

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDDIE HILLSMAN,

Defendant-Appellant.

UNPUBLISHED

August 13, 1999

No. 209826

Kalamazoo Circuit Court

LC No. 97-001210 FH

Before: Griffin, P.J., and Wilder and R. J. Danhof,* JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), and possession of burglar's tools, MCL 750.116; MSA 28.311. Defendant was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to ten to thirty years' imprisonment for the home invasion conviction, and six to twenty years' imprisonment for possession of burglar's tools. We affirm.

Defendant first claims that there was insufficient evidence presented at trial to sustain his convictions. We disagree. Viewing the evidence in a light most favorable to the prosecution, we are persuaded that a rational trier of fact could reasonably conclude that the elements of the offenses were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

The elements of first-degree home invasion, as applied to the present facts, are: (1) that defendant broke into a dwelling; (2) that he entered the dwelling; (3) that when he broke and entered the dwelling he intended to commit larceny; and (4) when he entered, was present in, or was leaving the dwelling, another person was lawfully present there. See MCL 750.110a(2); MSA 28.305(a)(2); *People v Warren*, 228 Mich App 336, 347-348; 578 NW2d 692 (1998). The first element is satisfied by evidence that a window in the house was pried out, a door was opened by reaching through the window to the inside, defendant was holding a windowpane and threw it into some bushes, and pry marks at the scene were consistent with those that would be made by a screwdriver found on defendant. The second element is established by evidence that an occupant of the house heard one set

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

of footsteps inside, moments later he found his front doors open and defendant on his front walkway, neither the occupant nor a neighbor saw anyone other than defendant, and a police officer testified that defendant had admitted his presence inside the house. The third element is satisfied by evidence that, contrary to defendant's assertion that he intended to take a nap inside the house because it was in shambles and he thought it was abandoned, the house was well maintained. Furthermore, a cologne bottle in front of jewelry boxes inside the house was knocked over. Regarding the fourth element, there is no doubt that another person was lawfully inside the house when defendant entered it.

The elements of possession of burglar's tools are: (1) the instrument involved was a burglary tool; (2) defendant knowingly possessed a burglary tool; and (3) when he possessed the tool, he intended to use it to break and enter a building. See MCL 750.116; MSA 28.311; *People v Wilson*, 180 Mich App 12, 16; 446 NW2d 571 (1989). Defendant contends that the evidence was insufficient to establish that a screwdriver found in his possession was used in the break-in. However, the home's occupant and a police officer testified that pry marks around a window and the caulking of the pane were fresh and were consistent with marks made by a flathead screwdriver. The officer stated that the marks appeared similar in size to a screwdriver found rolled up in defendant's jacket when he was stopped about five minutes after the police dispatch, three or four blocks from the street on which the house in question was located. The elements of both crimes were proven beyond a reasonable doubt.

Defendant next claims that he was denied his right to a fair and impartial jury because three jurors were exposed to extraneous influences. A criminal defendant tried by jury has a right to a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997); *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998). To establish that a jury's exposure to extrinsic influence was error requiring reversal, a defendant must prove: (1) "that the jury was exposed to extraneous influences," and (2) "that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict." *Budzyn, supra* at 88-89. If the defendant meets this initial burden, "the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt." *Id.* at 89.

The trial court and counsel individually questioned each of the three jurors at length regarding the circumstances related to defendant's objections. The court determined that the circumstances did not affect any juror's ability to be fair and impartial, and therefore did not excuse any juror. Defendant points to no specific reason or basis for alleging prejudice, other than the circumstances he describes as extraneous influences. He has not shown that the alleged extraneous influences created "a real and substantial possibility that they could have affected the jury's verdict." *Budzyn, supra* at 89. Defendant was not denied his right to a fair and impartial jury because of extraneous influences.

Defendant also alleges that he was denied his right to a fair and impartial jury because the three jurors in question were exposed to extrinsic influences that would have allowed them to be successfully challenged for cause. Where information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn and the juror is allowed to remain on the jury, a defendant is denied his right to a fair and impartial trial if he could have successfully challenged the juror for cause. *Daoust, supra* at 7-8. Defendant does not state any specific grounds for removal of the jurors for cause, but argues that extrinsic influences may have affected the jury's decision. After extensive questioning of the

jurors, the trial court found no grounds justifying removal for cause, but instead determined that each juror could render a fair and impartial decision. The court did not abuse its discretion in failing to excuse the jurors. Furthermore, defendant cites no authority supporting his contention that because he objected to three jurors there is some compound effect on the jury's impartiality, and we decline to consider the issue. *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987).

Next, defendant claims that the trial court improperly considered his jail conduct in sentencing him. However, the information at issue was part of defendant's presentence investigation report (PSIR). Because defendant did not challenge the PSIR information at sentencing, this issue has not been preserved for appellate review. *People v Persails*, 192 Mich App 380, 384; 481 NW2d 747 (1991); *People v Maxson*, 163 Mich App 467, 471; 415 NW2d 247 (1987).

Defendant also claims that his sentence is disproportionate. We disagree. Whether to impose an enhanced sentence as authorized by the habitual offender act is discretionary with the sentencing court. *People v Bewersdorf*, 438 Mich 55, 66; 475 NW2d 231 (1991). "In reviewing sentences imposed for habitual offenders, the reviewing court must determine whether there has been an abuse of discretion." *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). When sentencing defendant, the court considered the circumstances of the offense; the fact that it followed a previous conviction for burglary; defendant's continuing involvement with the law; his misconduct in jail, including violent threats against law enforcement officers; and the improbability of his rehabilitation. This evidence convinces us that the trial court did not abuse its discretion in imposing defendant's sentence. *Hansford, supra* at 326.

Defendant next maintains that he is entitled to resentencing on the ground of ineffective assistance of counsel. Our review of his claim discloses that he has failed to show that his "counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Finally, defendant claims that he was denied an opportunity to effectively allocute. Our review of the record belies his contention. There was no error.

Affirmed.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Robert J. Danhof