STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEE BARNES,

Defendant-Appellant.

UNPUBLISHED
April 11, 1997

No. 189819
Kent Circuit Court
LC No. 94-003454-FH

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of breaking and entering a motor vehicle for the purpose of stealing or unlawfully removing goods, chattels, or property of the value equal to, or greater than five dollars. MCL 750.356a; MSA 28.588(1). Defendant, who was also convicted of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, was sentenced to a prison term of two to twenty years, and ordered to pay restitution in the amount of $721.22 for damage to the victim's vehicle. We affirm defendant's conviction, but remand for correction of defendant's presentence investigation report (PSIR).

I

On appeal, defendant first argues that the lower court erred in admitting his confession to the investigating officer because, although defendant was admittedly not in custody, he was clearly the focus of the criminal investigation as the lead suspect. Accordingly, defendant claims that he should have first been advised of his rights pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). We disagree.

Rather than challenging the voluntariness of his statement, or arguing that he was indeed subjected to a custodial interrogation, thereby requiring an advisement of rights under present case law (see *Miranda, supra)*, defendant instead concedes that he was not in custody, and simply urges this Court to adopt a new test to be utilized in determining when a police officer must advise a defendant of his *Miranda* rights. However, this issue has already been resolved by our Supreme Court.

In *People v Hill*, 429 Mich 382, 397-398; 415 NW2d 193 (1987), our Supreme Court specifically addressed the very issue that defendant now raises, and clearly rejected it, holding as follows:

> It is our view that the purposes of the *Miranda* rule are better served by a custody test than by a focus test. The mere fact that an individual has become the focus of an investigation does not subject him to any avoidable offense against his liberty or dignity. It is only in the coercive atmosphere of custodial interrogation that he must be protected from improper police tactics. Similarly, the specter of involuntariness is not raised simply because the person being questioned is the prime suspect if the environment in which he is questioned is not coercive, i.e., if the suspect's freedom has not been significantly limited. The fact that an individual is the focus of an investigation does not, in and of itself, present any danger that involuntary statements will be made. . . . [T]he custody test corresponds to the protected interests far more precisely than does the focus test which is both underinclusive and overinclusive.

Having found nothing in the record to suggest that defendant's statement to the police was anything but voluntary, we find no merit to defendant's argument.

II

Defendant next argues that there was insufficient evidence to sustain his conviction because there was no evidence presented from which the jury could reasonably conclude that he intended to permanently deprive the victim of his property. More specifically, defendant contends that although he removed the battery from the victim's vehicle, there was no evidence to suggest that he intended to keep it. We disagree, and find defendant's argument both irrelevant and without merit.

We first note that although the jurors were instructed that they must determine that defendant intended to permanently deprive the victim of his property before they convicted defendant, such an intent is not required. Defendant was charged and convicted pursuant to the following statutory language:

> Any person who shall enter or break into any motor vehicle, house trailer, trailer or semi-trailer, for the purpose of stealing or unlawfully removing therefrom any goods, chattels or property of the value of not less than $5.00, or who shall break or enter into any motor vehicle, house trailer, trailer or semi-trailer, for the purpose of stealing or unlawfully removing therefrom any goods, chattels or property regardless of the value thereof if in so doing such person breaks, tears, cuts or otherwise damages any part of such motor vehicle, house trailer, trailer or semi-trailer, shall be guilty of a felony, punishable by a fine not to exceed $1,000.00, or by imprisonment in the state prison not more than 5 years. [MCL 750.356a; MSA 28.588(1), second paragraph.]

According to *People v Nichols*, 69 Mich App 357, 359; 244 NW2d 335 (1976), quoting *People v Chronister*, 44 Mich App 478, 479-480; 205 NW2d 238 (1973), there are three essential

elements of the crime of breaking or entering an automobile for the purpose of stealing goods valued at $5.00 or more that the prosecutor must prove beyond a reasonable doubt in order to convict the defendant, including:

> "1) That the defendant entered or broke into a vehicle.
>
> "2) That he either entered or broke into a vehicle with the purpose or intent of stealing or unlawfully removing property.
>
> * * *
>
> "3) [T]hat the defendant *intended* to remove property valued at $5 or more." (Emphasis in original.)

This Court also held in *Nichols, supra,* 359, that the statute [MCL 750.356a; MSA 28.588(1)] did not require, as defendant here argues, a completed larceny in order to sustain a conviction. Our review of the language of the statute itself reveals only that the defendant, at the time of breaking or entering the motor vehicle, must intend to "steal *or* unlawfully remove any goods, chattels or property." Here, defendant does not contest the fact that he damaged the victim's vehicle (i.e., smashed the window and pried open the hood) with the specific intent to remove the battery, and that he did so without first obtaining permission from Taylor, thus fulfilling the elements of the crime charged.

Moreover, in *People v Burrows*, 73 Mich App 51, 52-53; 250 NW2d 789 (1976), a case almost identical to the present case, this Court found that the defendant, who raised the hood and entered the engine compartment to sever the battery cables and remove the battery, was guilty of violating MCL 750.356a; MSA 28.588(1). This Court reasoned that the legislature, which intended to punish the breaking and entering of a motor vehicle with the purpose to steal, determined that such conduct would be felonious if the person's intent was to steal property of more than $5.00 in value *or* if the person, in the course of removing goods or property, damaged any part of the motor vehicle. *Id.* at 53. Once again, we find that both of the elements mentioned in *Burrows, supra*, which bring defendant's conduct within the purview of the statute, are present here.

We further find that although it was not necessary that the jurors find that defendant intended to permanently deprive the victim of his battery, there nonetheless was sufficient evidence presented to support such an intent. A challenge to the sufficiency of the evidence is resolved by considering only the evidence favorable to the prosecution, to the exclusion of all other, *People v Wolfe*, 440 Mich 508, 515, 489 NW2d 748, amended 441 Mich 1201 (1992), and because of the difficulty of proving an actor's state of mind, intent may be inferred from minimal circumstantial evidence and the reasonable inferences which arise from the evidence, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

At trial, there was evidence presented that defendant damaged the vehicle, that he removed the battery without permission, that he intended to assume ownership of the battery by attempting to place it in his own vehicle, and that he made no attempt to return the battery. From this evidence alone, we find

that the jury could reasonably infer that defendant intended to permanently deprive the victim of his property.

III

Finally, defendant argues that he is entitled to resentencing because the PSIR relied upon by the trial court contained a conviction which was reversed on appeal and later dismissed. Because the prosecution concedes that the conviction should not have been included in the PSIR, we remand the case so that references to defendant's 1979 burglary conviction can be deleted. However, because defendant did not raise this issue prior to sentencing, it is not preserved and we do not believe defendant is entitled to resentencing on this basis. *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996).

Affirmed, but remanded for correction of defendant's PSIR.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Michael R. Smolenski