to entering the garage, and also possibly disbelieve the son-in-law's testimony about not disturbing the scene where the interior footprints were found. While it is within the province of the jury to determine issues of credibility, see *People v Odom*, 276 Mich App 407, 419; 740 NW2d 557 (2007), and a jury thus has the prerogative to disbelieve any evidence put before it, see *People v Cain*, 238 Mich App 95, 118; 605 NW2d 28 (1999) ("a jury may disbelieve the most positive evidence, even when it stands uncontradicted" [internal quotation marks and citation omitted]), such a carefully parsed and inventive interpretation of the testimony would lie outside a rational view of the evidence. See *People v Stram*, 40 Mich App 249, 254; 198 NW2d 753 (1972) (neither credibility nor reasonable doubt furnish "any logical basis for an affirmative finding of guilt as to a lesser included offense.").

Defendant additionally asserts error in the trial court's decision to ground its denial of the jury instruction on the lack of positive evidence. We disagree. Contrary to defendant's assertions, the record does not suggest that the trial court required defendant to produce such positive evidence as a prerequisite to an attempt instruction. The trial court found that defendant

had not produced even "some evidence," and stated that the omissions defendant relied on as evidence of non-entry were insufficient in light of the positive and uncontroverted testimony of entry. The court thus merely explained the basis for its decision, while showing no failure to appreciate that, under some circumstances, silence or other omissions may constitute good evidence to prove the elements of a crime.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood