

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES A. JENKINS,

Defendant-Appellant.

UNPUBLISHED

August 4, 1998

No. 198524

Recorder's Court

LC No. 96-002409

Before: Markman, P.J., Saad and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305. Defendant's conviction stems from a breaking and entering incident at an industrial plant in Detroit. Two weeks before the incident, defendant was arrested for breaking and entering at the same location. Defendant was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to four to twenty years' imprisonment. We affirm.

Defendant argues that he was denied a fair trial because the trial court allowed the prosecution to elicit testimony regarding defendant's previous arrest at the same location. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Hoffman*, 225 Mich App 103, 104; 570 NW2d 146 (1997); *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

Evidence of other acts is admissible under MRE 404(b), which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs or acts are

contemporaneous with, or prior or subsequent to the conduct at issue in the case.
[MRE 404(b)(1).]

Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994). “Rule 404(b) permits the trial court to admit other acts evidence *whenever* it is relevant on a noncharacter theory.” *VanderVliet, supra*, at 65.

The prosecutor did not offer Officer Dreary’s and Officer Duncan’s testimony to establish that defendant acted in conformity with a criminal propensity to commit this crime. *VanderVliet, supra*, at 65. Nor did the prosecutor offer the testimony to support a theory that the acts were so similar that they circumstantially indicated that they both were the work of defendant. *VanderVliet, supra*, at 69. Rather, the testimony was offered to establish that Officer Dreary had previously seen defendant so that when he saw defendant again on a dark night from one hundred yards away he was able to recognize him immediately. Officer Dreary’s testimony was admissible because it was offered for purposes of identification rather than to prove defendant’s character or propensity to commit the crime and it was relevant to defendant’s identification as the perpetrator of the crime. *VanderVliet, supra*, at 64-5.

The prosecutor also offered the testimony to show that defendant was familiar with the building and knew that he did not have permission to be in the building. The elements of breaking and entering an occupied dwelling with intent to commit a felony are: (1) a breaking and entering; (2) of an occupied dwelling; and (3) with felonious intent. *People v Brownfield*, 216 Mich App 429, 431; 548 NW2d 248 (1996). If a defendant enters a building and commits a larceny, he has not committed a burglary when he has the right to enter the building. *Brownfield, supra*, at 432. Therefore, whether defendant had permission to be in the building was a fact at issue in this case and Officer Dreary’s and Officer Duncan’s testimony was relevant to that issue.

Also, the relevancy of the testimony was not substantially outweighed by the danger of unfair prejudice. *People v Gibson*, 219 Mich App 530, 532; 557 NW2d 141(1996). The testimony was necessary to support Officer Dreary’s identification of defendant in light of the defense theory that it was far too dark and Officer Dreary was too far away to have been able to identify defendant. Additionally, in the absence of this testimony, defendant would potentially have been able to argue that he had permission or thought he had permission to be in the building to remove scrap. The trial court also properly instructed the jury regarding its limited consideration of this evidence. Accordingly, the trial court did not abuse its discretion in allowing Officer Dreary and Officer Duncan to testify regarding their prior arrest of defendant.

Defendant also contends that he is entitled to a new trial because the prosecutor improperly vouched for the credibility of his witnesses. We disagree. At trial, defendant failed to object to the prosecutor’s comments. Review of this issue is foreclosed because any prejudicial effect of the prosecutor’s remarks could have been cured by an appropriate instruction and a

failure to review the issue would not result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993).

Moreover, the prosecutor did not personally vouch for the credibility of the witnesses or suggest that he had special knowledge that the witnesses were testifying truthfully. See *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Rather, without reference to his personal beliefs, the prosecutor pointed out the fact that an employee of the plant, Henry Braswell, and Officer Duncan were not able to identify defendant as the person they saw on March 11, 1996. From that admission, the prosecutor argued that the jurors could infer that the testimony of Braswell and Officer Duncan was more credible. These statements do not constitute prosecutorial misconduct because there was no implication that the prosecutor had any special knowledge of the witnesses' credibility. *People v Fisher*, 220 Mich App 133, 161; 559 NW2d 318 (1996).

Defendant also maintains that he is entitled to resentencing because the trial court used the wrong grid to calculate defendant's sentence under the sentencing guidelines. We disagree. Generally, we do not address issues that a defendant raises for the first time on appeal *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). However, because defendant also argues that he was denied effective assistance of counsel during sentencing because his trial counsel failed to object to the wrong sentencing grid, we will address it. *Id.* at 647.

We find defendant's argument without merit, first, because the sentencing guidelines do not apply to habitual offenders' sentences and, as a result, have no bearing as to whether the trial court abused its discretion in imposing defendant's sentence. *People v Yeoman*, 218 Mich App 406, 419; 554 NW2d 577 (1996). Further, defendant's sentence of four to twenty years was based on accurate information. *People v Smith*, 423 Mich 427, 448; 378 NW2d 384 (1985). In sentencing defendant, the trial court took into account the evidence adduced at trial and defendant's prior criminal record which went unchallenged.

Furthermore, defendant's sentence was proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990). Under the habitual offender statute, defendant's sentence for breaking and entering a building with intent to commit larceny could have been enhanced up to twenty years. MCL 750.110; MSA 28.305; MCL 769.11; MSA 28.1083. In context of his previous theft-related felonies, defendant has exhibited an inability to conform his conduct to the laws of society and as a result, his sentence was proportionate. *People v Hansford*, 454 Mich 320, 326; 562 NW2d 460 (1997); *Milbourn, supra*, at 635. Because we find defendant's sentence to be based on accurate information and proportionate, and because the sentencing guidelines did not apply to defendant's sentence, defendant was not denied effective assistance of counsel for his trial counsel's failure to object to the trial court's calculation of the sentencing guidelines. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Finally, defendant says that he is entitled to resentencing because the trial court failed to recognize that it had sentencing discretion under the habitual offender statute. We disagree. We decline to review this issue because defendant raises it for the first time on appeal and because we find that it lacks merit. *People v Gauntlett*, 152 Mich App 397, 403; 394 NW2d 437 (1986).

Affirmed.

/s/ Stephen J. Markman

/s/ Henry William Saad

/s/ Joel P. Hoekstra