STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DANIEL RAY WITHERELL,

Defendant-Appellant.

UNPUBLISHED
January 4, 2000

No. 212487
Ingham Circuit Court
LC No. 97-072941 FH

Before: Talbot, P.J., Gribbs and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3). He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to thirty to sixty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion in admitting testimony that he was a suspect under surveillance and a composite drawing, stating "identity and information wanted" and "the above composite is of a suspect." Defendant contends that this evidence implicated him in prior bad acts, by allowing the jury to infer that he was wanted for other crimes and that he had a propensity to commit breaking and entering offenses. We disagree and hold that to the extent the contested evidence could be characterized as other crimes, wrongs, or acts, it was properly admitted pursuant to the res gestae exception to MRE 404(b).

Notwithstanding MRE 404(b), the common law continues to recognize that evidence of other criminal acts is admissible where they constitute part of the res gestae of the charged offense. *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995); *People v Cromwell*, 186 Mich App 505, 508; 465 NW2d 10 (1990); *People v Bowers*, 136 Mich App 284, 293-297; 356 NW2d 618 (1984); *People v Smith*, 119 Mich App 431, 436; 326 NW2d 533 (1982). Thus, evidence of other criminal acts is admissible when those acts are "so blended or connected with the [charged offense] that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich App 76, 83; 273 NW2d 395 (1978). Alternatively, "res gestae" has been defined as "the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary

to exhibit the former in its proper effect." *People v Robinson*, 128 Mich App 3e8, 340; 340 NW2d 303 (1983), quoting *People v Castillo*, 82 Mich App 476, 479-480; 266 NW2d 460 (1978).

The case against defendant was based in large part on the testimony of several Jackson County Police officers who had defendant under surveillance because he was a suspect in other potential breaking and entering offenses in Jackson County. Evidence that defendant was a suspect under surveillance was necessary to explain the events which ultimately led to his arrest, including how two officers happened to spot defendant leaving the victim's residence in Ingham County, the subsequent car chase involving several surveillance officers, and the discovery of his vehicle in a parking lot. Thus, this evidence was part of the res gestae of the crime and was needed to give the jury "an intelligible presentation of the full context in which the disputed events took place." *Sholl*, *supra* at 741. The trial court also took steps to make the evidence less prejudicial by deleting references to "breaking and entering" on the "wanted" poster and by prohibiting the officers from explaining why defendant was under surveillance. Two officers merely explained that they were surveying defendant because they were looking for a suspect based on a composite drawing. Consequently, the trial court did not abuse its discretion in admitting the contested evidence.

Defendant next contends that the trial court erred in denying his motion for a directed verdict because the circumstantial evidence was insufficient to establish his identity as the perpetrator of the crime. We disagree. In reviewing a trial court's ruling on a directed verdict, we view the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements were proven beyond a reasonable doubt. *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998).

The offense of second-degree home invasion by means of breaking and entering requires proof that the defendant broke and entered a dwelling with intent to commit a felony or larceny therein. MCL 750.110a(3); MSA 29.305(a)(3); CJI2d 25.2b. Larceny, charged here, is the taking and carrying away of the property of another with felonious intent and without the owner's consent. *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996). It is well established that circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime, including identity. *Crawford*, *supra* at 616.

In this case, two police officers testified that, shortly after observing defendant's unoccupied vehicle parked outside the victim's rural residence, they saw him run from the area of the victim's yard at about 12:20 p.m. He was carrying what appeared to be a pillowcase – one of the items the victims reported missing from her home. The officers, who were each parked approximately three hundred yards from defendant's vehicle, stated that defendant placed the pillowcase in the trunk and drove away at a high rate of speed. The officers, including several others on the surveillance team, testified that the subsequent chase ceased because defendant was driving recklessly by speeding through stop signs. A short time later, the police found defendant's vehicle at his girlfriend's place of employment parked at the far end of the parking lot with the license plate facing a fence. One officer also stated that the girlfriend told him that defendant arrived there at about 2:00 p.m., "essentially demanded" the keys to her vehicle, and left in it. Viewed in a light most favorable to the prosecution, this circumstantial

evidence was sufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that defendant was the perpetrator of the crime. See *People v Bottany*, 43 Mich App 375; 377-378; 204 NW2d 230 (1972) (the identity of the defendant as the person who committed a crime may be established beyond a reasonable doubt by segments of circumstantial proof in combination, even if each element standing alone might not be sufficient). Accordingly, the trial court did not err in denying defendant's motion for a directed verdict.

Defendant next maintains that the trial court's instruction defining reasonable doubt denied him a fair trial because it diluted the presumption of innocence and relieved the prosecutor of the burden of proving guilt beyond a reasonable doubt. However, defendant failed to preserve this issue for review because he did not object to the instructions given. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Therefore, our review is limited to whether defendant has demonstrated a plain error that affected his substantial rights, i.e. that could have affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Here, the trial court read a modified version of CJI 3:1:04, the former standard jury instruction on reasonable doubt, the substance of which this Court has cited with approval. See *People v Jackson*, 167 Mich App 388, 390-392; 421 NW2d 697 (1988); *People v Nickson*, 120 Mich App 681, 688; 327 NW2d 333 (1982). Even if we were to assume that the sentence defendant has extracted from the lengthy instruction and contests on appeal was erroneous, we find that the instruction as a whole adequately conveyed the definition of reasonable doubt to the jury. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). In addition, the court separately instructed the jury on the presumption of innocence, that "burden of proving guilt is on the prosecution throughout the entire course of the trial," and that "at no time does the burden of proof shift to the defendant." We are therefore convinced that the instructions fairly presented the concepts of reasonable doubt, the presumption of innocence, and the prosecution's burden to the jury and sufficiently protected defendant's rights. *Id.*, 143-144; *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Consequently, defendant has failed to demonstrate error, let alone outcome determinative error, and has thus forfeited review of this issue.

Defendant next contends that his thirty to sixty year sentence is disproportionate. We disagree. Because defendant was sentenced as an habitual offender, the sentencing guidelines do not apply and may not be considered on appeal in determining the appropriate sentence. *People v Cervantes*, 448 Mich 620, 625-626; 532 NW2d 831 (1995); *McFall*, *supra* at 415. Instead, our review is limited to whether the trial court abused its discretion in imposing defendant's sentence. *Cervantes*, *supra* at 627; *People v Elliott*, 215 Mich App 259, 261; 544 NW2d 748 (1996). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990).

In addition to several misdemeanors, defendant's instant conviction represents his sixth felony conviction, at least four of which are theft related. As the trial court noted, defendant's criminal record, which spans more than eighteen years, indicates that he is a career criminal whose earlier sentences failed to effectively eliminate his repeated larcenous behavior. Given defendant's criminal history and his apparent inability to conform his conduct to the law, we conclude that the trial court imposed a sentence

that was proportionate to the offense and the offender. See *Cervantes*, *supra* at 627-628 (a trial court does not abuse its discretion in giving a significant sentence to habitual offender where it considered the defendant's extensive criminal history and his potential for rehabilitation).

Finally, defendant argues that the trial court erred in refusing to strike inaccurate and unsubstantiated information contained in the victim's letter attached to the presentence investigation report. We disagree. Here, the probation officer that prepared the report referenced letters from both victims in the "victim impact" portion of the report. While a trial court must strike factual inaccuracies in the objective portions of the PSIR prepared by the probation officer, see MCL 771.14(5); MSA 28.1144(5)[1]; MCR 6.425(D)(3), defendant has cited no authority nor have we found authority for the unlikely proposition that a trial court must also strike inaccuracies contained within the "victim impact" portion of the report.[2] A victim of a crime has a right to submit written impact statements into the PSIR, MCL 780.764; MSA 28.1287(764); *People v Steele*, 173 Mich App 502, 504-505; 434 NW2d 175 (1988), and absent authority to the contrary, we presume that such statements are clearly understood by the Department of Corrections to contain nothing more than the victim's subjective opinion. MCL 780.763(3); 28.1287(763).

Affirmed.

/s/ Michael J. Talbot
/s/ Roman S. Gribbs
/s/ Patrick M. Meter

[1] Currently MCL 771.14(6); MSA 28.1144(6), as amended by 1998 PA § 315.

[2] Defendant's reliance on *People v Grove*, 455 Mich 439; 566 NW2d 547 (1997) is misplaced. In that case, the parties conceded that it was error to attach the challenged letters to the PSIR and the contested letters, which made unsubstantiated allegations, were written by a police sergeant who apparently was not a victim of the crime. *Id.* 452, 477.