STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD BENNETT,

Defendant-Appellant.

UNPUBLISHED
November 27, 2001

No. 222608
Livingston Circuit Court
99-011127-FH

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

A jury convicted defendant Gerald Bennett of breaking and entering a building with the intent to commit larceny.[1] The trial court sentenced Bennett as a third habitual offender[2] to a prison term of 10 to 20 years. Bennett appeals as of right. We remand for resentencing and affirm in all other respects.

I. Basic Facts And Procedural History

In the early morning hours of December 18, Todd Raskin, a police officer with the Green Oak Township Police Department in Livingston County, was patrolling M-36, driving eastbound in a fully marked police car when he saw a 1993 Ford Ryder Truck with a burned out right taillight. According to Officer Raskin, he stopped the vehicle because of the defective equipment; he could not see the occupants of the truck before pulling it over. Officer Raskin approached the truck and asked the two occupants for identification. Bennett was the driver and a Benjamin Horton was the passenger. According to Officer Raskin, he "looked throughout the cab of the vehicle," while getting the identification information from Bennett and Horton, for weapons, drugs, or anything suspicious and to make sure that there were only two people in the vehicle.

According to Officer Raskin, the truck was composed of a passenger cab and the "box" portion, and a door separated the two sections. Officer Raskin testified that he looked into the

[1] MCL 750.110.

[2] MCL 769.11.

rear "box" portion of the truck through the door in the cab and observed approximately two or three "objects stacked on top of each other." The objects were "gray, silver in color" and "sort of shaped like a flat U"; they were "flush up against the door that was open" which separated the two sections of the truck. Officer Raskin returned to his car, called for assistance and Officer Brandon Bullock of the Hamburg Township Police Department came to the scene. Officer Raskin then took the identification he had been given by Bennett and Horton and ran their names through the dispatch center, which in turn ran them through the LEIN computer. The search revealed that Horton was wanted on multiple outstanding warrants issued by Livingston County.

Officer Raskin then asked Horton to step out of the truck and patted him down; he then placed Horton under arrest because Horton was unable to post the bond for his warrants, and put him in the back of his police car. Officer Raskin then asked Bennett to step out of the vehicle. Bennett accompanied Officer Raskin to his patrol car, where Officer Raskin patted him down for weapons. According to Officer Raskin, he then asked Bennett where he was coming from and Bennett said that he was coming from "down the road." Officer Raskin also asked Bennett where he was going, to which he replied that he was going to Detroit. Officer Raskin asked Bennett what he was doing and he replied that he was "out collecting scrap metal. Officer Raskin also asked Bennett "if the people that he was collecting the scrap metal from knew that he was collecting it." Bennett said "yes."

Officer Raskin testified that he asked Bennett if the two officers could search the truck, and Bennett gave permission for them to do so. According to Officer Raskin, he stayed with Bennett at the patrol car while Officer Bullock searched the interior of the truck. Officer Bullock returned to the patrol car, Officer Raskin said, and "basically he thought there was just scrap metal in the vehicle" so Officer Raskin gave Bennett "directions on how to get to 23 to 96 so he could go back to Detroit which is where he said he was going" and then "released him."

According to Officer Raskin, he then drove Horton to the Taco Bell in Wixom and turned him over to the custody of the Livonia Police Department. Officer Raskin did not issue a citation to Bennett for the broken taillight. At no time during this traffic stop interaction with Bennett and Horton did Officer Raskin know that any crimes had been reported in the area.

According to Officer Raskin, at the end of his shift around 7:00 a.m., he returned to Green Oak; where dispatch asked him to contact Officer Medbury from the Hamburg Township Police Department "in reference to some investigative leads." Officer Raskin spoke with Officer Medbury, and based on their conversation, he concluded that the item that he had seen through the door of the truck defendant was driving was a cement form and that it had been stolen from a business, ProForm, located on M-36 approximately one mile west from where he had made the traffic stop. According to Officer Raskin, he had not realized what he had seen in the truck, having never seen a cement form, until speaking with Officer Medbury. Officer Raskin prepared an incident report on the traffic stop and faxed it to Officer Medbury that morning. According to Officer Raskin's testimony, M-36, where he stopped Bennett and Horton, was the most direct route from Hamburg Township, where ProForm is located, to US 23.

Officer Brandon Bullock testified that he assisted Officer Raskin in the traffic stop. Officer Bullock stated that he searched the truck driven by Bennett and that during his search he saw metal objects stacked in the back. He also observed cement on the objects and on the floor.

Officer Bullock returned to the police department around 7:00 a.m. at the end of his shift and overheard Officer Medbury on the telephone discussing a breaking and entering of a business in which cement forms were stolen. According to Officer Bullock, he told Officer Medbury that he believed that he had observed cement forms in the back of a truck stopped by Officer Raskin and advised Officer Medbury to call Officer Raskin for more information.

John Cogo, the owner of ProForm, testified that the doors had been securely shut the night the forms were stolen; someone had forced his way into the building, and no one had been given permission to enter.

Officer Cremonte testified that he investigated the case with Officer Medbury. According to Officer Cremonte, he and Officer Medbury set up surveillance outside the truck rental business where Bennett had rented the truck and apprehended Horton when he returned the vehicle. Officer Cremonte photographed the truck and took pieces of cement from the back of the truck as evidence.

Officer Medbury testified that he received a call reporting a "break-in" from John Cogo. After receiving information regarding the traffic stop from Officer Bullock, he contacted Officer Raskin. Officer Medbury stated that he first went to ProForm to investigate the scene and observed unusual footprint tracks that looked like arrows in the dirt. He then surveyed the truck rental business, waiting for the truck to be returned. According to Officer Medbury, after Horton returned the truck to the rental office, he looked at Horton's shoes and they had the same soles as the shoes which made the impressions in the dirt at the crime scene. Additionally, Amy Michaud, of the Michigan State Police Crime Laboratory, testified that the foot impressions left at the crime scene were consistent with the soles of Horton's shoes. Bennett did not testify. He now appeals his conviction for breaking and entering a building with the intent to commit larceny.

II. Ineffective Assistance Of Counsel

A. Standard Of Review

Bennett argues that he was denied the effective assistance of counsel when his trial counsel failed to challenge two jurors for cause. Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations.[3] In cases such as this, where a *Ginther* hearing has not been held, review by this Court is limited to mistakes apparent on the record.[4]

---

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

[4] *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994), citing *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991).

B. Legal Standards

To establish that the defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, this Court must find that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial.[5]

C. MCR 2.511(D)

(1) The Provisions Of The Rule

In arguing that counsel should have moved to remove jurors Burkhart and Brown for cause, Bennett relies upon the following portions of MCR 2.511(D):

> It is grounds for a challenge for cause that the person:
>
> * * *
>
> (7) has already sat on a trial of the same issue;
>
> * * *
>
> (13) is interested in a question like the issue to be tried.

Bennett contends that juror Burkhart sat on a trial of the same issue because she had sat on a jury where the defendant was charged with a theft offense. Bennett contends that juror Brown was interested in a question like the issue to be tried, because he had been the victim of a theft while he served in the military.

(2) Juror Burkhart

Our review of the record does not indicate that Burkhart had "already sat on a trial of the same issue" within the meaning of the rule. As the prosecution points out, citing *People v Kamischke*,[6] the rule refers to situations such as where a juror "had sat on a jury the day before in the trial of the defendant's co-accused." The entire record of the exchange the court had with juror Burkhart consisted of the following:

> [In response to the court's question whether any potential jurors had sat on juries previously . . .]
>
> THE COURT: Okay. Other hands? Take the microphone.

---

[5] *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[6] *People v Kamischke*, 3 Mich App 236; 142 NW2d 21 (1966).

JUROR BURKHART: Juror 88A. I was [sic] district court about a year ago actually. I sat on two cases. One was guilty and one was not.

THE COURT: What type of cases were they?

JUROR BURKHART: One was a drunk driving and the other was theft.

THE COURT: Anything about those experiences that would affect you?

JUROR BURKHART: No.

Thus, the record does not indicate specifically what type of "theft" crime the previous case was. Notably, the record also does not indicate which case resulted in acquittal; the defendant in the theft case could have been acquitted. Thus, we conclude that by serving on some other totally unrelated case involving "theft," juror Burkhart had not already sat on a trial of the same issue.

Further, the fact that juror Burkhart had served on a jury which acquitted a defendant demonstrated, if anything, her ability to serve as an impartial juror. For this reason, juror Burkhart may very well have appealed to Bennett's trial counsel, who may have wanted her on the jury as a matter of trial strategy. This Court will not second-guess trial counsel's decision.[7] We conclude that Bennett's trial counsel was not ineffective for failing to exercise a peremptory challenge to remove juror Burkhart from the jury.

(3) Juror Brown

Bennett relies on *People v DeHaven*,[8] for the proposition that juror Brown was interested in a question like the issue to be tried. *DeHaven* is readily distinguishable from this situation. In *DeHaven*, the jurors challenged were related to individuals who had committed similar offenses to the defendant in the case they were to decide.[9] There, the defendant was charged with statutory rape of his thirteen-year-old stepdaughter.[10] During voir dire, one juror failed to disclose that his brother-in-law was serving a life sentence for having raped five of his daughters, one of whom was thirteen years old.[11] A second juror failed to disclose that he was the cousin of that same man who was serving a life sentence for raping his five daughters.[12] The Court therefore granted DeHaven a new trial because it found that "the relationship of those two jurors

---

[7] *People v Henry*, 239 Mich App 140, 148; 607 NW2d 767 (2000), citing *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

[8] *People v DeHaven*, 321 Mich 327; 32 NW2d 468 (1948).

[9] *Id*. at 334.

[10] *Id*. at 329.

[11] *Id*. at 331.

[12] *Id*.

to one who had committed a similar crime was such that it deprived them of the capacity to act impartially."[13]

By contrast, here Bennett's trial counsel thoroughly questioned juror Brown, who readily admitted that he had had "some personal belongings stolen" when he served in the military, and satisfied himself that juror Brown could be a fair and impartial juror. When asked whether his prior experience would prevent him from being fair and impartial, juror Brown said "No, I don't think so" and then added "[i]t was a number of years ago." We conclude that, unlike the difficult situation that this Court faced in the recent case of *People v Benny Johnson*,[14] juror Brown had no interest in the issue to be tried.

Bennett also contends that juror Brown was "equally objectionable" under MCR 2.511(D)(4), which creates grounds for a challenge for cause of a potential juror who:

> shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be.

Based on our review of the record, we disagree.

Although Bennett claims that juror "Brown's response was equivocal at best," when the entire dialogue between trial counsel and juror Brown is reviewed, juror Brown comes across as quite certain that he will be able to serve impartially. Bennett likens the instant case to that of *People v Skinner*,[15] where this Court reversed a trial court's decision to deny a challenge for cause. However, the juror in *Skinner* repeatedly stated that he could not be impartial. Further, during voir dire, the juror said that he could not be fair and that he would be not be "of any help" to the trial; that he had a conscience that he had to live with; that he could not believe that the victim would have fabricated such a story; and that regardless of the court's instructions to follow the law, he would not be able to begin with a presumption of innocence and would have to find the defendant guilty.[16] Moreover, although the juror in *Skinner* eventually stated that he could be fair, he did so only after making "approximately eight statements" indicating that he didn't believe he could be fair.[17]

By stark contrast to the facts in *Skinner*, juror Brown in this case stated expressly and without hesitation that he thought he could be fair and impartial. We conclude that there was no basis for trial counsel to challenge juror Brown for cause, and nothing ineffective about his failure to exercise a peremptory challenge to excuse him.

---

[13] *Id*. at 334.

[14] *People v Benny Johnson*, 245 Mich App 243; 631 NW2d 1 (2001).

[15] *People v Skinner*, 153 Mich App 815, 819; 396 NW2d 544 (1986).

[16] *Id*. at 818-819.

[17] *Id*. at 819.

(4) Conclusion

We conclude that Bennett has failed to show that his trial counsel's failure to challenge jurors Burkhart and Brown for cause or remove them peremptorily was anything but sound trial strategy. Bennett has therefore not overcome the strong presumption that he received effective assistance of counsel. Counsel's questioning of both juror Burkhart and juror Brown was reasonably diligent. Further, because there was no ground for removing the jurors for cause, the court did not err by failing to sua sponte remove them.

D. Jury Selection Under MCR 2.511(F)

(1) Bennett's Argument

Bennett argues that his trial counsel was ineffective for failing to object to, and even acquiescing in, a jury selection method which did not comply with MCR 2.511(F). MCR 2.511(F) is typically the rule challenged when issues regarding alternate jury selection procedures are addressed by the courts. The rule applies to criminal trials.[18] MCR 2.511(F) provides that:

> After the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge exercised, another juror must be selected and examined before further challenges are made. This juror is subject to challenge as are other jurors.

Specifically, Bennett contends that the selection was flawed because the panel of potential jurors seated and examined was not equal in size to the jury that heard the case. Bennett also asserts that, "once a prospective juror was dismissed, a new prospective juror was not selected and examined before further challenges were made." (We observe that, more accurately, once a prospective juror was challenged and dismissed, a new prospective juror was selected; however, there was no *further* examination of the substituted juror. The substitute juror had been examined, albeit earlier. Defendant asserts that it "could clearly be argued that prejudice resulted from defense counsel having to bear in mind all of the background information provided by the 24 jurors, without an opportunity for further examination.") Bennett claims that this situation is similar to the situations in *People v Miller*,[19] *People v Colon*,[20] and *People v Russell*.[21]

(2) *People v Miller*

In *Miller*,[22] the Michigan Supreme Court held that the "struck jury" method utilized therein did not comply with the court rule in effect at the time, Rule 511.6. The "struck jury"

---

[18] MCR 6.412(A).

[19] *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981).

[20] *People v Colon*, 233 Mich App 295; 591 NW2d 692 (1999).

[21] *People v Russell*, 182 Mich App 314; 451 NW2d 625 (1990), rev'd by 434 Mich 922 (1990).

[22] *Miller, supra* at 326.

method involved calling a large number of jurors at once and then having the prosecution and the defense alternately strike the jurors until only the requisite number of jurors remain.[23] In *Miller*, over a month before trial, the judge entered an order describing how the alternative jury selection would operate.[24] Before jury selection began, defense counsel objected to the procedure, arguing that calling so many jurors at once would make it "difficult to keep track of the answers given by individual jurors to voir dire questions."[25] The trial court rejected this argument.[26] Seventy-three prospective jurors were called and questioned as a group; none was excused for cause, and then the attorneys took turns exercising peremptory challenges until only eleven jurors remained.[27] Then thirty-seven additional prospective jurors were called and questioned and the peremptory challenge process continued "until there were no further challenges, and the 14 remaining jurors [including two alternate jurors] with the lowest numbers were selected to hear the case."[28]

On appeal, this Court found that the jury selection did not comply with Rule 511.6, but affirmed the conviction after concluding that the evidence against the defendants was overwhelming and the defendants' objection to the process was untimely.[29] The Michigan Supreme Court reversed.[30] It agreed with this Court that nothing in the record indicated that defendants had been prejudiced by the selection process, but held that given the "fundamental nature of the right to trial by an impartial jury" and the "inherent difficulty of evaluating such claims" a defendant could not be made to show prejudice.[31] The Court held that "[w]here as here, a selection procedure is challenged before the process begins, the failure to follow the procedure prescribed in the rule requires reversal" and that the "'struck jury method' or any system patterned thereafter is disapproved and may not be used in the future."[32]

We observe that the selection procedure used in this case was different from that of *Miller*. Here, the entire venire was questioned as a group and as each prospective juror was removed, a substitute immediately took his or her place. Therefore, all of the potential jurors were questioned before any challenges were made. By contrast, in *Miller* a large group was called and questioned and then the attorneys alternately removed jurors until eleven remained, at which point an entirely new group of jurors was called and questioned. As a result, in *Miller*, the attorneys used their challenges before the second group was even called and questioned, a process which impeded the use of challenges. In this case, the entire group of potential jurors

---

[23] *Id*. at 323.

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id*. at 324.

[28] *Id*.

[29] *Id*.

[30] *Id*. at 326.

[31] *Id*.

[32] *Id*.

was questioned initially. Thus, there were no "surprises" awaiting after the attorneys had used their challenges. We believe that the language of MCR 2.511(F) indicates the importance of the new, substitute, replacement juror being subject to challenge, as are the other jurors. This objective was clearly met in this case, where the replacement juror was seated before the challenges continued and was thus subject to challenge, as the other jurors were. In fact, on more than one occasion, before the replacement juror even reached his or her seat in the box, an attorney would remove him from the jury, almost as if to say "don't bother" going to the box. Therefore, we conclude that the replacement jurors did not evade challenge.

Further, unlike in the situation in *Miller*, where the original venire included seventy-three prospective jurors who were called and questioned at once, this case involved an original venire of only twenty-four, a much more manageable number. In *Miller*, thirty-seven additional prospective jurors who had not been questioned with the other seventy-three and who had not been subject to challenge, were then introduced anew and the process began all over again. Thus, not all potential jurors were questioned before challenges were made. Here, though, the record reflects the fact that the attorneys were able to keep track of the information as it related to the twenty-four potential jurors. This was evidenced by the fact that replacement jurors were removed even before they reached their seats in the box. Clearly in this case, "another juror" was selected before further challenges were made, in compliance with MCR 2.511(F). Although the attorneys in this case did not examine the replacement jurors again after they were seated and before exercising their next challenge, there was nothing in the procedure which prevented them from doing so had they needed to refresh their memories. Also, no second group of potential jurors was subsequently called and subjected to a separate voir dire session in this case after challenges had begun. We conclude that *Miller* does not control the outcome in this case, given the factual differences in the method of jury selection.

(3) *People v Colon*

In *Colon*,[33] this Court revisited the issue. We held that the defendant had adequately preserved the issue for appeal, despite his failure to exercise all of his peremptory challenges, for two reasons: the defendant had objected to the selection procedure, and had not expressed satisfaction with the jury.[34] In *Colon*, the nonconforming selection procedure used was different than that in *Miller*. In *Colon*, the trial court examined nineteen prospective jurors at once.[35] After seven challenges were exercised and twelve prospective jurors remained, then the trial court selected and examined seven new prospective jurors.[36] Although the record did not indicate that the defendant had suffered any prejudice as a result of the procedure used, in light of *Miller, supra*, this Court reversed and remanded for a new trial.[37] We reasoned that the selection procedure utilized did not comport with MCR 2.511(F) in that "[t]he panel of potential jurors

[33] *Colon, supra.*

[34] *Id*. at 302.

[35] *Id*. at 303.

[36] *Id*.

[37] *Id*.

seated and examined was not equal in size to the jury that heard the case, and once a prospective juror was dismissed, a new prospective juror was not selected and examined before further challenges were made."[38]

Again, we observe that the flawed jury selection process in *Colon* is different from the situation in this case, where all potential jurors were questioned before any challenges were made. Unlike the situation in *Colon*, the trial court here did not forbid further examination of the replacement jurors. Clearly, in *Colon*, the second, new group of seven replacement jurors who were selected and examined only after seven challenges were made, were not "subject to challenge as [were] the other jurors" in accordance with the rule. Here a removed juror was replaced before challenges continued and where all of the twenty-four-person venire was questioned as a group.

In other words, unlike the "rotating" sessions in which venires were questioned, challenged, and removed before a new group was questioned in both *Miller* and *Colon*, the entire venire herein was questioned at once, and each previously examined replacement juror was seated before further challenges were made. For these reasons, we believe that the selection method constituted a "fair and impartial" alternative method in accordance with MCR 2.511(A)(4). We conclude that *Colon* does not control the outcome in this case, again given the factual differences in the method of jury selection. We therefore need not turn, as did the Court in *Colon*, to the dissent in *Russell, supra.*

(4) *People v Green*

This Court dealt recently with the issue of jury selection in *People v Green (On Remand)*.[39] In reaching its decision to affirm the conviction, we focused on MCR 2.511(A), a rule not considered in *Colon* and not in existence when *Miller* was decided, which provides:

> (2) In an action that is to be tried before a jury, the names or corresponding numbers of the prospective jurors shall be deposited in a container, and the prospective jurors must be selected for examination by a random blind draw from the container.
>
> * * *
>
> (4) Prospective jurors may be selected by any other fair and impartial method directed by the court or agreed to by the parties.

In *Green*, this Court relied upon MCR 2.511(A)(4) and described it as providing "considerable latitude" in the method used.[40] We similarly rely on the latitude provided in MCR 2.511(A)(4) in this case and find the procedure used in this matter distinguishable from that utilized in both

---

[38] *Id*.

[39] *People v Green (On Remand)*, 241 Mich App 40; 613 NW2d 744 (2000).

[40] *Id*. at 45.

Miller and *Colon*. We conclude that the jury selection process used here did not violate MCR 2.511.

(5) Jury Selection In The Context Of Ineffective Assistance Of Counsel

We note that even if the jury selection had not complied with MCR 2.511, Bennett has not established an ineffective assistance of counsel claim. Simply because, under *Miller*, it is unnecessary for a defendant to show prejudice when challenging a jury selection procedure, it does not necessarily follow that the defendant need not demonstrate prejudice when trying to establish an ineffective assistance of counsel claim. In other words, we could find that a case must be reversed because the procedure was flawed, but could consistently decide that the defendant received effective assistance of counsel because he has not shown that he was prejudiced by counsel's acquiescence in the procedure. Simply put, prejudice remains a prerequisite to a finding of ineffective assistance.[41] In fact, in this case, Bennett's trial counsel may have preferred the predictability of the system used and may have felt comfortable remembering responses to questioning given by the twenty-four potential jurors. Thus, it may very well have been trial counsel's strategic decision to agree to the trial court's alternative selection procedure, and Bennett has failed to show that the decision was unsound. Thus, we conclude that Bennett has not shown that he received ineffective assistance of counsel.

E. Prior Bad Acts Evidence

Bennett argues that he was denied a fair trial because the prosecutor failed to give notice of her intent to introduce prior bad acts evidence, that his trial counsel was ineffective for failing to object, and that the trial court abused its discretion by failing to intercede sua sponte to keep the testimony from being admitted.

We have reviewed the specific portions of testimony that Bennett cites and conclude that they simply do not constitute "bad acts" evidence for purposes of MRE 404(b). We were unable to identify the crime, wrong, or bad act inherent in the evidence introduced by the prosecution which would trigger MRE 404(b) analysis. We will not speculate, as Bennett would have us believe, that the piecemeal references by various witnesses to another, separate burglary for which Bennett was never charged and which did not implicate him, tainted the jury. For these reasons, we conclude that Bennett's prior bad acts evidence-arguments are without merit.

Similarly, Bennett's trial counsel was not ineffective for failing to object to the piecemeal references to the other burglary. Even assuming that trial counsel found the testimony objectionable, it could have been harmful to draw attention to the other burglary by objecting every time a witness referred to it in passing. Presumptively, trial counsel made the sound strategic decision not to highlight such references. Bennett has not overcome that presumption nor shown how he was prejudiced by his counsel's decision. Like Bennett's substantive argument based on MRE 404(b), his related ineffective assistance claim is based on pure speculation and is without merit.

---

[41] See *Pickens*, *supra* at 302-303.

F. Motion For Nolle Prosequi

Bennett argues that the trial court abused its discretion by granting the prosecution's motion for nolle prosequi absent notice, and by failing to give him the opportunity to respond. Bennett argues further that he was denied effective assistance at a critical stage of the proceedings, resulting in the denial of due process; Bennett also makes various other arguments related to the nolle prosequi motion. An appellant must identify his issues in his brief in the statement of questions presented.[42] Ordinarily, no point will be considered which is not set forth in the statement of questions presented.[43] Thus, although Bennett makes additional arguments in the body of his supplemental brief, we will address the issues in the context of the question presented. We review a trial court's decision regarding whether to grant a motion to dismiss for an abuse of discretion.[44]

Normally, a prosecutor must file notice of his intent to seek an enhanced sentence within twenty-one days of the arraignment or the filing of the information charging the underlying offense.[45] The record here indicates that Bennett and his trial counsel had notice of the prosecution's intent to dismiss the charges and to reissue them, adding the supplemental information. In fact, Bennett concedes that his trial counsel advised him that this was going to occur. Bennett was then rearraigned, and the defense filed a second motion to suppress the evidence in the "new case" even though an identical motion had been heard and decided. The prosecution argued that it was unnecessary to rehear the motion but, exercising an abundance of caution, the trial court allowed the defense to introduce any new or additional testimony. In other words, the entire process started anew after the original charges were dismissed.

Bennett's main concern appears to be that the prosecution prepared the motion and order of nolle prosequi and filed it; there was no hearing and, thus, the reasons given for the motion were not heard *orally*, on the record in open court. Bennett apparently wished to have the reasons for the motion made "verbally."

Our review of the record indicates that Bennett was in fact rearraigned and even had a second, identical motion to dismiss heard after the original charges were dismissed. Bennett concedes that he was rearraigned in his motion to strike the felony warrant. In fact, in his motion, Bennett conceded that the entire process started over again. Further, there is no requirement that the reasons for a nolle prosequi motion be made *orally* on the record.

---

[42] MCR 7.212(C)(5).

[43] *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000), citing *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990).

[44] *People v McCartney*, 72 Mich App 580, 589; 250 NW2d 135 (1976), citing *People v Charles O Wilson*, 386 Mich 565; 194 NW2d 237 (1972).

[45] MCL 769.13(1); *People v Bollinger*, 224 Mich App 491, 492; 569 NW2d 646 (1997).

MCL 767.29 provides, in pertinent part:

> A prosecuting attorney shall not enter a nolle prosequi upon an indictment, or discontinue or abandon the indictment, without stating on the record the reasons for the discontinuance or abandonment and without the leave of the court having jurisdiction to try the offense charged, entered in its minutes.

As a practical matter, however, the "record" does not only include oral representations made at hearings and captured on transcript. It also includes written documentation kept as part of Bennett's file. This included the motion for nolle prosequi, filed June 10, 1999, which stated the reason for the motion. Neither the statute, nor case law, requires more. The record indicates that there were no "proceedings . . . conducted outside of the presence of both trial counsel and the accuse[d]" despite defendant's belief otherwise.

Moreover, there is no requirement that there must be new evidence, new witnesses, or different charges in order for such a motion to be granted. The decision to move for nolle prosequi is within the prosecutor's discretion. Bennett relies upon *People v Ostafin*,[46] for his inaccurate assertion that a nolle prosequi requires that the prosecution establish one of the enumerated grounds for relief from judgment. Bennett misreads *Ostafin*. *Ostafin* involved the *setting aside* of a nolle prosequi order under GCR 1963, 528.3. There is no requirement that nolle prosequi motions be premised on mistake, inadvertence, or any other of the enumerated grounds for relief from a final judgment. Moreover, nolle prosequi is normally a dismissal without prejudice which does not preclude initiation of a subsequent prosecution.[47] "[A]s long as jeopardy has not attached, or the statute of limitations not run, our law permits a prosecutor to reinstate the original charge on the basis of obtaining a new indictment and thus beginning the process anew."[48] Further, although Bennett appears to argue that the prosecution abused its power by filing the supplemental information after he refused to accept a plea bargain, the nolle prosequi process is normally used in the context of plea bargaining.[49]

For these reasons, Bennett's ineffective assistance of counsel claim is inapplicable under the facts. Similarly, the trial court did not abuse its discretion by granting the motion and allowing the prosecution to reissue the charges. We conclude that Bennett's due process rights were not violated and all other issues that he raises on this point in his supplemental brief are without merit.

---

[46] *People v Ostafin*, 112 Mich App 712, 716-717; 317 NW2d 235 (1982).

[47] *McCartney, supra* at 585, citing *People v Reagen*, 395 Mich 306; 235 NW2d 581 (1975).

[48] *People v Sierb*, 456 Mich 519, 531-532; 581 NW2d 219 (1998), quoting *People v Curtis*, 389 Mich 698, 711; 209 NW2d 243 (1973).

[49] *McCartney, supra* at 587.

III. Search And Seizure

A. Standard Of Review

Bennett argues that the search and seizure of his truck was unconstitutional in that the stop was motivated by race; there was no consent to search the truck or, if there was consent, it was "tainted;" and that the officers' testimony regarding the stop was "inherently incredible." A trial court's ruling on a motion to suppress evidence will not be reversed unless that decision is clearly erroneous.[50] A decision is said to be clearly erroneous where, after a review of the record, this Court is left with a definite and firm conviction that a mistake had been made.[51]

B. Race

Bennett argues that the police officers were motivated by race when they stopped him in his Ryder truck. There is absolutely no basis for this assertion. Bennett does not dispute that it was the middle of the night when the police officers pulled the truck over. Thus, it is unclear how the police officers could have seen the occupants of the truck before they pulled it over. Officer Raskin testified that the only reason he pulled the truck over was because only one of its taillights was working. Bennett argues that race must have motivated the stop because, although Officer Raskin testified that a defective taillight motivated the stop, he never issued a citation. Bennett asserts that it necessarily follows that in fact the taillight was not broken. In fact, Officer Raskin explained that he very commonly chose not to issue citations for defective equipment violations. We conclude that there is simply no basis to even speculate that the stop was motivated by race.

C. Consent

Bennett argues that he never gave consent or that, if he did, the consent was "tainted." It appears that Bennett is denying that he gave consent and alternatively arguing that, if he did, he did so only because he was "illegally detained." There is no basis for this position.

Bennett argues that he was illegally detained based on the fact that Officer Raskin could not recall how long was he "detained" before he was released during the traffic stop. Bennett does not even suggest that he was there for any particular length of time, let alone a long while. Bennett also implies that the consent was given involuntarily, although he fails to argue any of the criteria generally used to determine voluntariness. Officer Raskin testified that Bennett was "free to leave" and that he had no basis to hold him at the time he pulled the truck over. There was evidence that Bennett gave Officer Raskin consent to search the vehicle after a LEIN search showed that Horton had warrants pending. Officer Medbury then searched the truck, Horton was arrested, and Bennett was free to go. Nothing was seized from Bennett, although objects, later identified as cement forms, were seen in the back of the truck.

---

[50] *People v Burrell,* 417 Mich 439, 448; 339 NW2d 403 (1983).

[51] *People v Armendarez,* 188 Mich App 61, 65-66; 468 NW2d 893 (1991).

The thrust of Bennett's argument appears to be that the stop was unduly long. As trial counsel admitted during argument, however, the record is simply "devoid" of evidence regarding the exact length of the stop, although nothing in the record indicates that the stop was particularly long. Furthermore, there appeared to be two grounds for searching the vehicle: the first being that the passenger was taken into custody for outstanding warrants and the second being consent. We conclude that there is no basis for Bennett's challenge to the stop.

In an effort to support his arguments that the stop was motivated by race and that consent was not given to search the truck, Bennett argues at length that the testimony of Officers Raskin and Medbury was "inherently incredible." Bennett compares portions of testimony taken from his trial and Horton's trial to support his point. Again, there is no merit to Bennett's position. Credibility is a matter for the trier of fact to decide. In this case the trial court was presented with conflicting testimony which required it to make a determination concerning the credibility of each witness and the weight to afford each witness' testimony. For these reasons, we conclude that the trial court's denial of Bennett's motion to suppress was not clear error.

IV. Probable Cause

A. Standard Of Review

Bennett argues that, because there was insufficient evidence to establish probable cause, his motion to quash should have been granted. We review the district court magistrate's decision to bind over a defendant, as well as the trial court's decision on a motion to quash an information, for an abuse of discretion.[52] The standard for determining whether probable cause has been shown at a preliminary examination is much lower than establishing that "defendant committed the crime," which is the standard employed in Bennett's analysis. Rather, the primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant has committed it.[53]

B. Breaking And Entering

Bennett was charged with breaking and entering with the intent to commit larceny, in violation of MCL 750.110. In *People v Toole*,[54] this Court explained that the elements of the offense of breaking and entering with intent to commit larceny are: (1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny therein. The prosecution's theory at trial here was that Bennett aided and assisted Horton in committing the crime.

---

[52] *People v Hamblin*, 224 Mich App 87, 91; 568 NW2d 339 (1997), quoting *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993).

[53] *Id*. at 92.

[54] *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998), citing *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993).

We note that MCL 767.39 abolished the distinction between accessories and principals:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Further, one need not actually do the breaking to be guilty as an aider and abettor to breaking and entering.[55] Additionally, a defendant could be guilty as an aider and abettor even if he were merely the lookout or the driver of the car used in taking the principal to the building.[56]

Bennett concedes that "the evidence strongly supports that only one person entered the building and moved these items from the shop." His theory is that Horton must have broken into the business and moved the cement forms himself. Even assuming that Horton hauled the forms himself, there was still ample testimony given at the preliminary examination to establish probable cause that Bennett aided and abetted him. Thus, we conclude that it was not an abuse of discretion for the trial court to deny Bennett's motion to quash.

V. Expert Testimony

A. Standard Of Review

Bennett argues that Officer Cremonte testified as an expert on the issue of cement, yet he was never qualified as an expert witness. Thus, Bennett contends, Officer Cremonte's testimony invaded the province of the jury. Bennett did not preserve this issue for appeal. In order to avoid forfeiture of an unpreserved issue on appeal, an appellant must show: 1) that an error occurred; 2) "that the error was plain, i.e., clear or obvious"; and 3) that the plain error affected substantial rights.[57] Once an appellant has satisfied these three requirements, an appellate court must "exercise its discretion in deciding whether to reverse."[58] Reversal is warranted only when the plain, unpreserved error resulted in "the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."[59] Because this issue is unpreserved, this Court must first review Bennett's contention to determine whether the admission of Officer Cremonte's testimony was plain error.[60] We conclude that it was not.

---

[55] *People v Davenport*, 122 Mich App 159, 162; 332 NW2d 443 (1983), citing *People v Clark*, 34 Mich App 70; 190 NW2d 726 (1971).

[56] *Id.*, citing *DeLoach v State*, 142 Ga App 666; 236 SE2d 904 (1977) and *State v Wilson*, 221 Kan 359; 559 P2d 374 (1977).

[57] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[58] *Id.* at 763.

[59] *Id.* at 763-764.

[60] See *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2001).

B. Officer Cremonte's Testimony

Had the parties and the trial court undertaken the proper procedure for expert witness qualification, Officer Cremonte would have qualified and his testimony would have been admissible. If a trial court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert may testify to the knowledge by opinion or otherwise.[61]

In this case, there is no question that Officer Cremonte's knowledge regarding particular types of concrete assisted the trier of fact in understanding the significance of the particular cement pieces found in the back of Bennett's truck. It makes no difference that Officer Cremonte may not have held any particular degree on the subject about which he testified. A witness may be qualified as an expert by knowledge, skill, experience, training or education; the test of qualification is broad.[62] According to Officer Cremonte, he and his family had been in the cement business for generations; his extensive knowledge regarding concrete pouring was "just common knowledge to him." In addition to working on the police force, Officer Cremonte also worked in the concrete business at the time that he testified. Had his status as an expert witness been challenged, he would have been qualified to testify.

Most significantly, this Court recently held that the failure to challenge the qualification of an expert within a reasonable time after learning his identity and basic qualifications constitutes forfeiture of the issue.[63] Here, trial counsel never objected specifically to Officer Cremonte's qualifications, and in fact based his cross-examination of Officer Cremonte upon the assumption that Officer Cremonte was an expert.

Even, however if the admission of Officer Cremonte's testimony had been error, Bennett still carries the burden of establishing that it was more probable than not that the error in question undermined the reliability of the verdict, rendering the error outcome determinative.[64] Bennett has failed to do so. There was sufficient evidence to support the verdict, so that Officer Cremonte's testimony did not undermine the reliability of that evidence. John Cogo, the business owner, testified that the cement particles found in the back of the truck were of the type generally seen on cement forms after they are used. This is the same point which Officer Cremonte made. It is not "more probable than not" that the admission of Officer Cremonte's testimony was outcome determinative. Therefore, we conclude that Bennett's argument on this point is without merit.

---

[61] MRE 702; *People v Stiller*, 242 Mich App 38, 54; 617 NW2d 697 (2000).

[62] MRE 702; *Grow v W A Thomas Co*, 236 Mich App 696, 713; 601 NW2d 426 (1999), citing *Dudek v Popp*, 373 Mich 300, 306; 129 NW2d 393 (1964).

[63] *Cox v Flint Bd of Hosp Mgrs (On Remand)*, 243 Mich App 72, 79-80; 620 NW2d 859 (2000).

[64] See *People v Snyder*, 462 Mich 38, 45; 609 NW2d 831 (2000), citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

VI. Sentencing

Bennett argues that under *People v Stoudemire*,[65] he was incorrectly sentenced as a third habitual offender. We agree and remand for sentencing in accordance with the rule set forth in *Stoudemire*, which provides that "multiple convictions arising out of a single incident count only as a single prior conviction for purposes of enhancing a sentence under the habitual offender statute."[66]

We remand the case for resentencing in accordance with *Stoudemire, supra* and affirm in all other respects. We do not retain jurisdiction.

/s/ Harold Hood
/s/ William C. Whitbeck
/s/ Patrick M. Meter

---

[65] *People v Stoudemire*, 429 Mich 262, 278; 414 NW2d 693 (1987).

[66] *Id.*