

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN K. JOHNSON,

Defendant-Appellant.

UNPUBLISHED

March 17, 2000

No. 203780

Recorder's Court

LC No. 96-007065

Before: Murphy, P.J., and Hood and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree home invasion, MCL MCL 750.110a; MSA 28.305(a), and was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to seventeen to thirty-five years' imprisonment. He appeals as of right. We affirm.

Defendant first claims that he was denied his right to present a defense when the trial court refused to allow defense counsel to testify on defendant's behalf. We disagree.

A criminal defendant has a state and federal constitutional right to present a defense. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). Although that right is a fundamental element of due process, it is not an absolute right. *Id.* The accused must still comply with established rules of procedure and evidence. *Id.*

Here, the codefendant was called by defendant and testified that he did not break in or enter the home in question. Defense counsel sought to testify that the codefendant had told him previously that he [the codefendant] had entered the home. The trial court denied the request.

We find no error in the trial court's ruling. First, defense counsel could not offer any such testimony as substantive proof that the codefendant had indeed been in the house. MRE 801. Second, the impeachment value of the proposed testimony was of negligible value. While the credibility of a witness is an issue of utmost importance, the codefendant's credibility was severely damaged without the proposed testimony. The codefendant's vague, inconsistent, and evasive testimony was incredible in its own right, and he was on several occasions confronted with inconsistent statements in his testimony

and his prior statement given to police. Second, the codefendant did not implicate defendant. In fact, the codefendant denied even knowing defendant. In light of these facts, we find that defense counsel's inability to further impeach the credibility of the codefendant did not deny defendant his right to present a defense. Further, in light of the eyewitness testimony presented at trial, we are satisfied that any error was harmless beyond a reasonable doubt. *People v Barrera*, 451 Mich 261, 290-291; 547 NW2d 280 (1996).

Next, defendant claims that the trial court erred by refusing to instruct on the misdemeanor charge of breaking and entering without intent to commit a felony.

Whenever an adequate request for an appropriate misdemeanor instruction is supported by a rational view of the evidence, the trial court must give the instruction unless to do so would result in undue confusion, violation of due process, or some other injustice. *People v Stephens*, 416 Mich 252, 255; 330 NW2d 675 (1982). The failure to give an appropriate instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

An element of the offense of second-degree home invasion is intent to commit a felony or larceny.¹ However, the offense of breaking and entering does not require that a defendant possess the intent to commit a felony or larceny. Therefore, the difference between the two offenses is the element of intent. The contested issue at trial was whether it was defendant or the codefendant who broke into and entered the home. Defendant's own testimony was that he did not enter the home, not that he entered the home but did not have the intent to commit a larceny. Because the requested misdemeanor instruction was inconsistent with both defendant's theory of the case and defendant's testimony at trial, we cannot conclude that there was no justification for the trial court's ruling. Accordingly, we conclude that trial court's refusal to instruct on the requested misdemeanor was not an abuse of discretion.

Last, defendant claims that his seventeen year sentence is disproportionate. We disagree.

An abuse of sentencing discretion will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). In the case at bar, defendant's sentence is within the statutory limits established by the Legislature for an habitual offender and the underlying felony, in the context of defendant's previous felonies, indicates that defendant is unable to conform his conduct to the laws of society. As a result, we find no abuse of discretion. *People v Nelson*, 234 Mich App 454, 464; 594 NW2d 114 (1999).

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ E. Thomas Fitzgerald

¹ The offense of second-degree home invasion requires proof that the defendant broke into a dwelling, entered the dwelling, and intended to commit a felony or larceny. See MCL 750.110a; MSA 28.305a. The offense of breaking and entering requires proof that the defendant broke into a building and entered the building. MCL 750.115; MSA 28.310.