

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BONITA GAIL HALL,

Defendant-Appellant.

UNPUBLISHED
September 8, 2000

No. 214496
Oakland Circuit Court
LC No. 98-160046-FH

Before: Fitzgerald, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Defendant appeals by right her conviction of first-degree retail fraud, MCL 750.356c; MSA 28.588(3). Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to a term of nine to fifteen years' imprisonment. We affirm.

Defendant first argues that the trial court abused its discretion by conducting an inadequate jury voir dire. We disagree. Well after the first witness began her testimony, defense counsel moved for a mistrial on the ground that the court failed to ask the potential jurors about their beliefs regarding a defendant's right not to testify during jury voir dire. During the voir dire, the court rejected a defense request that the court "ask questions of the jurors relative to various of the constitutional rights that are attendant to trial." We conclude that defendant's request, which invoked any of several constitutional rights, was too vague to preserve this issue for review. See *People v Gonzalez*, 178 Mich App 526, 534-545; 444 NW2d 228 (1989). Accordingly, we review the alleged error under the plain error rule.

"To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice" *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ""seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."" *Id.* at 763-764, quoting *United*

States v Olano, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

After reviewing the record, we conclude that defendant has failed to establish the three elements of the plain error rule. Accordingly, the issue has been forfeited. Further, even if the plain error rule had been satisfied, defendant has failed to show that the fairness, integrity or public reputation of judicial proceedings was adversely affected.

Defendant next argues that her sentence violates the two-thirds rule of *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). We disagree. The two-thirds rule of *Tanner* applies to habitual offender sentences. *People v Wright*, 432 Mich 84, 85-86; 437 NW2d 603 (1989). Because the offense of first-degree retail fraud had, at the time of trial, a statutory maximum term of two years, the maximum enhanced sentence for fourth felony offenders was fifteen years. MCL 769.12; MSA 28.1084. That was the maximum sentence defendant received. Defendant's nine-year minimum sentence was within the *Tanner* rule.

We also conclude that defendant's claim that the court was required to hold a separate hearing to determine the existence of defendant's prior convictions is without merit. Prior convictions may be determined by the court at sentencing. MCL 769.13(5); MSA 28.1085 (5); *People v Green*, 228 Mich App 684, 700; 580 NW2d 444 (1998). As was done here, the prior conviction may be established by information contained in the presentence report. MCL 769.13(5)(c); MSA 28.1085(5)(c); *Green, supra* at 700. Due process is satisfied if the sentence is based on accurate information and the defendant had a reasonable opportunity at sentencing to challenge the information. *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996). Defendant was given the opportunity to speak at the sentencing, but chose not to challenge any of the information in the presentencing investigation report. A defendant cannot collaterally attack prior convictions used at sentencing for the first time on appeal. *People v Jones*, 83 Mich App 559, 568; 269 NW2d 224 (1978).

Finally, defendant argues that the trial court abused its discretion because her sentence violated the principle of proportionality. Again, we disagree. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). Where an habitual offender's criminal history demonstrates that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

Here the trial court considered permissible factors in sentencing defendant, including, punishment of defendant, protection of society, reformation of defendant, and deterrence of others. *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). Defendant's voluminous record of offenses, some of which were committed while she was on parole, demonstrates an inability to conform her conduct to the law. Accordingly, we find no abuse of discretion in defendant's sentence. *Hansford, supra* at 323.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald