

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY LEIGH NICHOLS,

Defendant-Appellant.

UNPUBLISHED

September 16, 2004

No. 246973

Muskegon Circuit Court

LC No. 02-047351

Before: Griffin, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant Terry Leigh Nichols appeals as of right his jury trial conviction of breaking and entering with intent to commit larceny, MCL 750.110. The trial court sentenced defendant as a habitual offender third offense, MCL 769.11, to five to twenty years' imprisonment. Defendant now appeals, and we affirm.

I

Defendant first argues that the evidence was insufficient to support his breaking and entering conviction because, other than the testimony of Jennifer Averill, his alleged accomplice who admitted that she participated in the break-in, there was no other evidence, physical or otherwise, linking him to the crime. Defendant maintains that each of the prosecution witnesses intentionally lied to the police in their initial version of what occurred, omitted critical information, and all had improbable memory losses or a selective memory that rendered their testimony implausible. Defendant contends that, at most, the prosecution's proofs at trial showed that defendant was in possession of stolen property.

We review de novo defendant's claim that the evidence was insufficient to support his conviction. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "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." *Id.* at 400. This Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of the

crime. *Nowack, supra* at 400. The prosecution “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.*, quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). Evidence of a defendant’s intent may be inferred by the jury from all the facts and circumstances in a particular case. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

The elements 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. *People v Cornell*, 466 Mich 335, 360-361; 646 NW2d 127 (2002); *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998); *People v Adams*, 202 Mich App 385, 389-390; 509 NW2d 530 (1993).

The evidence produced at trial indicates that a family medical practice in the village of Ravenna was broken into sometime after closing on Wednesday, March 20, and Thursday morning, March 21, 2002. Numerous items were taken, including drug samples, medical equipment, instruments, cash, clocks, commemorative coins, and personal possessions belonging to the staff of the medical office. Jennifer Averill, defendant’s alleged accomplice, who indicated that she was testifying pursuant to a plea agreement, stated that, on the night in question, she was with defendant when he committed the breaking and entering. Averill testified that immediately prior to breaking into the doctor’s office, defendant attempted to break into a nearby pharmacy. While she watched, defendant smashed out a window of the pharmacy, but when the motion alarm went off, defendant quickly exited the building, and they walked a short distance to the doctor’s office. There, defendant broke a window and entered the building. Averill testified that once defendant ascertained that there was no alarm system or motion detector, they ransacked the office and took numerous items, even using the office’s own trash bags in order to remove the items from the scene. Averill testified that after they left the doctor’s office, they went to a local bar near the crime scene, where defendant bought cigarettes. The bartender testified at trial and confirmed that, on the night in question, defendant came in the back door with a woman, purchased cigarettes, and then left in a small red car with the woman driving. Averill ultimately contacted the police concerning the breaking and entering and turned over all of the items she retained from the breaking and entering to the police.

Two days after the breaking and entering, defendant was seen by some witnesses in possession of several of the stolen items, and they observed him trying to sell the items (samples of Viagra and Paxil) to various people. Other witnesses testified that they observed some of the stolen items in the closet of defendant’s sister. In fact, some of the stolen items were purchased by these witnesses and later turned over to an investigating officer. The items that defendant was attempting to, and did, sell were identified as the same items stolen from the doctor’s office.

An investigating detective testified at trial that when defendant was arrested, he attempted to flee on foot. The detective testified that defendant was interviewed later that afternoon and denied any involvement in the breaking and entering. During the interview, defendant claimed that Ms. Averill implicated him because she hated him. Defendant initially denied that he was with Averill on the night in question, but, after being advised that the bartender had seen them together that night, admitted that he called Averill in the evening to request a ride to Muskegon. He stated that Averill dropped him off at the house of a friend and, after being joined by yet another acquaintance, Matt Baker, they drank vodka, walked to a

number of different spots in the general vicinity and then returned to the friend's house, where he stayed the night. Defendant stated in his interview that he woke up the next morning at approximately noon, made contact with Baker, and the two spent the rest of the day together. A videotape of the interview was played to the jury, as well as an audiotape of three of defendant's telephone calls intercepted from the jail, in which defendant referred to Baker as an alibi.

Defendant essentially suggests that this Court should sit as a thirteenth juror and decide the credibility of the witnesses as they were presented to the jury. Although some of the witnesses' testimony was contradicted at trial, absent exceptional circumstances, issues of witness credibility are for the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). The credibility of an accomplice, or any other witness, is within the sole province of the jury, *People v Crawford*, 458 Mich 376, 396; 582 NW2d 785 (1998), and a defendant may be convicted solely on the uncorroborated testimony of an accomplice. *People v Sullivan*, 97 Mich App 488, 492; 296 NW2d 81 (1980); *People v Ochko*, 88 Mich App 737, 741; 279 NW2d 294 (1979). We will not second-guess the jury's determination of credibility. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). We conclude that the testimony taken as a whole, when viewed in a light most favorable to the prosecution, was sufficient for the jury to find that the essential elements of breaking and entering with intent to commit larceny were proven beyond a reasonable doubt.

II

Defendant next contends that the trial court abused its discretion and committed error requiring reversal by improperly admitting other acts evidence at trial. As previously noted, the trial testimony of Jennifer Averill indicated that, on the night in question, defendant first broke into and entered a pharmacy located in close proximity to the doctor's office, but, on noticing a motion detector, left that location and immediately proceeded to the nearby doctor's office, where he committed the instant offense. At trial, the court allowed the prosecution to introduce evidence concerning the pharmacy incident as *res gestae* evidence. Defendant now argues that admission of this highly prejudicial, marginally relevant other acts evidence resulted in a miscarriage of justice and denied him his right to a fair trial. We disagree.

Notwithstanding MRE 404(b), evidence of other criminal acts is admissible where they constitute part of the *res gestae* of the charged offense, i.e., when those acts are "so blended or connected with the [charged offense] that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). "*Res gestae*" has alternatively been defined as "the facts which so illustrate and characterize the principal fact as to constitute the whole one transaction, and render the latter necessary to exhibit the former in its proper effect." *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983), quoting *People v Castillo*, 82 Mich App 476, 479-480; 266 NW2d 460 (1978).

Here, there was an acute temporal connection between the two acts in question. Under the circumstances, where the credibility of the witnesses was of critical importance, evidence regarding the pharmacy incident was part of the *res gestae* of the crime, and its admission was relevant to give the jury "an intelligible presentation of the full context in which the disputed events took place." *Sholl*, *supra* at 741; see also *People v Flynn*, 93 Mich App 713, 719; 287 NW2d 329 (1979) ("[w]here other criminal acts are an inseparable part of the whole deed for

which defendant is charged, the prosecution is permitted to complete the story of the crime by proving the immediate context of happenings near in time and place.”). Accordingly, we conclude that the trial court did not abuse its discretion in admitting the disputed evidence pursuant to *Sholl* and *Robinson*, *supra*.

III

Finally, we reject defendant’s argument that the trial court failed to individualize his sentence or articulate substantial and compelling reasons, based on objective and verifiable factors, for its upward departure from the statutory sentencing guidelines range of five to thirty-four months in the instant case.

A trial court may impose a sentence outside the statutory guidelines’ range only for substantial and compelling reasons. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). A substantial and compelling reason must be objective, verifiable, keenly or irresistibly grab the court’s attention, and must be of considerable worth in deciding the length of a defendant’s sentence. *Id.* at 272; *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A court may not depart from a sentencing guidelines range based on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on the facts of record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3); *Abramski*, *supra* at 74. “A departure from the legislative guidelines range must render the sentence proportionate to the seriousness of the defendant’s conduct and the individual’s criminal history.” *People v Hendrick*, 261 Mich App 673, 677-678; 683 NW2d 218 (2004).

This Court reviews for clear error the existence of a particular sentencing factor. *Babcock*, *supra* at 273. Whether a factor is objective and verifiable is a question of law subject to de novo review, and whether the factor constitutes a substantial and compelling reason to depart from the sentencing guidelines is reviewed for an abuse of discretion. *Id.* at 273-274. In ascertaining whether the departure was proper, this Court must defer to the trial court’s direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

Here, in justifying an upward departure from the guidelines range of five to thirty-four months and imposing an actual sentence of five to twenty years’ imprisonment, the court noted that defendant had already been in the custody of the Department of Corrections and had twice absconded from parole. The court accurately noted that while defendant’s parole status was scored in the guidelines, the absconding was not. The trial court further noted that while defendant’s prior felonies were accounted for in the guidelines, the fact that the present conviction was defendant’s third property theft conviction, indicating an uncontrollable propensity toward these types of theft offenses, was not adequately scored in the guidelines. See *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

We agree with the trial court that the fact that defendant had previously absconded from parole is an objective and verifiable factor not adequately considered by the guidelines. Moreover, the nature of defendant’s prior convictions showed a distinct pattern which “keenly” or “irresistibly” called attention to itself. *Babcock*, *supra* at 258. Applying the *Babcock* standard of review, we conclude that the trial court did not clearly err in its factual determinations, its departure from the guidelines was based on proper objective and verifiable factors, and these

factors constituted substantial and compelling reasons for the court's decision to depart upward from the sentencing guidelines. Thus, the trial court did not abuse its discretion in its upward departure from the statutory guidelines. Moreover, the extent of the departure was within the "permissible range of principled outcomes" and represented a principled choice. *Id.* at 268-269. Defendant's sentence is proportionate to the seriousness of the crime and the circumstances surrounding the offense and the offender.

Affirmed.

/s/ Richard Allen Griffin

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra