

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS LUDWICK,

Defendant-Appellant.

UNPUBLISHED

May 15, 2001

No. 221833

Ingham Circuit Court

LC No. 99-074414-FH

Before: Holbrook, Jr., P.J., and Hood and Griffin, JJ.

MEMORANDUM.

Defendant was convicted, following a jury trial, of receiving and concealing stolen property with a value in excess of \$100, MCL 750.535; MSA 28.803. He was sentenced as an habitual offender, third offense, MCL 769.12; MSA 28.1084, to eighteen months' to ten years' imprisonment and appeals as of right. We affirm.

Defendant first argues that the admission of prior bad acts evidence deprived him of his due process rights when the danger of unfair prejudice substantially outweighed any probative value. We disagree. Defendant failed to object to the statement that defendant was in "trouble again" and had failed to advise a friend that the property was stolen because he did not want to "go back to prison." Reversal of a conviction based on plain, forfeited error is warranted only when it results in the conviction of an actually innocent defendant or when error affects the integrity of the judicial proceedings. *People v Carines*, 460 Mich 750, 763-767; 597 NW2d 130 (1999). The defendant bears the burden of persuasion with respect to prejudice. *Id.* Defendant has failed to meet his burden.

Defendant next argues that his sentence was disproportionate. We disagree. Sentencing guidelines do not apply to habitual offenders. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). Rather, we review the sentence imposed for an abuse of discretion. *Id.* We cannot conclude that the trial court abused its discretion in sentencing defendant.

Lastly, defendant argues that trial counsel was ineffective for failing to object to the admission of bad acts evidence and his sentence. We disagree. In order to establish a claim of ineffective assistance of counsel based on deficient performance, defendant must overcome the strong presumption that trial counsel's action constituted sound trial strategy under the

circumstances. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant has failed to meet his burden. Review of the record reveals that defense counsel failed to object to testimony regarding defendant's prior record, but also elicited the testimony in accordance with his theory of the case. Douglas Smith testified that he saw defendant with the stolen ladder on top of a vehicle and the stolen tools were in the trunk of the vehicle. Defense counsel also elicited testimony that defendant was involved with Smith's former girlfriend, with whom Smith fathered a child. Defense counsel also established that the tools were taken from a locked truck, but the truck was not vandalized in the process. Rather, it appeared that access to the truck was gained through a key, and Smith had the key to the truck as an employee. Therefore, defense counsel attempted to discredit Smith's testimony by demonstrating that he had a motive to ensure that defendant returned to prison. "A defendant may not assign error on appeal to something his own counsel deemed proper at trial." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Counsel may not harbor error as an appellate parachute. *Id.*

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Harold Hood
/s/ Richard Allen Griffin