STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NEAL WAYNE ROLAND,

Defendant-Appellant.

UNPUBLISHED
July 7, 1998

No. 199588
Saginaw Circuit Court
LC No. 96-011858 FH

Before: Sawyer, P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of receiving and concealing stolen property valued in excess of $100, MCL 750.535; MSA 28.803. The trial court sentenced him to three to five years' imprisonment. We reverse.

I

Defendant argues that the trial court abused its discretion in denying his motion for a new trial based on his allegation that the jury's verdict was against the great weight of the evidence. Defendant further argues that the evidence at trial was insufficient to support a guilty verdict. The elements of the crime of receiving and concealing stolen property in excess of $100 are the following: (1) that some property was stolen; (2) that the value of the stolen property was in excess of $100; and (3) that the defendant bought, received, possessed, concealed, or aided in the concealment of the stolen property (4) while knowing that it was stolen. MCL 750.535; MSA 28.803; *People v Keshishian*, 45 Mich App 51, 53; 205 NW2d 818 (1973). The only element at issue is element (4): whether defendant knew the property in question was stolen at the time he concealed it. Although there was no direct evidence—e.g., a confession to the police, an admission to a friend—that defendant knew the items were stolen, there was ample circumstantial evidence. "Because the law recognizes the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to sustain a conclusion that a defendant entertained the requisite intent." *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985). Evidence of the following was presented at trial: (1) the morning after a police officer left a calling card at the home defendant shared with his girl friend, defendant hid a number of stolen items in a junked van at his employer's car lot; (2) defendant told a coworker who observed him putting the items

in the van to not tell anybody about his actions; (3) the same day, defendant told his boss that he had a family emergency and had to leave; (4) upon arriving home, he asked his girl friend to recommend a motel and to register a room for him under her name; and (5) he proceeded to the motel but apparently brought no suitcases or toiletry items with him. This evidence was sufficient for the jury to find beyond a reasonable doubt that defendant knew the items were stolen, especially since "'[g]uilty knowledge means not only actual knowledge, but constructive knowledge, through notice of facts and circumstances from which guilty knowledge may fairly be inferred.'" *Keshishian, supra* at 53, quoting *People v Tantenella*, 212 Mich 614, 621; 180 NW 474 (1920). Furthermore, the preceding evidence indicates that the trial court did not abuse its discretion in finding that the jury's verdict was not against the great weight of the evidence.

II

Next, defendant argues that the trial court abused its discretion in denying his motion for a mistrial because his constitutional right to remain silent was violated when reference was made at trial to his refusal to answer questions of the police. In *People v Bobo*, 390 Mich 355, 359; 212 NW2d 190 (1973), the Supreme Court indicated that "the fact that a witness did not make a statement may be shown only to contradict his assertion that he did." In other words, evidence of a defendant's silence may be used only for impeachment purposes. In this case, the evidence of defendant's silence was not used for impeachment purposes, since defendant did not allege that he made a statement to the police. In fact, the police officer testified to defendant's silence before defendant even took the stand; this precludes justifying the statement as impeachment. *People v Gallon*, 121 Mich App 183, 187-188; 328 NW2d 615 (1982). The testimony regarding defendant's silence was used as substantive evidence of his guilt; this was improper under *Bobo, supra* at 359. See *Gallon, supra* at 187. Since the testimony was not used for impeachment purposes, it does not matter that defendant was technically not under arrest at the time he invoked his Fifth Amendment right to silence. See *People v Cetlinski*, 435 Mich 742; 460 NW2d 534 (1990) (evidence of a defendant's silence that did not occur during arrest or police accusation is admissible *for impeachment purposes*).

The improper introduction of evidence regarding defendant's silence does not automatically mandate a reversal of defendant's conviction, because the Fifth Amendment violation is subject to harmless error review. *People v Swan*, 56 Mich App 22, 31; 223 NW2d 346 (1974). A determination of whether the error was harmless involves a two-step inquiry: (1) was the error so violative of a sound judicial system that reversal is necessary and (2) if not, was the error harmless beyond a reasonable doubt? *Gallon, supra* at 188. If step (1) is satisfied, it does not matter whether the error was harmless beyond a reasonable doubt under step (2), because the purpose of step (1) is to deter misconduct of prosecutors and police. *Id.* An error may satisfy step (1) if "it was deliberately injected into the proceedings by the prosecutor, if it deprives the defendant of a fundamental element of the adversary process, or if it is of a particularly inflammatory or persuasive kind." *Id.*, 188-189. Here, the prosecutor said in his opening statement, "the defendant refuse[d] to say anything and he [was] arrested." He then further compounded his error by inquiring of a testifying officer, "And when you contacted [defendant], did you ask him about the fax machine?" In *Gallon, supra* at 186, the prosecutor simply asked, "And then what happened," after which the testifying police officer mentioned

some things the defendant had told him and then indicated that the defendant had told him "I don't want to talk anymore." There was no indication in *Gallon* that the prosecutor had mentioned anything about the defendant's silence in his opening statement. Nevertheless, we stated the following:

> [I]t is clear from the record that the detective's testimony was solicited and responsive. We find that the prosecutor's conduct in injecting the error was either deliberate or flagrantly negligent and, therefore, the error cannot be found harmless under the first prong of the test. [*Id.*, 189.]

The prosecutor's conduct in this case was even more egregious than the prosecutor's conduct in *Gallon*. Therefore, the prosecutor's error in deliberately injecting evidence of defendant's silence into the trial—and thereby violating defendant's constitutional right to remain silent—was not harmless. The trial court abused its discretion in denying defendant's motion for a mistrial.

Defendant's further allegation that the prosecutor erred in mentioning in his rebuttal closing argument that defendant called his attorney prior to the arrival of the police is without merit. Defendant himself raised the issue of calling his attorney as a way to explain why he went to a motel room on the day of his arrest -- he wanted the jury to think that he went to the motel room so that he could have some peace and quiet in order to call his attorney. Because defendant himself injected this information into the trial in order to support his theory of the case, the prosecutor did not err in reiterating the information in his rebuttal argument.

III

Next, defendant argues that his arrest without a warrant in his motel room was illegal. The Fourth Amendment to the United States Constitution prohibits police officers "from making a warrantless nonconsensual entry into a suspect's home to make a routine felony arrest." *People v Oliver*, 111 Mich App 734, 747; 314 NW2d 740 (1981), rejected on other grounds *People v Williams*, 422 Mich 381; 373 NW2d 567 (1985). For purposes of this prohibition, a person's motel room is equivalent to his or her home. *People v Oliver*, 417 Mich 366, 378-379; 338 NW2d 167 (1983). However, if a defendant consents to a police officer's entry into his or her motel room, a subsequent arrest without a warrant supported by probable cause is legal. *People v Smith*, 148 Mich App 16, 22-23; 384 NW2d 68 (1985). It is not necessary that the police inform the defendant of the purpose of their visit in order for the defendant's consent to entry to be valid. *Id.* at 23. At trial, no one alleged that the officers' entry into the motel room was nonconsensual. In fact, the arresting officer testified both at trial and at defendant's preliminary examination that defendant invited him into the room. Once the police had validly entered defendant's room by way of defendant's consent, they were free to arrest defendant without a warrant as long as the arrest was supported by probable cause. *Smith, supra* at 22-23.

At the time of defendant's arrest, the following circumstances, of which the arresting officer was aware, had occurred: (1) a fax machine stolen from a store in Ann Arbor had been pawned in Saginaw by defendant's girl friend; (2) defendant's girl friend indicated that defendant had brought the fax machine and other items into her home; (3) the day after the police had left a calling card at his door,

defendant had loaded items into his vehicle before leaving for work; and (4) defendant had requested that his girl friend rent him a motel room under her name. These facts would justify a fair-minded person of average intelligence in believing that defendant had committed a felony; therefore, defendant's arrest was supported by probable cause. See *Oliver*, *supra*, 111 Mich App 747. Defendant's arrest was legal, and, accordingly, his contention that the evidence found in the van should have been suppressed as "fruit of the poisonous tree" is without merit.

IV

Next, defendant argues that the prosecutor's reference in his opening statement to a request defendant's girl friend made of her mother constituted hearsay and violated defendant's spousal privilege under MCL 600.2162; MSA 27A.2162. An invocation of the spousal privilege serves only to prevent a spouse from *testifying on the witness stand*; out-of-court statements, if otherwise allowable, are not excluded by the privilege. See *People v Fisher*, 442 Mich 560, 575; 503 NW2d 50 (1993) (phrase "be examined" in the spousal privilege statute indicates that the privilege applies only to testimony provided as a sworn, examined witness). Thus, the prosecutor's statement did not violate defendant's spousal privilege.

Nor did the statement constitute hearsay. As indicated in MRE 801(c), an out-of-court statement constitutes hearsay only if it is "offered in evidence to prove the truth of the matter asserted." The out-of-court statement presently contested was not "offered in evidence"; it was mentioned in opening argument. Furthermore, the contested out-of-court statement—which essentially amounts to the following: "Mother, will you lie about the fax machine?"—was going to be offered not to prove the truth of the matter asserted but rather to show its effect on the hearer. Thus, it would not have constituted hearsay if admitted into evidence. *People v Eggleston*, 148 Mich App 494, 502; 384 NW2d 811 (1986).

Defendant's additional argument—that reversal of his conviction is required because of the arresting officer's testimony regarding another out-of-court statement by his girl friend—is without merit. Notwithstanding that the testimony was stricken, defendant himself freely testified to the content of the out-of-court statement (he and his girl friend's live-in relationship). "The erroneous admission of hearsay testimony is harmless error where the same facts are shown by other competent testimony." *People v Hoerl*, 88 Mich App 693, 702; 278 NW2d 721 (1979).

V

Next, defendant argues that the trial court abused its discretion by admitting for impeachment purposes defendant's prior conviction for burglary. MRE 609(a)(2) provides that a defendant who has testified at trial may be impeached with evidence of a prior conviction if it contained an element of theft, it was punishable by imprisonment in excess of one year, and the court determines that it has significant probative value regarding credibility that outweighs its prejudicial effect. In determining the conviction's probative value regarding credibility, the trial court must consider only the age of the conviction and the degree to which the conviction helps in assessing the defendant's truthfulness. MRE 609(b). In determining the conviction's prejudicial effect, the trial court must consider only the prior crime's

similarity to the charged offense and the effect on the trial if admission of the evidence would cause the defendant not to testify. MRE 609(b).

A conviction for burglary is moderately probative of veracity. *People v Johnson*, 170 Mich App 808, 810; 429 NW2d 237 (1988). Therefore, the trial court's conclusion that the conviction had probative value was proper. Furthermore, the conviction occurred in 1990, and the present trial took place in 1996 -- a difference of six years. It was therefore proper for the trial court to implicitly conclude that the conviction was of recent vintage. Moreover, the admission of the conviction did not prevent defendant from testifying.

The crime of burglary *is* somewhat related to the crime of receiving and concealing stolen property, since a receiving and concealing offense often arises out of a burglary. However, similarity between the offense charged and the prior offense does not automatically mandate exclusion of the prior offense for impeachment. *People v Lesperance*, 147 Mich App 379, 388; 382 NW2d 788 (1985). As long as there is an indication that its probative value outweighs its prejudicial effect, a trial court even has discretion to allow for impeachment purposes evidence of a conviction which is *identical* to the charged crime. *Id.*, 389. In *Lesperance, supra* at 389, we concluded that impeaching the defendant with prior convictions for attempted breaking and entering and larceny over $100 was allowable in a prosecution for larceny and receiving and concealing stolen property. In *People v Coward*, 111 Mich App 55, 66; 315 NW2d 144 (1981), we indicated that a defendant being tried for breaking and entering could be impeached with a prior conviction for breaking and entering an automobile. The offense in question in this case is more dissimilar to the charged crime than those deemed admissible in *Lesperance* and *Coward*. We stated in *Coward*:

> What is necessary is that the trial court recognize that it has discretion to exclude evidence of prior convictions and that it exercise that discretion by weighing the factors for and against admissibility. . . . [*Id.*, 67.]

The trial court in this case did weigh the factors for and against admissibility, and it was not an abuse of its discretion to allow for impeachment purposes evidence of defendant's prior burglary conviction.

VI

Next, defendant argues that his judgment of sentence must be altered to reflect that he was not sentenced as an habitual offender. Although it is somewhat unclear from the record, it appears that the trial court did not sentence defendant as an habitual offender. Nevertheless, defendant's judgment of sentence at one point states "HOA 4th Offense." Defendant does not dispute that he met the requirements for an enhancement as a fourth-offense habitual offender. After any future trial, the court should make clear on the record whether it is imposing an habitual offender enhancement and the judgment of sentence should accurately reflect the judge's decision.

VII

Finally, defendant argues that the charge against him should have been dismissed because the prosecution violated the 180-day rule, MCL 780.131(1); MSA 28.969(1). We have recently held that adjournments requested by a defendant should not be used against the prosecutor in

evaluating a potential violation of the 180-day rule. *People v Jones (On Rehearing)*, 228 Mich App ___; ___NW2d ___ (Docket No. 152860, rel'd 2/20/98), slip op, p 2. Because the trial delays in the case at bar were attributable to adjournments requested by defense attorneys, the 180-day rule was not violated, even if it began running on the day the complaint was issued.[1]

Another reason why the 180-day rule was not violated is that defendant's sentence was required to run consecutively to his prior sentence on an unrelated charge. This Court held in *People v Conner*, 209 Mich App 419, 429; 531 NW2d 734 (1995), that "the purpose of the [180-day] statute[2] does not apply in a case where a mandatory consecutive sentence is required upon conviction." The Court went on to indicate that if the purpose of the statute does not apply, the statute itself does not apply. *Id.* Therefore, because defendant's sentence was required to be consecutive, making the purpose of the 180-day rule inapplicable, the 180-day rule does not apply in this case.

Defendant raises one additional issue regarding the trial judge's response to a question from the jury. Defendant argues that the judge's response allowed the jury to convict defendant if it believed he merely "suspected"—as opposed to knew—that the property in question was stolen. This argument is meritless. Although the judge's response was not ideal, it did not, as defendant alleges, mislead the jury as to the elements of the offense. In fact, the judge stated, "the word 'suspect' does not appear in any of my instructions." The judge was not obligated to define the word "know" because it is "generally familiar to laypersons and is susceptible of ordinary comprehension." See *People v Cousins*, 139 Mich App 583, 593; 363 NW2d 285 (1984).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Martin M. Doctoroff

[1] We are unable to determine when the 180-day period began running because the record gives no indication as to when defendant's parole on his unrelated offense was revoked such that he became, for purposes of the 180-day rule, an inmate in a state facility or a local detainee awaiting incarceration in a state facility. As indicated in *People v Wright*, 128 Mich App 374, 379; 340 NW2d 93 (1983), and *People v Gambrell*, 157 Mich App 253, 257; 403 NW2d 535 (1987), if a defendant was on parole at the time of his or her offense, only when the parole is actually revoked is he or she "awaiting detention in a state facility" such that the 180-day period begins running; a mere parole hold is insufficient to commence the period.

[2] The purpose of the statute is to give inmates "'an opportunity to have [their] sentences run concurrently consistent with the principle of law disfavoring accumulations of sentences.'" *Conner, supra*, 209 Mich App 427, quoting *People v Smith*, 438 Mich 715, 718; 475 NW2d 333 (1991).