STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE MICHAEL GUILMETTE, a/k/a BRUCE MICHAEL GAILMETTE, a/k/a BRUCE MICHAEL GUILLETTE,

Defendant-Appellant.

UNPUBLISHED
April 16, 2002

No. 224720
Livingston Circuit Court
LC No. 99-010925-FH

Before: Cavanagh, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for first-degree home invasion, MCL 750.110a(2). The trial court initially sentenced defendant to a term of thirteen to twenty years' imprisonment, but then vacated that sentence and sentenced defendant as a fourth habitual offender, MCL 769.12, to a term of twenty to thirty years' imprisonment. We affirm.

Defendant argues that the trial court erred when it admitted evidence of a second photographic identification. Defendant contends that the second photographic array was unduly suggestive because he was the only person in the group of photos who was wearing glasses. We disagree. To show that his due process rights were violated, defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). On review, a trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *Id*. at 303.

The trial court did not err when it admitted evidence of the second photographic lineup. The victim had previously identified defendant in an earlier photographic lineup, but the earlier picture was several years old. Therefore, the police assembled a second photographic lineup using a more recent photo. We are not persuaded that the second photographic lineup was unduly suggestive merely because defendant was the only person in the group who was wearing glasses. Indeed, the victim stated that this was not a principal factor in her identification of defendant. Instead, she relied more on his heavy mustache and complexion. In light of the totality of the circumstances, we find no clear error in the trial court's determination that the lineup was not so suggestive there was a substantial likelihood that it would lead to

misidentification. See *People v Kevin Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001).

Defendant also contends that he was entitled to counsel at the second photographic lineup. Even though he was not in custody at the time, defendant asserts that the presence of counsel was required because the clear intent of the second photographic lineup was to build a case against him. We disagree. Generally, counsel is not required at a precustodial, investigatory photographic lineup. The right to counsel attaches with custody. *Kurylczyk*, *supra* at 302; see, also, *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001).

Defendant relies on *Kurylczyk*, *supra* at 299, wherein this Court recognized that, in *People v Cotton*, 38 Mich App 763, 769; 197 NW2d 90 (1972), this Court "refused to 'exclude the possibility that under unusual circumstances a suspect may have a right to counsel during a pretrial photographic identification though at the time he is not in custody.'" As explained in *Kurylczyk*, the "unusual circumstances" involved in *Cotton* were as follows:

> Although the defendant was not in custody at the time of the challenged lineup, he previously had been arrested and had been taken into custody. Further, two lineups had been conducted while he was in custody, and he had been given the advice of counsel during those lineups. Finally, his car had been impounded for inspection by investigators. Under those circumstances, the Court determined that the police could not strip the defendant of his right to counsel by releasing him from custody just before the photographic display. [*Kurylczyk*, *supra* at 299-300.]

In *People v Lee*, 391 Mich 618, 625; 218 NW2d 655 (1974), however, the Court refused to recognize the defendant's right to counsel at the "pre-custody, pre-questioning, mere suspicion phase" of an on-going investigation because the defendant had not been detained by the police.

Here, defendant was not in custody, nor had he previously been arrested or detained when the second photographic lineup was conducted. The lineup was conducted as a precustodial, investigatory photographic identification. We are not persuaded that defendant has identified an "unusual circumstance" that would bring this case outside the general rule that counsel is not required at this stage of an investigation.

Next, defendant claims that his first-degree home invasion conviction was not supported by sufficient evidence because the elements of entry and intent were not proven. We disagree. The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). As our Supreme Court explained in *Nowack*:

> The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. 'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.' *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

> We once again caution reviewing courts that the prosecutor need not negate every reasonable theory consistent with innocence. *People v Konrad*, 449 Mich 263, 273, n 6; 536 NW2d 517 (1995). Instead, the prosecution is bound to prove the elements of the crime beyond a reasonable doubt. It is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility; it need only convince the jury 'in the face of whatever contradictory evidence the defendant may provide.' [Id. at 400.]

Regarding the element of entry, "it is sufficient if any part of [the] defendant's body is introduced within the house." *People v Gillman*, 66 Mich App 419, 430; 239 NW2d 396 (1976), quoting 3 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 1133, p 1528. See, also, CJI2d 25.2a(3). In this case, the victim testified that she observed a footprint on the tile foyer inside the front door of her house. She took a photograph of this footprint, which was introduced at trial. Defendant's claim that the photo was taken "hours" after the police left and after "many" people had walked through the home is not supported by the record. This evidence, viewed most favorably to the prosecution, was sufficient to enable the jury to find the element of entry beyond a reasonable doubt.

We find no merit to defendant's claim that defense counsel was ineffective for failing to object to the admission of the photograph. See *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Contrary to what defendant asserts, the victim's testimony that she took the photograph and that it accurately depicted what she saw was sufficient to authenticate the photo under MRE 901(b)(1). See *Ferguson v Delaware Int'l Speedway*, 164 Mich App 283, 291; 416 NW2d 415 (1987); see, also, *Werthman v General Motors Corp*, 187 Mich App 238, 242; 466 NW2d 305 (1991). Thus, defendant has not shown that defense counsel could have successfully precluded admission of the photograph. Also, the prosecutor did not make an impermissible argument when she referred to the photograph as proof of entry into the house. The prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995).

We also find that the evidence was sufficient to support the "intent" element of home invasion. A defendant's intent may be proved by the nature, time, and place of the defendant's acts before and during the breaking and entering, by what he said, what he did, and how he did it, and by any other facts and circumstances in evidence. *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988); CJI2d 3.9. The evidence here showed that defendant drove his vehicle up to the victim's house where he was neither known nor invited. The house was secluded from both the road and close neighbors. Defendant rang the doorbell several times and walked around the property. He returned to the door and rang the bell again, and also began banging on the door. Despite not receiving any answer, the door opened and came crashing in. When the victim disclosed that she was home, defendant ran to his van and drove away quickly. Cumulatively considered, this evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant's intent was to locate a secluded house in which nobody was home for the purpose of breaking into that house to steal property.

Next, the trial court did not abuse its discretion in admitting other bad acts evidence pursuant to MRE 404(b). See *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). Contrary to what defendant argues, identification was not the only conceivable justification for admission of the

other acts evidence. There were common features between the similar act and the charged offense sufficient to admit the other acts evidence to show a common design, plan, scheme or system. See *People v Sabin (After Remand)*, 463 Mich 43, 63-64; 614 NW2d 888 (2000). The record shows that the evidence was admitted pursuant to a limiting instruction that allowed the evidence to be considered for the proper purposes of proving identification and to show a common design, plan, scheme or system. See MRE 404(b); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994).

Defendant argues that the trial court erred in failing to instruct the jury on flight. Defendant failed to preserve this issue by requesting an instruction on flight at trial. See *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In light of defendant's alibi defense, we conclude that the trial court's failure to instruct on flight did not affect defendant's substantial rights. Further, we find that defense counsel was not ineffective for failing to request an instruction on flight. Defendant has not overcome the presumption that counsel did not request the instruction because doing so would have tended to emphasize defendant's identity as the perpetrator, thereby undermining his alibi defense. See *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant's remaining ineffective assistance of counsel claims are vague and unsupported. Defendant has not demonstrated that counsel's performance fell below an objective standard of reasonableness or that he was so prejudiced that he was denied a fair trial. See *Toma*, *supra*.

Finally, while we agree with defendant that the sentencing court proceeded improperly when it first sentenced him for the underlying offense, vacated that sentence, and then sentenced him as an habitual offender, resentencing is not warranted. MCL 769.13, as amended by 1994 PA 110, no longer provides for the vacation of an underlying sentence when sentencing an habitual offender. *People v Green*, 228 Mich App 684, 699; 580 NW2d 444 (1998). Instead, the court should impose a single, habitualized sentence, within the limits authorized by the habitual offender statutes. *Id*. Defendant asserts that, because procedurally the court should have imposed just a single sentence, the first sentence imposed, thirteen to twenty years, was valid and the trial court therefore lost the authority to impose a different sentence. We disagree.

"Although the authority of the court over a defendant typically ends when a valid sentence is pronounced, the court may correct an invalid sentence after sentencing." *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). As the Court in *Miles* observed, "[a] sentence is invalid . . . when it is based upon . . . a misconception of law[.]" *Id*. In this case, the trial court's original thirteen to twenty year sentence was clearly based on an erroneous understanding of the sentencing procedure for habitual offenders. Therefore, the court had the authority to modify this sentence to reflect an intended habitualized sentence within the limits authorized by the habitual offender statute.

Furthermore, it is apparent that defendant was not prejudiced by the erroneous procedure. Even though two separate sentence recommendations were presented in the presentence report, the court was aware that the recommended thirteen to twenty year sentence was based solely on the underlying offense, and that the recommended twenty to thirty year sentence was based on defendant's status as an habitual offender. Additionally, the sentencing information report

contained the correct guidelines range in light of the offense and defendant's habitual offender status, and also indicated that the recommendation was based on defendant's habitual offender status. Thus, the trial court was not misled as to the applicable recommended sentence range. The court ultimately sentenced defendant within the recommended range, to twenty to thirty years' imprisonment. Under these circumstances, resentencing is not warranted.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Peter D. O'Connell