STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY L. LATIMER,

Defendant-Appellant.

UNPUBLISHED
March 30, 1999

No. 206680
Mecosta Circuit Court
LC No. 96-003914 FH

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305. The prosecution proceeded against defendant as a third offense habitual offender, MCL 769.11; MSA 28.1083. The trial court sentenced defendant to ten to twenty years' imprisonment. Defendant appeals of right. We affirm.

I. Basic Facts And Procedural History

On the night of December 1, 1996, defendant borrowed a car and drove with three other men (Vershawn Copeland, Andre Latimer who is defendant's half-brother, and Albert Austin) from Baldwin to Big Rapids. At trial, Copeland testified that on the way to Big Rapids the men discussed breaking into a store; however, Austin and defendant testified that there was no discussion regarding a break-in.

At trial, Nasser Al-Shahari testified that at around 2:00 a.m. on December 2, 1996, he heard sounds outside his house and, looking outside, he saw two males emerging from a J.C. Penney's store carrying coats. He also saw a third individual near his house who appeared to be waiting for the other two men. The manager of the store, John Brown, testified that the rear door of the store had been broken. He also verified that merchandise had been taken from the store. This merchandise consisted of a number of Starter-brand jackets, each of which was valued at $100, as well as a variety of other jackets, sweatshirts, and other merchandise; the total retail value of the merchandise taken was $2,026.

After retracing their steps from an initial false start, the police followed a second set of three pairs of footprints in the snow that led away from the store. Sergeant James Chapman testified that as

they followed the tracks, they found articles of clothing that had apparently been taken from the store. Sergeant James Cook of the Ferris State University Police testified that he was assisting the Big Rapids police in the investigation, that he observed a man with an armful of clothing and that he illuminated the man with the spotlight on his patrol car. According to Sergeant Cook, as soon as the man was illuminated, he started running.

Sergeant Chapman testified that he saw the man, that he identified himself as a police officer, that he ordered the man to stop and that he gave chase when the man continued to run. Sergeant Chapman and Officer Timothy Cavric testified that the man then ran inside a house and they followed him inside. The officers also testified that the man was wearing a distinctive green jacket or shirt with a large white stripe on it. Austin stated that Copeland, another man and then defendant subsequently ran into an apartment followed by the police. Sergeant Chapman testified that he found the man, later identified as defendant, laying in a bed and that, in his opinion, the man was attempting to appear as if he was sleeping.

Sergeant Chapman claimed that defendant had no shoes on and that the bottoms of his socks were black with dirt. Defendant, however, claimed that he had taken off his shoes when he came back inside and that his socks became dirty when the police took him outside without shoes on. The police found a pair of athletic shoes with wet soles in the bedroom near defendant. When the police handed these shoes to defendant, he initially said they were his shoes; when informed by Officer Cavric that the shoe soles matched the tracks in the snow, defendant then stated that they were not his shoes, but rather said that the shoes in fact belonged to Copeland.[1] However, Copeland claimed that he did not wear those shoes when he participated in the break-in. Copeland testified that he wore someone else's shoes, that he did not know who wore his shoes and that he did not put his shoes back on because they had glass in them.

The police opened the trunk of the car used by defendant that evening and found clothing taken from the Penney's store.

Copeland was given a favorable plea agreement, pursuant to which he pleaded guilty to the breaking and entering, and agreed to testify for the prosecution. He stated that he served as a lookout while defendant and Andre Latimer broke into the Penney's store. Copeland further testified that while he and defendant were in jail, defendant wrote notes to him. One of the letters was given to him by defendant and the others were either slid under the door or given to him by a trustee. The trial court held a hearing outside the presence of the jury and then admitted the letters over defendant's objection. Copeland subsequently read the letters into the record.[2]

Detective Steven DeLaney testified that defendant made statements to him claiming that he was not involved in the breaking and entering, but that it was committed by "Sancho, Eric and Antoine." Defendant admitted at trial that this statement was not true, that the three names were fictitious, and that Copeland and Andre Latimer had committed the break-in. Defendant claimed that he lied to Detective DeLaney because he believed Copeland was his friend and because his little brother, Andre Latimer, was involved.

According to defendant, Copeland and Andre Latimer went to the Penney's store and broke in while he stayed behind. When they came back, defendant claimed, they told him they had some jackets outside in the bushes; defendant disclaimed any knowledge of how the clothing had gotten into the car trunk. Defendant also stated that the athletic shoes found in the house were not his; they were size 11 and he wore a size 8 or 8½ Defendant admitted that he had been wearing a green and white shirt, that he had been outside the house carrying a jacket and that he ran from the police officer. Defendant denied, however, that he had an armful of clothing; he claimed he had just the jacket. Defendant claimed that he had run away and ignored the command to stop because his cousin had several "run-ins" with the Big Rapids police. Defendant testified that he was scared that the police would use their guns and that he did not want to get shot. Defendant also admitted that he ran into the bedroom and laid on the bed until the police arrested him.

Defendant admitted that he had written the letters to Copeland. He claimed, however, that these letters were written in response to letters from Copeland who wanted to know what he could do to help defendant. Defendant said that Copeland needed his assistance in recalling what had occurred on the night of the break-in and so defendant supplied him with certain details.

II. Standard Of Review

A. Insufficient Evidence

This Court reviews a claim of insufficient evidence by considering the evidence in a light most favorable to the prosecution and determining if a rational jury could find that the essential elements of the offense were proven beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 515; 489 NW2d 748 (1992), modified on other grounds 441 Mich 1201 (1992).

B. Admission of Evidence.

This Court reviews a claim of improper admission of evidence for an abuse of discretion. *People v Martin,* 150 Mich App 630, 637; 389 NW2d 713 (1986).

C. Jury Instructions

This Court reviews unobjected-to instructions for manifest injustice. *People v Van Dorsten,* 441 Mich 540, 544-545; 494 NW2d 737 (1993). We will find manifest injustice where "the erroneous or omitted instructions pertain to a basic and controlling issue in the case." *People v Johnson,* 187 Mich App 621, 628; 468 NW2d 307 (1991).

D. Sentencing

We review a trial court's imposition of a particular sentence for an abuse of discretion. *People v Castillo,* 230 Mich App 442, 447; 584 NW2d 606 (1998).

III. Insufficient Evidence

Defendant contends that the prosecutor failed to present sufficient evidence to prove anything other than that defendant possessed stolen property and that he was associated with persons who may have committed a breaking and entering.

As noted above, a witness saw two males running out of the Penney's store carrying some coats. He also saw a third individual close to his house. Copeland, an admitted participant in the breaking and entering, testified for the prosecution and asserted that defendant and his half-brother had broken into the store while Copeland served as a lookout. A short time after the break-in, the police saw defendant with his arms full of what proved to be stolen clothing, apparently in the process of loading the clothing into the trunk of a car he had borrowed that evening. When the police identified themselves and ordered defendant to stop, he instead fled into a nearby house. Evidence of flight is admissible as some evidence of consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Defendant also admitted that he lied to the police when he spoke to them after his arrest. Copeland testified that while they were in jail defendant wrote letters to him trying to get him to give the police an incriminating story by which he would take responsibility for the breaking and entering and absolve defendant. This evidence, considered in a light most favorable to the prosecution, *Wolfe, supra*, was sufficient to sustain the jury's verdict.

IV. Admission Of Evidence

Defendant contends that the trial court erred when it admitted into evidence several letters that had been delivered to Copeland when he was being held in the Mecosta County Jail because the letters were not properly authenticated. We hold that the trial court properly concluded that the evidence presented at a mid-trial evidentiary hearing sufficiently authenticated the letters as having been written by defendant, or at his direction, and that the letters were therefore not hearsay because they were statements of a party opponent under MRE 801(d)(2)(A).

In order to comply with the preliminary requirement of authentication, MRE 901(a) provides that this condition "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." One of the non-exclusive methods of establishing that evidence is authentic is the "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics [of the proffered evidence], taken in conjunction with circumstances." MRE 901(b)(4); *Martin, supra* at 637-638. Although there was evidence both supporting and refuting the conclusion that defendant authored the letters, the trial court was ultimately persuaded that there was a sufficient showing that the letters had been written by defendant. The trial court based its determination on a reference to a statement by Copeland's mother in one of the letters, the fact that the letters referred to matters that were within the common knowledge of only defendant and Copeland, and the fact that the handwriting in the letters appeared to be identical. We find no abuse of the trial court's discretion.

V. Jury Instructions

Defendant contends that the trial court erroneously instructed the jury in such a manner as to preclude it from considering the receiving and concealing charge and thus prevented it from passing on defendant's theory of the case. Defendant acknowledges that he failed to object to the trial court's instructions. It also appears that defendant agreed to the instructions that were given.

The instructions given by the trial court were taken from the standard jury instructions and also reflected the Michigan Supreme Court's holding in *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). These instructions thus accurately summarized the law, and since they did not preclude the jury from considering the receiving and concealing stolen property charge, but rather only required that the jury would consider that charge if it either agreed to a finding of not guilty on the breaking and entering charge or failed to reach agreement on that charge, defendant has failed to establish that manifest injustice will occur from this Court's refusal to consider this issue.

VI. Sentencing

Defendant contends that his sentence was an abuse of discretion, in three ways: the trial court failed to articulate sufficient reasons for the sentence; the trial court failed to individualize the sentence; and, the sentence was disproportionate. We hold that none of these claims has merit.

A trial court is required to articulate the basis for a sentence it imposes. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). Where the sentencing record clearly indicates that the sentence was premised on the circumstances surrounding the offense, *People v Brown*, 186 Mich App 350, 358; 463 NW2d 491 (1990), or on the defendant's prior record, the fact that he is an habitual offender and the circumstances of the immediate crime, *People v Terry*, 224 Mich App 447, 455-456; 569 NW2d 641 (1997), this Court has held that the trial court's articulation is sufficient. Here, the trial court stated that defendant was twenty-eight years old, that he had been convicted of a total of six felonies, that his prior record was extensive, that his juvenile record indicated that at an early age defendant had demonstrated a propensity to commit crimes, that prior attempts at community supervision had not accomplished much, that defendant presented a risk of continued larcenous behavior, and that defendant was being sentenced as a third offense habitual offender. This constituted sufficient articulation of the reasons for the trial court's sentence.

Defendant's sentence was also properly individualized and not disproportionately severe to the circumstances of the offense and the offender. *People v Milbourn*, 435 Mich 630, 650-652; 461 NW2d 1 (1990). The trial court sentenced defendant as a third offense habitual offender.

> [A] trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society. [*People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).]

The trial court considered defendant's background and, as indicated above, noted defendant's prior criminal history and his failure to reform his conduct. In light of *Hansford*, these were proper bases on which to impose a ten-year minimum sentence.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

[1] Defendant admitted that he had first stated that the shoes were his and then had denied they were his.

[2] Copeland also apparently wrote a letter explaining that he had pleaded guilty to help defendant out.