STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2009
v	No. 280259 Kent Circuit Court
MARK ANTHONY BOBO, Defendant-Appellant.	LC No. 06-009627-FH

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of breaking and entering a building with intent to commit larceny. MCL 750.110. The trial court sentenced defendant as a habitual offender, fourth offense, see MCL 769.12, to three years' probation with one year to be served in jail. On appeal, defendant argues that there was insufficient evidence to support the jury's finding that he broke and entered the shed with intent to commit larceny and contends that he was denied his right to a fair trial when the prosecutor elicited improper character evidence from a witness in violation of MRE 404(b). Because we conclude that there were no errors warranting relief, we affirm.

I. Basic Facts

Defendant's conviction arises from a break-in and theft of an air-conditioning unit and lawnmower from a storage shed owned by an apartment complex. The owner of the property testified that he had recently terminated defendant's employment and that defendant drove a red pick-up truck with front-end damage. Paula Nice, who was a tenant, testified that she was attempting to leave the apartment's parking lot at about 2:30 a.m. on the morning at issue when she observed defendant with a red pickup truck backed up to the storage shed. She stated that the truck had front-end damage and that she observed a lawnmower handle protruding from the back of the truck. Nice did not see defendant break into the shed or take anything from the shed. Nice asked defendant to move the truck, and defendant responded by telling Nice that he worked for the landlord. Nice later picked defendant out of a police photo array as the individual that she saw at the shed.

II. Sufficiency of the Evidence

A. Standard of Review

We shall first address defendant's argument that there was insufficient evidence to convict him of breaking and entering with the intent to commit larceny. This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In analyzing a challenge to the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution and considers whether there was sufficient evidence to justify a rational trier of fact in finding all of the elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

B. Breaking and Entering

The elements of breaking and entering with intent to commit a larceny are: "(1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny therein." *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998). At trial, Nice testified that she observed defendant at the shed at 2:30 a.m., with his truck backed up to the shed and a lawnmower handle protruding from the back of the truck. In addition, there was testimony that the shed's lock was subsequently found broken, items were missing from the shed—including a lawnmower—and that defendant falsely asserted that he worked for the landlord. This evidence, when viewed in a light most favorable to the prosecution, would allow a rational trier of fact to conclude that defendant broke and entered the storage shed. Similarly, there was sufficient evidence that defendant had the requisite intent.

Although the crime charged is predicated on showing that defendant had intent to commit larceny, "it is not necessary that the larceny be successful, only that the defendant had intended to commit larceny when he broke and entered." *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993). However, "[i]ntent to commit larceny cannot be presumed solely from proof of the breaking and entering." *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). But "intent may reasonably be inferred from the nature, time and place of defendant's acts before and during the breaking and entering." *Id*. "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Here, a witness observed defendant with his truck backed-up to the shed with a lawnmower handle protruding out of the back at 2:30 a.m., and defendant falsely represented himself to be an employee of the landlord. Moreover, the lock to the shed was broken and items were missing from the shed. Although defendant presented evidence that he could not have been the perpetrator, this Court will not interfere with the factfinder's role in determining the weight of the evidence or the credibility of the witnesses. See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). When viewed in a light most favorable to the prosecution, we conclude there was sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant broke into and entered the storage shed with intent to commit larceny.

III. Prosecutorial Misconduct

Defendant next argues that the prosecutor committed misconduct when he elicited testimony from a detective concerning defendant's criminal record. Defendant further argues that the trial court failed to properly cure the error and that this error warrants reversal.

At trial, the prosecutor asked a detective where he obtained the pictures for the photographic array presented to Nice and the detective responded: "[w]e get the pictures from a database from prior arrests from the Kent County Jail." Defendant's trial counsel did not object to this testimony, but a juror later presented a written question for the witness noting the photo and asking whether defendant had any prior convictions. The trial court responded by telling the jury that the question was irrelevant and cautioning them not to consider any potential prior arrest or conviction when making its decision. The court stated that the testimony could only be used for "purposes of how the photo was secured." Further, at the close of evidence, and outside the jury's presence, the trial court asked defense counsel if he wanted the court to give the jury another curative instruction on the issue. Defendant's trial counsel declined, noting that the jury had already received a curative instruction and stating that he preferred that the trial court refrain from giving another instruction.

Although we agree that the prosecutor improperly elicited the detective's testimony, we nevertheless conclude that this issue does not warrant relief. The trial court instructed the jury not to consider any possible prior arrest or conviction in considering the evidence. And defendant's trial counsel expressly approved the trial court's handling of the issue. Hence, defendant's trial counsel waived any claim of error in this regard. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

There were no errors warranting relief.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly