STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 24, 1999
v	No. 182196 Recorder's Court
MARK Z. HOAG, Defendant-Appellant.	LC No. 94-001962 ON REMAND

Before: Markman, P.J., and McDonald and Cavanagh, JJ.

PER CURIAM.

This case is before us for the second time. Previously, we reversed defendant's conviction of entry without breaking, MCL 750.111; MSA 28.306, on the basis that he had been denied effective assistance of counsel. *People v Hoag*, unpublished opinion per curiam of the Court of Appeals, issued March 24, 1998 (Docket No. 182196) (Markman, J., dissenting). The Supreme Court subsequently reversed this Court's opinion and remanded for consideration of defendant's remaining issues. *People v Hoag*, 460 Mich 1; ___ NW2d ___ (1999). We now affirm.

I

Defendant first argues that the trial court erred in refusing to instruct the jury on the offense of larceny from a vacant building, MCL 750.359; MSA 28.591. This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. Even if jury instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998).

Defendant was charged with breaking and entering with the intent to commit larceny, MCL 750.110; MSA 28.305.[1] Defendant asserts that the trial court should have granted his request for an instruction on the offense of larceny from a vacant building.[2]

We have not found, and neither party has cited, any case law addressing whether larceny from a vacant building is a cognate lesser offense of breaking and entering with intent to commit larceny. However, our Supreme Court has generally noted that larceny is a cognate lesser offense of breaking

and entering. See *People v Kamin*, 405 Mich 482, 496; 275 NW2d 777 (1979), overruled in part on other grounds, *People v Beach*, 429 Mich 450; 418 NW2d 861 (1988). Therefore, we conclude that larceny from a vacant building is a cognate lesser offense of breaking and entering with intent to commit larceny.

A requested instruction on a cognate lesser offense must be given where there is evidence that would support a conviction of the cognate lesser offense. Under this standard, there must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991).

In the present case, the trial court refused to instruct the jury on larceny from a vacant building because there was no evidence that the building was vacant. Defendant argues that the testimony presented a general issue of fact regarding whether the building was vacant. Specifically, defendant points to his own testimony that he believed that the building was abandoned and the testimony of Richard Lewandowski that Lewandowski had never seen anyone entering or leaving the building. However, Willie Howard testified that he and his son used the building for storage, and he was present in the building when defendant was there. Furthermore, defendant conceded that "there was all kinds of stuff just scattered all about." Under the circumstances, we conclude that the trial court correctly denied defendant's request for an instruction on larceny from a vacant building because the evidence did not support a finding that the building was vacant.

II

Defendant next asserts that he was denied the effective assistance of counsel at trial. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant maintains that counsel's performance was deficient because he misplaced, and therefore did not introduce at trial, photographs that supported defendant's contention that he believed that the building was abandoned. However, defense counsel testified at the *Ginther*[3] hearing that he had not intended to use the photographs at trial because they did not depict the building as defendant described it. Specifically, defendant testified that the door and a window were open, and in the photographs the doors were closed and the windows were boarded up. Under the circumstances, defendant has not demonstrated that this decision was not sound trial strategy. See *Stanaway*, *supra*. The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel. *People v Plummer*, 229 Mich App 293, 309; 581 NW2d 753 (1998).

Defendant contends that he was nevertheless deprived of a fair trial by counsel's failure to have the photographs at trial because counsel testified that he would have used the photographs if defendant

had insisted that he do so. However, given the discrepancies between the photographs and defendant's testimony, we conclude that a reasonable probability does not exist that the introduction of the photographs would have led to a different outcome at trial. See *Pickens*, *supra*.

III

Defendant next argues that he was deprived of due process and a fair trial by prosecutorial misconduct. When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Green*, 228 Mich App 684, 692-693; 580 NW2d 444 (1998).

Defendant argues that the prosecutor impermissibly admonished the jury that it was its civic duty to convict. Prosecutors should not urge the jurors to convict as part of their civic duty. *People v Howard*, 226 Mich App 528, 546; 575 NW2d 16 (1997). However, in the instant case, defendant objected to the prosecutor's remarks, and the prosecutor rephrased the argument. Thus, the error was cured, and defendant was not denied a fair trial.[4]

Defendant also raises several other claims of prosecutorial misconduct. However, defendant did not object at trial to the comments of which he now complains.[5] In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). We have reviewed each of defendant's claims and conclude either that the prosecutor's comments were proper or that the failure to consider the issue further will not result in a miscarriage of justice.

IV

Next, defendant claims that the sentence imposed by the trial court is not proportionate to "this petty property offense." This Court reviews a sentencing court's decision under an abuse of discretion standard. *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995). An abuse of discretion will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant contends that the trial court erred in emphasizing his criminal record. We disagree. 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). In view of defendant's extensive criminal record, the sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender, and the trial court therefore did not abuse its discretion in sentencing him. See *Milbourn*, *supra*.

V

In his final issue, defendant claims that the trial court erred in finding that the offense of entry without breaking protects business entities instead of, or in addition to, property owners or possessors. However, defendant has not clearly articulated the precise nature of this claim of error. To the extent that he is asserting that he was prejudiced by defense counsel's failure to ascertain that Howard had no property interest in the building located at 6503 McGraw, defendant's argument has been rejected by the Supreme Court. See *Hoag*, *supra* at 7-8. To the extent that he is asserting that he was unfairly prejudiced by Howard's testimony, we note that the Supreme Court stated: "The fact that [Howard] might not have had the authority to consent to defendant's presence on the premises is irrelevant, given that there is no allegation that he (or anyone else) actually gave defendant permission to go into the building." *Id*. at 8, n 6. Accordingly, we conclude that any error in the trial court's interpretation of the statute prohibiting entry without breaking was harmless.

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Mark J. Cavanagh

[1] MCL 750.110; MSA 28.305 provides:

> A person who breaks and enters, with intent to commit a felony or a larceny therein, a tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat, ship, or railroad car is guilty of a felony, punishable by imprisonment for not more than 10 years.

[2] MCL 750.359; MSA 28.591 provides:

> Any person or persons who shall steal or unlawfully remove or in any manner damage any fixture, attachment or other property belonging to, connected with or used in the construction of any vacant structure or building, whether built or in the process of construction or *who shall break into any vacant structure or building* with the intention of unlawfully removing, taking therefrom or in any manner damaging any fixture, attachment or other property belonging to, connected with or used in the construction of such vacant structure or building whether built or in the process of construction, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail of not more than 1 year or by a fine of not more than 500 dollars. [Emphasis added.]

[3] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[4] Although the trial court did not provide a curative instruction, defendant did not request one.

[5] In his appellate brief, defendant notes that he objected to the reference to Toni Cato-Riggs at sentencing. However, the purpose of the appellate preservation of error requirement is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice. *People v Schmitz*, 231 Mich App 521, 527-528; 586 NW2d 766 (1998). Because defendant did not timely object in the trial court, this claim of error is not properly preserved for appellate review.