STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 27, 2001
v	No. 220568 Isabella Circuit Court
WARREN WAYNE BESAW, Defendant-Appellant.	LC No. 98-008539-FH

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

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree home invasion (home invasion II), MCL 750.110a(3). Defendant was sentenced as a third habitual offender, MCL 769.11, to fifteen to thirty years' imprisonment. We affirm.

On May 16, 1998, defendant and his nephew entered without permission a house owned by Nancy and James Hornak. The house was located close to the Chippewa River, on which defendant and his nephew were canoeing. Defendant claimed he was so drunk during his canoe trip that he had fallen into the Chippewa River several times, and that he had entered the house looking for a telephone so that he could call someone to come and pick him up. Defendant asserted that it was his nephew who had entered the Hornak house with the intent to steal.

Defendant first argues that there was insufficient evidence to support his conviction. We disagree. "When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999). At the time defendant entered the Hornak house, MCL 750.110a(3) read:

> A person who breaks and enters a dwelling with intent to commit a felony or larceny in the dwelling or a person who enters a dwelling without permission with intent to commit a felony or a larceny in the dwelling is guilty of home invasion in the second degree.

At trial, the prosecution argued that defendant was guilty of home invasion II either as a principal or as an aider and abettor. The jury was instructed on both theories. Defendant

concedes that he entered the Hornak house without permission.[1] However, defendant argues that insufficient evidence was presented on the issue of intent.

Defendant entered the house through the master bedroom. The outside door that led into the master bedroom was approximately eighty inches above ground level. Despite the difficulty posed by entering through this door, neither defendant's nor his nephew's fingerprints were left on the door. Indeed, their fingerprints were not found anywhere in the house. However, a sock not belonging to the Hornaks was found. The prosecution argued that this sock was used to prevent the leaving of fingerprints. The evidence also showed that defendant did not make a telephone call even though a phone was plainly visible in the master bedroom. Several items, including a crystal apple and a box of silver plated flatware, were found removed from their normal storage places. Additionally, a clear plastic bag was found at the top of the basement stairway that contained a watch, a ruby ring, a turquoise ring, some coins, and a running medal that James Hornak had been awarded. Defendant's nephew testified that at one point he handed the bag to defendant while the nephew continued to stuff items into it. It is also reasonable to infer from parallel muddy footprints left by defendant and his nephew throughout the house that the two were acting in concert. Finally, as police searched the area, defendant was found lying in the grass near the home of a man who lived just north of the Hornaks. Viewing this evidence in the appropriate light, we conclude that sufficient evidence was presented for the jury to have found that defendant possessed the requisite intent required under either theory of the case.

Defendant next argues that he was denied a fair trial by two instances of alleged prosecutorial misconduct. We disagree. "Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the prosecutor's" conduct in context to determine "whether defendant was denied a fair and impartial trial." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Accord *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Of the two alleged instances, only one—involving the cross-examination of defendant's expert witness—was properly preserved at trial. Out of the presence of the jury, the prosecutor motioned for permission to ask the expert whether he had considered defendant's past criminal history when opining that while defendant was a sociopath, he was not a "hardened criminal." The court granted the motion, but warned the prosecutor not to ask about any specific instances of defendant's criminal history because the probative value of such testimony would be substantially outweighed by the danger of unfair prejudiced. MRE 403. The prosecutor followed the court's instructions, asking the witness if he had "taken into account [defendant's] past criminal record" when offering the foregoing opinion. The witness answered that he had, and the subject was dropped.

We find no misconduct in the prosecutor's handling of this evidence. We find no error in the introduction of this evidence, *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999), nor did the prosecutor violate the court order limits on the subject. There is

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[1] We believe the evidence also supports a finding that defendant broke and entered the house without permission. See CJI2d 25.2b(2).

no evidence of bad faith on the part of the prosecutor. *Noble, supra* at 661. Indeed, the prosecutor carefully and properly raised the issue first out of the presence of the jury, thereby avoiding any potential prejudice or the need for a cautionary instruction had the court rejected the posing of this question.

As for the second alleged instance of misconduct, we conclude that a miscarriage of justice will not result from our failure to review this unpreserved matter. *Id.* Contrary to defendant's claim, the prosecutor did not misstate the law on aiding and abetting in his closing argument to the jury.

Finally, we reject all of defendant's attacks on the validity of the sentence imposed. Defendant argues that resentencing is required because the trial court failed to articulate its reasoning for defendant's sentence, failed to individualize defendant's sentence, and imposed a disproportionate sentence that also violates the constitutional protection against cruel and unusual punishment. We find no merit to any of these arguments.

In imposing sentence, the trial court clearly articulated "the criteria considered and the reasons supporting its decision regarding the length and nature of the sentence imposed." *Rice, supra* at 445-446. The court stated that it considered defendant's discipline, the need to protect society from his habitual criminal tendencies, the slight potential for reformation, and the need to deter others from committing like offenses. The trial court observed that it was concerned with defendant's prior felony convictions and the fact that he has failed to conform his behavior to the law. Moreover, the trial court also expressed concern over the fact that defendant had committed this crime while out on parole. The court's careful consideration of these factors also belies defendant's assertion that the court did not tailor the sentenced imposed to defendant and his crime. *Id.* at 446.

We also find no merit to defendant's claims that his sentence is disproportionate and violates the constitutional prohibition against cruel and unusual punishment. A trial court does not abuse its discretion by imposing a sentence on an habitual offender that is within the statutory limits and a defendant's underlying felony, and previous felonies, show that he cannot conform his conduct to the law. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). We find that defendant's sentence, which falls within the statutory limits, was warranted under the circumstances of this offense and this offender. A proportionate sentence is not cruel or unusual punishment. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997); *People v Williams* (*After Remand*), 198 Mich App 537, 543; 499 NW2d 404 (1993).

Affirmed.

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