STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2007
v	No. 264385 Muskegon Circuit Court
JERON LAMAR HINTON, Defendant-Appellant.	LC No. 04-050452-FH

Before: O'Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction and sentence for attempted first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to five to twenty years' imprisonment. We affirm.

On January 27, 2004, at approximately 1:45 a.m., two elderly women reported to the police a possible break-in at their home. They heard a noise, noticed a basement window frame lying on the snow, and saw fresh footprints in the snow by the window and around the house. Responding officers discovered that the basement window was broken, but they did not find an intruder inside the home. Officers then followed the tracks in the snow. The tracks went around the home, out to the street, several blocks along the street, through a parking lot, and up an outside stairway to an upstairs apartment where defendant was staying. The shoes defendant was wearing were damp and matched the "distinctive spiral print" and size of the tracks in the snow. The trial court admitted into evidence testimony about defendant's 1997 conviction for attempted breaking and entering a vehicle.

Defendant first argues on appeal that the trial court abused its discretion by admitting evidence of his prior conviction. We disagree.

The admissibility of bad-acts evidence under MRE 404(b) is within the trial court's discretion, and we will reverse only when there has been a clear abuse of that discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005). An abuse of discretion occurs when the trial court fails to select a "principled outcome" where more than one outcome is possible. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). In general, MRE 404(b) is a rule of inclusion, and "prior bad acts" are only excluded from evidence if admitted for the improper purpose of proving a defendant's bad character or propensity to act in conformity with it. *People v VanderVliet*, 444

Mich 52, 65; 508 NW2d 114 (1993). Evidence of a prior crime is admissible if relevant and offered for a proper purpose, and if the probative value of the evidence must not be substantially outweighed by unfair prejudice. *Id*. at 74-75; *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Evidence is relevant and therefore "admissible if it is helpful in throwing light on any material point." MRE 401; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Defendant's prior crime was offered to prove defendant's intent, which is a proper purpose under MRE 404(b)(1). Defendant's general denial of the charged offense put all elements, including intent, at issue. *VanderVliet, supra* at 78; *Crawford, supra* at 389. The prosecution was required to prove that defendant not only broke the window, but also that, when he broke it, he intended to commit a larceny, felony, or assault inside the dwelling. MCL 750.110a(2). Defendant's prior conviction of breaking a vehicle window to steal something from within the vehicle helps "throw light" on whether defendant broke the window intending to steal something from inside the house, as opposed to accidentally breaking it or breaking it out of simple destructiveness. It was therefore relevant, and it established a proper intermediate inference "other than defendant's wretched character." *People v Martzke* (*On Remand*), 251 Mich App 282, 294-295; 651 NW2d 490 (2002). Its temporal remoteness affects its weight, not its admissibility. *McGhee, supra* at 611-612.

"Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford, supra* at 398. Whether the probative value of evidence of bad acts is substantially outweighed by the danger of unfair prejudice "is best left to a contemporaneous assessment of the presentation, credibility and effect of testimony." *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). We see no such danger here. The "reverberating clang" of the prior conviction did not drown out the weaker evidence of guilt in the current offense: the two crimes were not excessively similar, and neither necessarily inferred the other. *Crawford, supra* at 398-399. The evidence was highly relevant to the specific intent necessary for first-degree home invasion. In any event, we do not believe defendant was prejudiced, given the additional evidence that defendant had apparently walked to every door and window on the house other than the front door, and given the trial court's clear instruction to the jury regarding the limited consideration they could give to defendant's prior conviction. A limiting instruction that "cautions the jury not to infer that a defendant had a bad character and acted in accordance with that character can protect the defendant's right to a fair trial." *Magyar, supra* at 416. The evidence was properly admitted.

Defendant next argues that the trial court improperly departed from the sentencing guidelines based on defendant's alleged attempt to suborn perjury and the fact that he absconded to Missouri while the proceedings were pending. We disagree.

A trial court must impose a sentence within the recommended minimum sentence range under the legislative guidelines unless it finds substantial and compelling reasons to depart from that range, *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001), and it states the reasons on the record. *Babcock, supra* at 258. A factor justifying departure must be external to the minds of any person involved in the decision and capable of objective verification; it must also "keenly or irresistibly grab" the court's attention and be of "considerable worth." *Id*. at 257; *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). We review for clear error the existence of a factor, we review de novo whether it is objective and verifiable, and we review for

an abuse of discretion whether it is substantial and compelling. *Babcock*, *supra* at 265. A departure from the guidelines must also be proportionate to the seriousness of the defendant's conduct and criminal history. *Babcock, supra* at 264.

Subornation of perjury is substantial and compelling. *People v Adams*, 430 Mich 679, 693; 425 NW2d 437 (1988); *People v Syakovich*, 182 Mich App 85, 90-91; 452 NW2d 211 (1989). Defendant contends that the evidence fails to show that he made willful, material, or flagrant attempts at perjury. We disagree. Defendant attempted to persuade his boss to testify that he was working the night of the crime. His boss declined to do so; rather, she testified that defendant told her he had been accused of a crime and asked her to say that he had been working that night. However, defendant told officers when they arrived at his apartment that he had been there for several hours, not that he had been at work. Moreover, he did not ask his boss to verify whether he had been working, but rather to say that he had. We agree with the trial court that it was proper to conclude from the testimony, which is objective and verifiable on the record, that defendant willfully, materially, and flagrantly attempted to convince his boss to lie for him. This was a proper basis for departure from the guidelines.

Absconding is also a substantial and compelling reason to enhance a sentence, even when the defendant is separately charged and convicted for the offense. *People v Bryars*, 168 Mich App 523, 526; 425 NW2d 125 (1987). The trial court's finding of fact that defendant absconded during the proceedings has ample evidentiary support. Moreover, a trial court may consider not only the circumstances surrounding the offense for which it is sentencing, but also "hearsay relevant to the defendant's life and character, and other criminal conduct for which the defendant has not been charged or convicted." *Morales v Parole Board*, 260 Mich App 29, 45-46; 676 NW2d 221 (2003). Defendant also argues that he was subjected to double jeopardy by the trial court's consideration that he absconded. However, the guidelines and their scoring are merely tools to assess "the proper punishment, they are not, in and of themselves, a form of punishment" and thus, do not implicate double jeopardy issues. *People v Milbourn*, 435 Mich 630, 635-636, 655-656; 461 NW2d 1 (1990); *People v Gibson*, 219 Mich App 530, 535; 557 NW2d 141 (1996). The court did not abuse its discretion, nor did it commit plain error, in basing its departure from the sentencing guidelines on either of the challenged factors.

A sentence is proportionate when it accounts for "the seriousness of the defendant's conduct and criminal history." *Babcock, supra* at 264. This offense was defendant's fifth felony conviction in Michigan, his most serious to date, and his second felony that he committed while on parole. In addition, defendant was arrested for two felonies in Kansas City, Missouri, during his abscondence. Defendant also attempted to offer perjured testimony at his trial, and he was on trial for a home invasion that occurred while two elderly ladies were in the home. Finally, defendant's abscondence charge here was also not his first. The guidelines specified a four year minimum sentence for defendant; the trial court departed by adding one year to that minimum. Given defendant's criminal history, his progression to more serious crimes, the lack of successful rehabilitation after short incarcerations, his lack of respect for the criminal justice system, his inability to complete parole without committing other offenses, and the nature of the crime, we conclude that the sentence departure was proportionate. *Babcock, supra* at 264.

Finally, defendant argues that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), forbids a trial court from considering any fact that was not considered by the

jury. However, *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 160, 164; 715 NW2d 778 (2006).

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Alton T. Davis