STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 6, 2001
v	No. 219695 Wayne Circuit Court
FRANCIS EDWARD CLARK, Defendant-Appellant.	LC No. 98-005432

Before: Smolenski, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3), for which he was sentenced to three to fifteen years' imprisonment. Defendant appeals as of right and we affirm.

Defendant first argues that the prosecution failed to present sufficient evidence to sustain his conviction of second-degree home invasion. When determining whether sufficient evidence has been presented to sustain a conviction, a 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). To find defendant guilty of second-degree home invasion, the prosecution was required to prove beyond a reasonable doubt that defendant broke into and entered a dwelling with the intent to commit a larceny once inside. See MCL 750.110a(3); MSA 28.305(a)(3); CJI2d 25.2b.

The evidence adduced at trial shows that the incident occurred on March 22, 1996, while the complainant was at work. Defendant was known to the complainant because he had done some work on her house in the previous year. The complainant's next-door neighbor testified that she had seen defendant performing work at the complainant's house and identified defendant as a man she saw in the backyard of the complainant's house on the date of the breaking and entering. The neighbor also noticed a blue Honda with front-end damage parked in front of the complainant's house.

The complainant's daughter went to the house between 12:00 p.m. and 2:00 p.m. to let the cat out and noticed that someone had been inside the house. The complainant and her daughter noticed that the side door was unlocked and that the door leading to the kitchen was

open, which the complainant stated was unusual because she never left the kitchen door open. Further, they noticed that the door wall had been pried away from the structure. The complainant testified that missing items from her house included a camera, video cassette recorder, camcorder, and some jewelry. Further, the complainant testified that defendant drove a blue Honda that had front-end damage when he had worked on her house.

Taken in a light most favorable to the prosecution, there was sufficient evidence for the jury to find that defendant committed second-degree home invasion.

Defendant next argues that the trial court erred in admitting identification evidence obtained at a precustodial photographic lineup. Defendant asserts that he was entitled to counsel at this precustodial photographic lineup because he was the focus of the investigation.

Defendant's contention that he was entitled to counsel at a precustodial photographic lineup because he was the "focus" of the investigation by the police is incorrect in light of *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993), where four justices[1] held that "[i]n the case of photographic identifications, the right of counsel attaches with custody." Thus, counsel is not required at precustodial, investigatory lineups. *Id.* As further explained by more recent decisions of this Court, a defendant is generally not entitled to counsel at a precustodial photographic lineup, and will be entitled to counsel at such a lineup only when the circumstances underlying the investigation and lineup are "unusual." *People v Lee*, 243 Mich App 163, 182; ___ NW2d ___ (2000); *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994). As succinctly stated in *McKenzie, supra*, p 472, "On the basis of *Kurylczyk*, the focus test is no longer applicable."

The question here is whether there are unusual circumstances such that counsel was required at the precustodial photographic lineup. At the time the photographic lineup was conducted, the investigating officer knew that defendant was the individual seen at the scene of the crime on the day the home invasion occurred based on information from the complainant and her neighbor. When the photographic lineup was conducted, defendant was the sole suspect being investigated and the investigating officer had made unproductive attempts to have defendant voluntarily appear at the police station for questioning. These circumstances could arguably to constitute the "unusual" circumstances in that a witness had made a positive identification, defendant was always the sole suspect being investigated, the police had attempted to contact him to appear at the police station, and the intent of the photographic lineup appeared to be a building of the case against defendant. See *Lee, supra*, p 182; *McKenzie*, p 472.

However, even if defendant was entitled to counsel at the precustodial photographic lineup, admission of the evidence at trial was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994). Here, there was a sufficient independent basis for the neighbor to identify defendant in court. The neighbor had known defendant previously from his working on the complainant's house and saw defendant at

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[1] The lead opinion was written by Justice Griffin, with Justices Boyle, Riley, and Mallett concurring with this specific holding.

the back of the house on the day of the incident. Therefore, the photographic lineup did not taint the neighbor's identification of defendant at trial. See *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998).

Lastly, defendant argues that his conviction should be reversed because of alleged juror misconduct. Defendant failed to preserve this issue for appeal because he did not move for a new trial or evidentiary hearing before the trial court. *People v Benberry*, 24 Mich App 188, 191-192; 180 NW2d 391 (1970). Moreover, defendant has provided no evidence whatsoever that any misconduct occurred or that he was prejudiced in any way by an alleged conversation (of unknown content) between a juror and the police officer in charge of the case. Consequently, there is no error requiring reversal based on this issue.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald