STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 2, 1999
v	No. 211215 Roscommon Circuit Court
ADAM KEITH CORNELL, Defendant-Appellant.	LC No. 96-003174 FH

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of breaking and entering with intent to commit larceny, MCL 750.110; MSA 28.305. The trial court sentenced defendant, as an habitual offender, to eight to twenty years' imprisonment. Defendant appeals as of right. We affirm.

I. Basic Facts And Procedural History

In mid-February, 1996, a house owned by Thomas Becker[1] was completely destroyed in a fire. A fire investigator determined that the fire was not accidental. Three sets of foot impressions were found approximately thirty feet from the house, and tracking dogs led the police to a residence approximately two miles away, where, among other people, defendant and his cousin Christopher Cornell were present. The owner of the house informed the police that the person they should be looking for was Cary Prescott. The police later stopped a vehicle with defendant, Christopher Cornell, and Prescott inside, and all three men gave various statements to the police regarding the fire. Christopher Cornell and Prescott testified against defendant pursuant to plea agreements.

Defendant gave two written statements to the police, that were both admitted into evidence. In the first statement, defendant claimed that Prescott told defendant and Christopher Cornell that he wanted to show them a place where he had outrun a police dog and that when they arrived at the house, Prescott started punching windows out and started the house on fire. Defendant stated that neither he nor Christopher Cornell did anything to the house. In defendant's second statement, he claimed that the three men were out walking when Prescott said that there was a house in the woods with items inside and that they could make a lot of money. Defendant stated that Prescott kicked in the door and the men

entered the house, but that "there was not anything in the house to take." At that point, according to defendant's second statement, Prescott started punching windows out and set the curtains on fire. Defendant denied setting anything on fire, and stated that he did not even want to be there.

Prescott testified that it was Christopher Cornell's idea to break into the house and that they had not intended to steal anything. Prescott stated, "Well, we hadn't really planned on taking anything. It was empty. We just went there to look around and see what kind of a house Charleton Heston lived in." Later during his testimony, however, Prescott stated that he did not plan to steal anything but probably would have, and that he wanted to see what was inside and maybe "get a little souvenir." He also testified that he could not state whether he had intended to steal anything because he did not remember. Prescott also stated that he tried unsuccessfully to set the curtains on fire and that he did not see either defendant or Christopher Cornell actually set anything on fire.

Christopher Cornell testified that the three men had been drinking that night[2] and that their intent was to look for items to steal inside the house. He stated that they did not find anything of value to steal, however, and that Prescott then set the curtains on fire and defendant set a mattress on fire.

Defendant did not testify and did not present any witnesses. The trial court refused to give defendant's requested instruction on the misdemeanor offense of breaking and entering without permission, holding that the issue whether there was an intent to commit larceny was "squarely framed for the jury." Specifically, the trial court held:

> The Court would note for the record entering without permission is a misdemeanor. The Court takes note of the record that the defendant asserts and it was his position that there was no intent to commit a larceny and I think that the issue is squarely framed for the jury. Either there was a B and E with intent or the crime did not occur. I would not give the entering without owner's permission instruction under the circumstances of this case.

II. Preservation Of Issues And Standard Of Review

A. Jury Instructions

Defendant requested an instruction on the lesser offense of breaking and entering without permission, and the trial court refused to give this instruction. Therefore, this issue has been properly preserved for appellate review. See *People v Schmitz*, 231 Mich App 521, 527-528; 586 NW2d 766 (1998). This Court reviews a trial court's decision whether to grant a requested lesser included misdemeanor instruction for an abuse of discretion. *People v Stephens*, 416 Mich 252, 265; 330 NW2d 675 (1982). The failure to grant an appropriate instruction is an abuse of discretion "if a reasonable person would find no justification or excuse for the ruling made." *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

B. 180 Day Rule

Defendant moved to dismiss for violation of his right to a speedy trial, but the trial court denied the motion. Defendant later moved to dismiss for violation of the 180-day rule. The trial court denied this motion, as well. Therefore, this issue has been properly preserved for appellate review. In any event, a defendant need not object to the delay in order to allow appellate review of a claim that the 180-day rule has been violated. *People v Hewitt*, 176 Mich App 680, 681-682; 439 NW2d 913 (1989). Whether the 180-day rule applies is a question of law that this Court reviews de novo. See *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995) (holding that whether the 180-day rule applied to habitual offender informations was a question of law reviewed de novo). "We review the trial court's attributions of delay for clear error." *People v Crawford*, 232 Mich App 608, 612; 591 NW2d 669 (1998).

III. Jury Instructions

Defendant argues that the trial court erred in refusing to instruct the jury on the lesser included misdemeanor offense of breaking and entering without permission, MCL 750.115; MSA 28.310. We disagree.

A requested instruction on an appropriate lesser misdemeanor offense must be given where it is supported by a rational view of the evidence, unless to do so would result in undue confusion or some other injustice. *Stephens, supra* at 255. The evidence must not only justify a conviction of the misdemeanor, but proof of the element differentiating the charged offense and the misdemeanor must be sufficiently in dispute so that the jury may rationally reject the charged offense and convict on the misdemeanor. *People v Steele*, 429 Mich 13, 21; 412 NW2d 206 (1987). Here, the only differentiating element was the intent to commit larceny. Defendant gave a written statement to the police indicating that Prescott told him that there was a house in the woods with items inside and that they could make a lot of money there. Defendant also stated that the men entered the house, but that there was not anything to take. Additionally, Cornell testified that the purpose of breaking into the house was to look for items to steal. Prescott testified that they had not planned to steal anything, but also stated that he wanted to possibly take a souvenir from inside the house. When directly asked whether he had an intent to steal, Prescott stated that he could not be sure because he could not remember. In light of this evidence, we conclude that the jury could not have rationally found that defendant lacked the intent to commit larceny when he entered the house. The requested jury instruction was not supported by a rational view of the evidence, and the trial court did not abuse its discretion in refusing to grant the instruction.

IV. The 180 Day Rule

Defendant argues that the 180-day rule was violated by the delay in bringing him to trial. We again disagree.

The 180-day rule, MCL 780.131; MSA 28.969(1), provides that a prison inmate must be brought to trial for other untried pending charges within 180 days of the Department of Corrections providing notice to the prosecutor of the place where the inmate is imprisoned. Generally, the untried charges must be "dismissed with prejudice if the prosecutor fails to make a good-faith effort to bring the

charge to trial within the 180-day period." MCR 6.004(D)(2). However, the 180-day rule did not apply to defendant because he was a parolee whose parole had not been revoked. *People v Chavies*, 234 Mich App 274, 279; ___ NW2d ___ (1999). Additionally, defendant committed the instant offense while on parole. He was therefore subject to consecutive sentencing under MCL 768.7a(2); MSA 28.1030(1)(2). The purpose of the 180-day rule is to resolve untried charges against prison inmates to allow sentences to run concurrently. *Connor, supra* at 425. This purpose is not served where mandatory consecutive sentencing applies. *People v McCullum*, 201 Mich App 463, 465; 507 NW2d 3 (1993). We conclude that the 180-day rule did not apply to defendant.

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck

[1] The house was known locally as the "Heston house" because it was once lived in by Charleton Heston.

[2] Defendant does not argue that he lacked the intent to commit larceny due to intoxication.