STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN JAMES PARKER,

Defendant-Appellant.

UNPUBLISHED
January 24, 1997

No. 182771

Tuscola Circuit Court
LC No. 93-006319-FH

Before: Doctoroff, P.J., and Hood and Paul J. Sullivan,* JJ.

PER CURIAM.

Defendant appeals by right from his jury convictions for breaking and entering (B&E) an unoccupied building, MCL 750.110; MSA 28.305, and larceny in a building, MCL 750.360; MSA 28.592. Defendant was sentenced as a fourth-degree habitual offender, MCL 769.12; MSA 28.1084, to twenty to thirty-five years in prison for B&E and five to fifteen years in prison for larceny. We affirm.

Defendant first contends that there was insufficient evidence presented at trial to support his convictions. We disagree. The record reveals that, on the night in question, a pharmacy was broken into by use of a green crowbar, and several thousand dollars worth of pharmaceuticals were stolen, as well as approximately $20 in loose change. Very shortly after the break-in, the car in which defendant and two companions were riding was stopped near the pharmacy for speeding. In the trunk of the car, police discovered the crowbar and pharmaceuticals in question. Furthermore, defendant had $5.68 in loose change on him when the car was stopped, which, when combined with the loose change found on the other two occupants of the car, totaled $20.11. Viewing the foregoing in the light most favorable to the prosecution, a rational trier of fact could have inferred that defendant participated in the break-in and larceny, either alone or in conjunction with one or both of the others, and that he intended to do so. Accordingly, the jury could have found the evidence sufficient to prove the essential elements of both offenses beyond a reasonable doubt. *People v Baker*, 216 Mich App 687, 689; 551 NW2d 195 (1996).

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* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant next contends that he is entitled to have his convictions dismissed because he was prosecuted in violation of the 180-day rule, MCL 780.131; MSA 28.969(1). We disagree. The 180-day rule provides that trial of pending charges against an inmate of a state penal institution must commence within 180 days after either (1) the local prosecutor has actual knowledge of the inmate's status, or (2) the Department of Corrections has or should have such knowledge. If, however, the prosecution has made a good-faith effort to timely commence trial, no violation of the rule will be found. MCR 6.004(D); MCL 780.131(1); MSA 28.969(1)(1); *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). Any unexplained delay is chargeable to the prosecution. *People v England*, 177 Mich App 279, 285; 441 NW2d 95 (1989).[1]

In this case, the record reveals that defendant was sentenced on an unrelated crime on May 20, 1993, but trial on the instant charges did not commence until October 12, 1994. Although defendant's trial on these charges was scheduled for September 1, 1993, well within 180 days from defendant's unrelated incarceration, there were interim delays variously owing to (1) proceedings on a motion to suppress the evidence found in the trunk of the car, and appeal thereof; (2) the temporary unavailability of a codefendant for trial;[2] and (3) the withdrawal of defendant's original appointed counsel. However, the record reveals that the only delay possibly attributable to the prosecution was a trial adjournment from April 15, 1994 to June 6, 1994, caused by the unavailability of a codefendant who had been hospitalized just prior to the trial. While the codefendant's hospitalization was not the fault of the prosecution, the delay arising therefrom could be chargeable to the prosecution because it had originally requested that defendant's case be consolidated with his companions' cases for purposes of trial. However, the delay caused by the unavailability of the companion was only fifty-two days. Even if this delay were to be charged to the prosecution, it would be insufficient to constitute a violation of MCL 780.131; MSA 28.969(1). Since defendant either himself requested or otherwise stipulated to all the other delays, including the withdrawal of his original trial counsel, the overall delay in bringing defendant's case to trial was not the result of a lack of good-faith preparation by the prosecution. MCR 6.004(D); *Bell*, *supra*, at 278. Accordingly, defendant is not entitled to relief pursuant to the 180-day rule.

Defendant next contends that his convictions for both B&E and larceny in a building were violative of the prohibition against double jeopardy. We disagree. The prohibition against double jeopardy is not violated when a defendant is convicted of both B&E and larceny, notwithstanding that the acts may have occurred in the same chain of events. Since B&E is not a continuing offense, a larceny committed once inside a building is a separate act. *People v Patterson*, 212 Mich App 393, 395; 538 NW2d 29 (1995). Accordingly, defendant's separate convictions were proper.

Defendant next contends that he was denied a fair trial when, during closing argument, the prosecutor allegedly referred to defendant's failure to testify on his own behalf. We disagree. A review of the record reveals that the prosecutor was merely responding to issues raised by defense counsel during cross-examination. Such comment was not improper. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). In context, it is clear that the prosecutor's closing remarks in no way implicated defendant's right to be free from self-incrimination. Thus, defendant was not denied a fair trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Finally, defendant contends that his sentences were disproportionate. We disagree. We note that the sentencing guidelines do not apply to habitual offenders, nor may they be considered on appeal of such a sentence. *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996). We further note that defendant's twenty-year minimum sentence was well below the life sentence allowable for a fourth-degree habitual offender. MCL 769.12(1)(a); MSA 28.1084(1)(a). We find defendant's arguments on this issue to be without merit. In light of defendant's crime and his status as a fourth degree habitual offender, we find the sentence imposed by the trial court proportional.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Paul J. Sullivan

[1] We note that the sole purpose of the 180-day rule is to insure that multiple and unrelated sentences may run concurrently. *Bell*, *supra*, at 279. As such, the rule must not be confused with the wholly separate fundamental right to a "speedy trial" applicable to all criminal defendants.

[2] Defendant was eventually tried alone for reasons unrelated to this appeal.