STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT JOHN JOHNSON, a/k/a ROBERT MILLER,

Defendant-Appellant.

UNPUBLISHED
May 26, 1998

No. 196816
Recorder's Court
LC No. 95-007136

Before: Sawyer, P.J., and Kelly and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of entering without breaking, MCL 750.111; MSA 28.306, and sentenced to a term of two to five years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the prosecution failed to prove beyond a reasonable doubt each element of the crime of entry without breaking. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Circumstantial evidence and the reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *Id.*

The elements of entering without breaking are (1) entering without breaking (2) a building for public or private use (3) with the intent to commit a felony or any larceny therein. *People v Ray Jackson*, 71 Mich App 487, 490; 247 NW2d 382 (1976); see also MCL 750.111; MSA 28.306. The intent necessary to commit an offense may be found in the defendant's conduct or words. *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981).

In this case, although the prosecution presented evidence that the security gate to the building was bent and the interior door was kicked in, defendant testified the building was open. The prosecution presented evidence that defendant was coming out of the front of the warehouse carrying boxes. Defendant was headed toward a Chevy Blazer that had its hood and trunk open and its emergency lights flashing. Inside the Blazer there were an additional four to five boxes of items from the

warehouse. Defendant testified that he took some screens from the interior of the building with the intention of selling them. Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the essential elements of the crime of entering without breaking were proven beyond a reasonable doubt.

Next, defendant argues that the trial court abused its discretion in refusing to give defendant's requested misdemeanor jury instruction on entering without breaking and without permission. See MCL 750.115; MSA 28.310. We disagree. The trial court has discretion whether to give a requested misdemeanor instruction and cannot be reversed on appeal absent an abuse of that discretion. *People v Steele*, 429 Mich 13, 22; 412 NW 2d 206 (1987); *People v Dabish*, 181 Mich App 469, 474; 450 NW 2d 44 (1989). Entering without breaking and without permission requires the prosecution to prove beyond a reasonable doubt that: (1) defendant entered without breaking (2) a building for public or private use (3) without first obtaining permission to enter. MCL 750.115; MSA 28.310; see also CJI2d 25.4. As explained in *People v Rollins*, 207 Mich App 465, 468-469; 525 NW2d 484 (1994):

> A court must instruct concerning a lesser included misdemeanor where (1) the defendant makes a proper request; (2) there is an "inherent relationship" between the greater and lesser offense; (3) the jury rationally could find the defendant innocent of the greater and guilty of the lesser offense; (4) the defendant has adequate notice; and (5) no undue confusion or other injustice would result.

In this case, the third condition is not satisfied. Defendant testified that he entered the building to take screens out from the back of the building. Defendant also testified that his intention when taking these things was to sell the items at a flea market. Defendant's defense was that the property was abandoned and the building was open. By defendant's own admission, he was doing more than merely entering the property without permission. He intended to remove, and did remove, items from the property.

Last, defendant argues that the trial court abused its discretion by sentencing defendant on an offense variable level higher than called for by the nature of the crime. We disagree. Defendant does not state a cognizable claim on appeal for this issue because he does not claim that the factual predicate used by the trial court to assess points is unsupported or is materially false. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997). Further, defendant's minimum sentence of two years is within the sentencing guidelines range of twenty-four to sixty months and is, therefore, presumed proportionate. *People v Kennenbrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). Defendant failed to allege any unusual circumstances which would cause his sentence to be disproportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). We conclude that defendant's sentence was proportional to this offense and offender. *People v Lemons*, 454 Mich 234, 260; 562 NW2d 447 (1997). Accordingly, we find no abuse of sentencing discretion. *Daniel, supra*.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Michael R. Smolenski