STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 2009
v	No. 286174 Wayne Circuit Court
LESTER EARL SANDERS, Defendant-Appellant.	LC No. 07-023214-FH

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of breaking or entering a vehicle causing damage, MCL 750.356a(3), possession of vehicle identification number (VIN) plates, MCL 750.415(5), and attempted unlawful driving away of an automobile (UDAA), MCL 750.413; MCL 750.92. Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 34 months to 20 years' imprisonment for the breaking or entering conviction, 34 months to 15 years' imprisonment for the possession of VIN plates conviction, and 34 months to 15 years' imprisonment for the attempted UDAA conviction. We affirm.

I. Summary of Facts and Proceedings

At approximately 1:40 a.m. on October 26, 2007, Ryan Damask witnessed, through the windows of his apartment, a red Ford Explorer drive slowly through the apartment's parking lot. Damask saw the Explorer stop and a man, later identified as defendant, exit through the passenger door. Defendant walked over to a parked Plymouth Breeze, circled around it, and went back to the Explorer, where he put something in his hand. Leaving the Explorer passenger door open, he then walked back to the Plymouth Breeze's passenger door and attempted to defeat the lock. When Damask saw this, he called the police. Defendant succeeded in getting the door open and entered the vehicle. At that time, Officer Keith Smyth, from the Van Buren Township police department, arrived at the scene. Upon seeing Officer Smyth, defendant left the Breeze and headed over to the Explorer.

Officer Smyth saw defendant walk from between two parked cars and head towards the passenger door of the red Ford Explorer. Officer Smyth ordered defendant to stop and step to the rear of the Explorer, at which time, Officer Smyth heard something fall to the ground. A black and yellow screwdriver was found on the ground in the immediate area where defendant was standing. A search of defendant revealed a small black flashlight and a pair of pliers. There

were two other occupants of the Explorer: a female driver and a man in the back seat. These two individuals were arrested for having open intoxicants in the vehicle and the Explorer was impounded. The Explorer's registered owner was not present that night.

Officer Patrick Wehrman arrived on the scene to assist Officer Smyth and later conducted a search of the Explorer. In the center console, Officer Wehrman found three State of Michigan vehicle certificates of title. Additionally, Officer Wehrman found, wrapped in paper towel, a VIN plate, a federal certification sticker, and a paint label, which were all for the same Chrysler vehicle with a VIN ending in 268575. The prosecution's theory was that defendant was involved in a "retagging" enterprise, where people purchase a car, for minimal cost, at a junkyard and remove its VIN tags. The people then steal a car that closely matches the type of car they purchased from the junkyard and transfer the junkyard VIN tags onto the stolen vehicle.

After defendant and the other Ford Explorer occupants were arrested, the owner of the Plymouth Breeze, David Watkins, was located in the apartment complex. Watkins verified that he was the car's owner and that he saw the passenger lock had a hole in it. Additionally, Watkins identified that there were scratches to the door panel near the door handle area that were not present before.

Defendant was charged with breaking or entering a vehicle causing damage, possession of VIN plates, and attempted UDAA. At trial, after plaintiff rested defendant moved for a directed verdict on the possession of VIN plates and attempted UDAA charges, which the trial court denied. The jury found defendant guilty on all three counts and the trial court sentenced defendant within the guidelines on each count. Defendant now appeals.

II. Directed Verdict

Defendant first argues that the trial judge erred in denying his motion for directed verdict for counts two and three, possession of VIN plates and attempted UDAA. We disagree. When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews de novo the record to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

MCL 750.415(5) provides, "A person shall not knowingly possess, buy, deliver, or offer to buy, sell, exchange, or give away any manufacturer's vehicle identification number plate, federal safety certification label, . . . or any facsimile thereof." Possession encompasses both actual possession and constructive possession. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). Constructive possession exists when there is proximity to the article coupled with indicia of control. *Id.* Furthermore, possession may be sole or joint, *id.*, and may be proved by circumstantial evidence and drawing reasonable inferences therefrom. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000).

Here, a manufacturer's VIN plate and a federal safety certification label were found in the center console of the red Ford Explorer. Although not the registered owner of the Explorer, defendant lived at the same address as the registered owner, 189 Cortland, Highland Park. The other two vehicle occupants lived in Detroit. Defendant had recently been seated in the front

passenger seat adjacent to that center console. Also, defendant was apprehended immediately after breaking into a vehicle that was similar to the type of car described by the VIN plate. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant had constructive possession of the materials in the center console. Therefore, the trial judge did not err in denying defendant's motion for directed verdict on the count of possession of VIN plates.

We reach the same conclusion with respect to the UDAA charge. The necessary elements of UDAA are "'(1) possession of a vehicle, (2) driving the vehicle away, (3) that the act is done willfully, and (4) the possession and driving away must be done without authority or permission.'" *Landon v Titan Ins Co*, 251 Mich App 633, 639; 651 NW2d 93 (2002), quoting *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993). Defendant was charged with attempted UDAA in conjunction with MCL 750.92. An "attempt" consists of "(1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense." *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

Defendant first claims that there was insufficient evidence to identify him as the person involved in this crime. This argument has no merit. Damask saw an individual break into the Plymouth Breeze and saw the police arrive and apprehend this same individual. Officer Smyth also verified that the individual arrested outside the Ford Explorer and Plymouth Breeze was defendant. Therefore, the evidence was sufficient to establish that defendant was the person involved in the crime.

Defendant next claims that there was insufficient evidence to show that he intended to drive the vehicle away. "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted). As discussed earlier, the evidence shows that defendant had possession of a VIN plate, a federal certification sticker, and a paint label for a different Plymouth Breeze. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant intended to drive the vehicle away and eventually swap out the VIN plates of the vehicle. Therefore, the trial judge did not err in denying defendant's motion for directed verdict on the count of attempted UDAA.

III. Sufficiency of the Evidence

Defendant next argues that there was insufficient evidence to support his conviction for breaking or entering of a vehicle causing damage. We disagree. We review de novo a challenge to the sufficiency of the evidence, taking the evidence in a light most favorable to the prosecution to determine "whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "All conflicts with regard to the evidence must be resolved in favor of the prosecution." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

Defendant asserts that no one saw him break into the Plymouth Breeze, but this claim is unsupported by the record. Damask testified that he saw an individual, later identified as defendant, walk up to the Breeze with something in his hand. Defendant then "worked on" the passenger door lock, opened the door, and entered the vehicle. Aside from defendant's use of

force in prying the lock, his use of force in simply opening the door was enough to meet this element because any amount of force used to open a door, no matter how slight, is sufficient to constitute a breaking. See *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998). Furthermore, the statute only requires a breaking *or* an entering – not both. MCL 750.356a(2). The fact that defendant entered the vehicle is enough to satisfy this element.

Defendant also claims that the prosecution did not prove the damage element of the crime. This claim fails as well. "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *Wilkens*, *supra* at 738. Here, Damask saw defendant work on the passenger door handle of the Plymouth Breeze. The vehicle's owner, David Watkins, testified that the scratches near that area of the car and the punched out door lock were not present before this incident. A jury could reasonably infer that defendant caused this damage when he broke into the vehicle. Therefore, there is sufficient evidence to prove this damage element. Defendant also maintains that Watkins admitted that the damage was present two days before the actual commission of the crime. It is true that the very last exchange between the prosecutor and Watkins consisted of the following:

> *Q*. And when you went and looked at your car the evening of October 24th or in the early morning of October 24th, that's the first time you noticed that the door lock had been punched out?
>
> *A*. Yeah.

However, all of Watkins's preceding testimony related to what he saw after the police notified him about a possible break in of his vehicle at 2:00 a.m. on October 26, 2007. There are specific references of "October 26th, 2007," "2:00 in the morning," "I went down to the car . . . after [the police] called me." Even if the prosecutor's mentioning of October 24 in his final question to Watkins was something more than a simple misstatement, any conflicts in the evidence are to be resolved in favor of the prosecution on appeal. *Id.* Therefore, there was sufficient evidence to prove that the damage occurred when defendant broke into the vehicle.

IV. Jury Composition

Defendant, a black male, argues that he was denied his Sixth Amendment right to a jury of his peers because only three of the final fourteen jurors, or roughly 20 percent, were minorities. Defendant claims that the minority population in Wayne County is 40 percent[1] and, based on this discrepancy, he was denied the right to a properly composed jury.

"A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community." *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003) (internal quotes and citation omitted). "To establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, *and* that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *People v Diapolis Smith*, 463 Mich 199, 203; 615 NW2d 1

[1] Defendant provides no support for this assertion.

(2000) (emphasis added). Here, defendant makes no showing that any underrepresentation was the result of any systematic exclusion. Instead, defendant relies solely on the composition of his own particular jury. Since defendant has not made out a prima facie case, defendant cannot prevail. *Id*. at 207.

Defendant further argues that the trial court erred by failing to determine whether there was purposeful discrimination in the prosecutor's dismissal of juror Jones, an African-American woman, for cause. We disagree. Jones stated that she could not be fair to defendant because her car was stolen from the same township as the one at issue in this case. After much questioning, Jones was adamant that she could not be an impartial juror. She was excused for cause with no objection from defendant at the time. Under these circumstances, we conclude that the trial court appropriately dismissed juror Jones for cause. Given defendant's failure to object, we assume defendant is arguing that a *Batson*[2] challenge should have been made *sua sponte* by the trial court. This argument fails for two reasons. First, although our Supreme Court has held that "a trial court *may* sua sponte raise a *Batson* issue," *People v Bell*, 473 Mich 275, 287; 702 NW2d 128 (2005), amended 474 Mich 1201 (2005) (emphasis added), it did not hold that a trial court *must* do so. More importantly, however, is that *Batson* challenges only apply to peremptory challenges, not challenges for cause. Accordingly, we find no error.

V. Evidentiary Issues

Defendant also argues that the title documents found in the Ford Explorer's center console and an application he made to the State of Michigan for an Identification Card ("ID Card") should not have been admitted because they were irrelevant. Defendant's failure to timely object to the admission of these exhibits means that our review is for plain error. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). To avoid forfeiture under the plain error rule, defendant must show that (1) an error occurred, (2) the error was plain or obvious, and (3) the error affected one of defendant's substantial rights. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008).

Defendant failed to show how the three title documents were irrelevant. Relevant evidence is evidence that has *any tendency* to make the existence of any material fact or issue at trial more or less probable than it would be without the evidence. MRE 401; *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). The prosecution explained that the purpose was to show that defendant was involved with a scheme involving stealing vehicles and retagging those vehicles with VIN tags from cars purchased from junkyards. The mere fact that the title documents did not contain defendant's name does not somehow automatically deprive them of all probative value. The lack of defendant's name on the documents, instead, went to the weight of the evidence. See *People v McGhee*, 268 Mich App 600, 611-612; 709 NW2d 595 (2005).

Defendant also failed to show how the application he filled out for a State of Michigan ID Card was irrelevant. The prosecution used this application to establish defendant's address of 189 Cortland, Highland Park, Michigan. Defendant's address was relevant since he was the only

[2] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

person in the Explorer that night that lived at the same address as the Explorer's registered owner's address. Thus, the evidence had a tendency to make it more probable than not that defendant was the one who had control over the vehicle and its contents that night.

Defendant next argues that the business records of the towing company that impounded the Ford Explorer were irrelevant. The trial court's decision to admit the evidence is reviewed for a clear abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A trial court abuses its discretion when it reaches a decision resulting in an outcome that falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

To the extent that the towing records were not relevant, any error was harmless. A trial court's error in determining admissibility is not a ground for reversal unless, after an examination of the entire cause, it is more probable than not that the error was outcome determinative. *People v Steven Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000), remanded on other grounds 465 Mich 928 (2001). There is nothing to suggest that the presence of the towing records had any effect whatsoever on the jury reaching its guilty verdicts. The salient evidence was strong in the form of an eyewitness seeing defendant break and enter a vehicle, a police officer apprehending defendant outside the vicinity of the vehicle, defendant dropping a screwdriver when confronted by the police, and VIN plates found near defendant's location matching the type of vehicle that defendant was breaking into.

Last, defendant brings an unpreserved claim arguing that both the application for the state ID Card and the towing records should not have been admitted because they "severely prejudiced" defendant. However, defendant mischaracterizes MRE 403, which prevents the admission of some evidence, even though relevant. MRE 403 states in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Defendant's assertion that the evidence was severely prejudicial is inadequate. All evidence is prejudicial or damaging to one side or the other at trial. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Only *unfairly* prejudicial evidence is covered by this aspect of MRE 403. *Id.* "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Defendant failed to show how this evidence would be given undue or preemptive weight by the jury. Thus, defendant's unpreserved claim fails.

VI. Sentencing Comments

Although not entirely clear from the brief, defendant's next claim on appeal appears to be that the trial court erred by stating a sentence recommendation prior to conviction. We disagree.

Prior to trial, the prosecutor stated that there was an offer for 12 months in the Wayne County Jail in exchange for a guilty plea to one count, although the record is unclear as to which count that would have been. The trial judge then explained to defendant that if he wanted to proceed to trial and was found guilty, the sentencing guidelines would mandate roughly a four-year minimum sentence in prison:

> If you're acquitted, that's great. Okay. It's zero, al right [sic] . . . . And if I alternatively, was to give you a guideline sentence, it would be – I believe the guideline range is 46 months to 25 years. . . . Once I bring them through that door, there's not going to ben [sic] any more discussions, and one year in the Wayne County jail I can gurantee [sic] you is not going to be an option if you get convicted.

Defendant cites *People v Cobbs*, 443 Mich 246, 281; 505 NW2d 208 (1993), in which the Michigan Supreme Court reaffirmed that during plea negotiations, "the judge may not initiate or participate in discussions regarding the sentence that is to be imposed." We find *Cobbs* inapplicable to this case because defendant did not accept any guilty plea offer. *Cobbs* deals with protecting defendants from the "coercive atmosphere" fostered by judicial participation in plea bargain negotiations. *Id.* at 282, quoting *People v Killebrew*, 416 Mich 189, 205; 330 NW2d 834 (1982). Specifically, if a defendant accepts a guilty plea and the trial judge was involved with the plea discussions, then the guilty plea is void because it is considered involuntary due to the coercive effects. *Killebrew*, *supra* at 213. Because defendant chose to go to trial rather than accept the plea, the coercive effects of *Cobbs* and *Killebrew* are not at issue. Defendant's choice definitively established that there was no coercive effect to remedy.

Defendant also seems to argue that his right to impartial sentencing was violated, citing *People v Coles*, 417 Mich 523; 339 NW2d 440 (1983). However, *Coles* was decided prior to the Legislature's enactment of statutory sentencing guidelines, MCL 777.1 *et seq.*, in 1998. "Following the enactment of these guidelines, the trial court is required to choose a sentence within the guidelines range, unless there is a 'substantial and compelling' reason for departing from this range." *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003). Defendant has not argued that his sentence falls outside the guidelines range, or that the guidelines were improperly scored. Accordingly, the trial court was not required to state any reasons on the record for the imposition of the sentence.

VII. Ineffective Assistance of Counsel

Defendant failed to move for a new trial or request a *Ginther*[3] hearing below. Accordingly, our review is limited to mistakes apparent in the appellate record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *Id.*

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.* Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

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

Defendant first argues that his trial counsel should have subpoenaed the two witnesses on his witness list and failure to do so was ineffective counsel. However, there is nothing on the record to demonstrate what these two witnesses would have testified to at trial. Absent this crucial piece of information, this argument is waived. *Davis*, *supra* at 368.

Defendant next states, without explanation, that his trial counsel should not have stipulated to a special jury instruction. The special jury instruction defined constructive possession as having "control of [an item] or the right to control [an item] either alone or together with someone else." Defendant makes no attempt to argue why or how this instruction was incorrect, let alone how his counsel was ineffective in stipulating to it. Consequently, without any analysis in his brief, defendant has abandoned this issue on appeal. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

Affirmed.

/s/ Alton T. Davis
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro