STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 2002
v	No. 223545 Monroe Circuit Court
MICHAEL LOUIS FEKETIA, Defendant-Appellant.	LC No. 98-029558-FH

Before: Holbrook, Jr., P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree home invasion, MCL 750.110a(2), and sentenced as a fourth felony habitual offender, MCL 769.12, to a term of twenty to forty years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in refusing to suppress the victim's in-court identification. Defendant contends that the identification was the product of an improper on-the-scene identification conducted without the presence of counsel and which was also unduly suggestive. We disagree.

A trial court's decision on a motion to suppress evidence is reviewed for clear error. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983); *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996). However, the trial court's application of constitutional principles to the facts is reviewed de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

In Michigan, a defendant generally has the right to an attorney during pretrial identification procedures. *People v Anderson*, 389 Mich 155, 168; 205 NW2d 461 (1973); *People v Winters*, 225 Mich App 718, 722; 571 NW2d 764 (1997). However, a defendant is not entitled to counsel during a "prompt" on-the-scene corporeal identification. *Anderson*, *supra* at 187, n 23; *Winters*, *supra* at 726. In the present case, the on-the-scene identification was conducted about seventy minutes after the crime was committed, but, more significantly, within a few minutes after defendant was detected and apprehended near the crime scene. Under the circumstances, the identification procedure constituted a "prompt" on-the-scene identification such that counsel's presence was not required. See *People v Starks*, 107 Mich App 377, 379-381; 309 NW2d 556 (1981).

Defendant also argues that the on-the-scene identification was improper because the police had "strong evidence" that he was the perpetrator. However, as this Court held in *Winters*, *supra* at 726-728, the "strong evidence" standard does not prohibit the police from promptly conducting an on-the-scene identification.

Defendant also argues that the identification procedure was improper because it was unduly suggestive. See *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *Winters*, *supra* at 725. An on-the-scene identification is unduly suggestive when "'the witness[,] when called by the police or prosecution[,] either is told or believes that the police have apprehended the right person.'" *Gray*, *supra* at 111, quoting *Anderson*, *supra* at 178. Here, there is no indication that the victim was ever told that the police had apprehended the right person, or that she was otherwise led to believe that. The victim testified that she did not assume that defendant was the perpetrator simply because he was in police custody. Therefore, we find no merit to defendant's claim that the identification was impermissibly suggestive.

Defendant also argues that the circuit court erred in denying his motion to quash because, apart from the victim's illegal identification, the evidence presented at the preliminary examination failed to establish his identity as the perpetrator. "As a general matter, the district court's decision to bind over the defendant is subject to review for abuse of discretion." *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991). In light of our conclusion that the identification procedure was not improper, we hold that the circuit court did not abuse its discretion in refusing to quash the information.

In a supplemental brief, defendant argues that the trial court should have suppressed the victim's on-the-scene identification as the fruit of an illegal seizure. We disagree.

The record discloses that the police had a "particularized suspicion, based on an objective observation, that" defendant was the offender in question. See *People v Shabaz*, 424 Mich 42, 54, 57, 59; 378 NW2d 451 (1985). Further, defendant was detained with an objective – an on-the-scene identification – that was aimed at quickly resolving the officers' suspicions, and which was ascertainable and near at hand. *Burrell*, *supra* at 456-459. Therefore, the stop was reasonable and proper, and the trial court did not err in denying defendant's motion to suppress the victim's identification as the fruit of an illegal arrest.

Defendant next argues that the trial court erred in refusing to instruct the jury on the lesser offenses of larceny in a building, MCL 750.360, and misdemeanor trespass, MCL 750.552.[1] We disagree.

Claims of instructional error are reviewed de novo, *People v Hall*, ___ Mich App ___; ___ NW2d ___ (No. 223182, issued 1/18/02), slip op at 4. A court's failure to instruct on a requested misdemeanor, however, is reviewed for an abuse of discretion. *People v Stephens*, 416 Mich 252, 255, 265; 330 NW2d 675 (1982).

[1] Defendant also contends that the trial court erred in failing to instruct on entering without breaking or without permission. Because defendant did not request an instruction on this offense at trial, appellate relief is not available. MCL 768.29.

Whereas the larceny statute is principally aimed at deterring theft, the crime of home invasion has as its general purpose the deterrence of entries into occupied dwellings with an unlawful purpose. Thus, the two offenses do not relate to the protection of the same societal interests, or have a common purpose, and, therefore, do not have an "inherent relationship." *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987); *Stephens*, *supra* at 262. Accordingly, the trial court did not err in refusing to instruct on larceny in a building. *People v Hendricks*, 446 Mich 435, 442-444; 521 NW2d 546 (1994).

Similarly, while the crime of trespass is aimed at protecting property rights, unlike the crime of home invasion, it does not require that the entry be for an illegal purpose or involve an occupied dwelling. See MCL 750.110a(2). Because these two crimes also protect different societal interests and have different purposes, we conclude that they lack an "inherent relationship." *Steele*, *supra* at 18-22; see also *Stephens*, *supra* at 261-265. Thus, the trial court did not abuse its discretion in refusing to instruct on the lesser offense of trespass. *Hendricks*, *supra* at 442-444.

Next, defendant argues that misconduct by the prosecutor deprived him of a fair trial. We disagree.

Claims of prosecutorial misconduct are generally reviewed on a case by case basis to determine whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The challenged remarks must be viewed in context. *Id.* In this case, however, defendant did not preserve this issue with an objection to the challenged remarks at trial. Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); see also *People v Grant*, 445 Mich 535, 548-553; 520 NW2d 123 (1994).

In remarking that he was not taking the jury on an imaginary journey, the prosecutor was responding to defense counsel's remark whereby defense counsel asked the jury to take an imaginary journey from a different perspective. Viewed in context, defendant has not demonstrated that the prosecutor's remarks were plainly improper. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001).

We also reject defendant's claim that the prosecutor improperly vouched for the credibility of the victim's identification testimony. Viewed in context, the prosecutor was arguing how the evidence showed that the victim's testimony was credible. The prosecutor did not improperly suggest that he had some special knowledge that the witness was testifying truthfully. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Similarly, the prosecutor relied on facts in evidence when commenting on the reliability of the tracking dog. Plain error has not been shown.

Because defendant has failed to show that the prosecutor's remarks were improper, we reject defendant's claim that defense counsel was ineffective for failing to object to the remarks. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Next, defendant argues that the district court erred in dismissing the case without prejudice when the prosecutor's witnesses failed to appear at the time of the original preliminary examination. We disagree. Dismissal without prejudice was the proper remedy. *People v Crawford*, 429 Mich 151, 157, 161; 414 NW2d 360 (1987); *People v Weston*, 413 Mich 371, 376; 319 NW2d 537 (1982).

Even if the district court erred in failing to articulate its determination of probable cause to bind defendant over for trial following the rescheduled preliminary examination, such error was harmless because the evidence at the preliminary examination was sufficient to support the bindover, *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998), and further, sufficient evidence was presented at trial to support defendant's conviction. See *People v Moorer*, 246 Mich App 680, 682; 635 NW2d 47 (2001).

Finally, we disagree with defendant's claim that his sentence is disproportionate to the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

A sentence imposed on a habitual offender is reviewed for abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). The sentencing guidelines are inapplicable to habitual offenders. *People v Gatewood*, 450 Mich 1025, 1025; 546 NW2d 252 (1996). In light of defendant's previous criminal history, his twenty to forty year habitualized sentence does not constitute an abuse of discretion. *Hansford*, *supra*.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder