STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE JACKSON,

Defendant-Appellant.

UNPUBLISHED
July 8, 1997

No. 189425
Oakland Circuit Court
LC No. 95-138817

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering a building with intent to commit a larceny, MCL 750.110; MSA 28.305. After trial, defendant pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to three to ten years' imprisonment for the breaking and entering conviction. The trial court then vacated this sentence and sentenced defendant to five to thirty years' imprisonment for the habitual offender conviction. Defendant appeals as of right. We affirm.

Defendant was stopped by police just as he was leaving the parking lot of a church at nine o'clock on a Saturday night. Defendant's wife and two minor children were in the car with him. The police were responding to a burglar alarm at the church, which had been triggered only a few minutes earlier. When the police arrived, no one else was in the area. Defendant told the police that he was at the church looking for a job. He also told police he had pulled into the church parking lot because one of the children had spilled something in the car. Eventually, defendant was arrested, and the police found a long-handled screwdriver tucked in his belt. During an inventory search of the car, they also found property stolen from the church underneath defendant's seat. The church doors were found propped open, with gouge marks under the door handle.

Defendant first argues that the trial court erred in admitting statements he made before he was given *Miranda*[1] warnings. Defendant claims that he was subject to custodial interrogation when he was questioned in the back of a police car. We find the error harmless and decline to reverse.

The trial court found that the officer's questions were part of an "investigatory stop," and that defendant's responses were therefore admissible. However, the trial court failed to determine whether defendant was "in custody" for *Miranda* purposes, which would have made his statements inadmissible. See *People v Chinn*, 141 Mich App 92, 96-97; 366 NW2d 83 (1985). However, we decline to reverse on this issue because, in light of the overwhelming evidence against defendant, any error in the admission of his statements was harmless beyond a reasonable doubt. *People v Strunk*, 184 Mich App 310, 320; 457 NW2d 149 (1990).

Defendant next argues that the prosecutor improperly appealed to the jurors' sense of religious duty by emphasizing the fact that defendant had robbed a church. Because defendant did not object to these remarks, appellate review is precluded unless a timely instruction could not have cured any resulting prejudice or unless our failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). We find neither.

Here, the prosecutor used a reference to the church and the Ten Commandments to illustrate the wrongful nature of defendant's conduct. Such comments are permissible given that the prosecutor did not misstate the facts or the law nor appealed to the juror's religious duties. *People v Mischley*, 164 Mich App 478, 482-483; 417 NW2d 537 (1987). The prosecutor also properly argued from the facts that it was unlikely that anyone would be applying for a job at a church at nine o'clock on the night before Easter. While the prosecutor did improperly suggest that stealing from a church made defendant's crime worse, the trial court immediately cured any prejudice by instructing the jury to disregard that argument. Thus, the prosecutor's comments did not deprive defendant of a fair trial. See *People v Bahoda*, 448 Mich 261, 266-267 and fnts 5-7; 531 NW2d 659 (1995).

Next, defendant argues that the trial court erred in refusing to instruct the jury on the cognate lesser included offense of receiving or concealing stolen property. The only question is whether such an instruction was supported by a rational view of the evidence. In *People v Steele*, 429 Mich 13; 412 NW2d 206 (1987), the Michigan Supreme Court explained:

> [P]roof on the element or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense.
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> * * *
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> Thus, the differentiating elements must be factually disputed, and the dispute must be great enough for a jury to rationally reject the existence of the greater offense and accept the existence of the lesser misdemeanor offense. [*Id.* at 20-21 (citation omitted).]

Here, the trial court properly concluded that no rational trier of fact would acquit defendant of the greater offense while convicting him of the lesser offense. This is so because a conviction on a charge of receiving or concealing stolen goods would require finding, among other things, that defendant knew that the property was stolen. *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530

(1993). The only basis in the record for such a finding would be evidence indicating that defendant was the person who committed the breaking and entering. Thus, defendant was either guilty of breaking and entering or not guilty at all. Instructing the jury on the crime of receiving or concealing stolen goods would have allowed them to engage in "pure speculation" that some other person committed the robbery and then gave the stolen goods to defendant. Because there was no evidence in the record to support such a theory, the trial court properly declined to give the requested instruction. *People v Bailey*, 451 Mich 657, 667-675; 549 NW2d 325 (1996).

Defendant also argues that the evidence introduced at trial was insufficient as a matter of law to sustain his conviction. We disagree. Defendant was stopped as he left the parking lot of church where the burglar alarm had just been triggered. Defendant had property stolen from the church under his front seat, and had a long-handled screwdriver tucked in his belt. The doors of the church were found propped open, with gouge marks under the door handle. Viewed in the light most favorable to the prosecution, this evidence was more than sufficient to sustain defendant's conviction. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); see also *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

We also reject defendant's contention that there was an accumulation of error which denied him a fair trial. Any error shown was either harmless, or was cured by an appropriate instruction from the trial court. Defendant's conviction will therefore not be set aside on this basis.

Lastly, defendant has failed to provide this Court with a copy of his presentence investigation report and has thereby waived any argument regarding the proportionality of his sentence. *People v Rodriguez*, 212 Mich App 351, 355; 538 NW2d 42 (1995). Further, even if we were to address this issue, we would find that defendant's sentence was proportionate. Defendant had ten prior felony convictions and was convicted as an habitual offender, fourth offense. He faced up to life in prison. See MCL 769.12(1)(a); MSA 28.1084(1)(a). Under these circumstances, his five to thirty year sentence was not an abuse of discretion.

Affirmed.

/s/ Janet T. Neff
/s/ Myron H. Wahls
/s/ Clifford W. Taylor

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 694 (1966).