

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD LEE THIEKE, JR.,

Defendant-Appellant.

UNPUBLISHED

March 4, 1997

No. 183222

St. Clair Circuit Court

LC No. 94-002432-FH

Before: Markman, P.J., and Smolenski and G.S. Buth,* JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305. After determining that defendant was a second-offense habitual offender, MCL 769.10; MSA 28.1082, the court utilized the sentence enhancement provisions of MCL 769.13; MSA 28.1085 and sentenced defendant to concurrent terms of three to five years' imprisonment. Defendant was also order to pay \$11,005.66 in restitution to the Kampgrounds of America. Defendant appeals as of right. We affirm.

Defendant and his brother broke into two separate buildings of a Kampgrounds of America (KOA) campground on two different occasions. They took cash, checks and credit card receipts.

Defendant contends that he was denied a fair trial because the trial court did not allow him to impeach his brother on cross-examination with his brother's previous conviction "for criminal sexual conduct toward defendant-appellant's child." Defendant contends that this evidence was necessary to establish his brother's bias or motive to testify falsely, particularly in light of the fact that this case was a credibility contest.

This Court reviews limitations on cross-examination for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). In this case, the record indicates that defense counsel produced a certified record of conviction indicating that defendant's brother had been

* Circuit judge, sitting on the Court of Appeals by assignment.

previously convicted of second-degree criminal sexual conduct. However, defense counsel also informed the court that the victim of this crime was the eight-year-old brother of defendant's girlfriend. Thus, defendant's argument is based on a misreading of the factual record.

In any event, the following exchange occurred when defense counsel cross-examined defendant's brother concerning defendant:

Q. (Defense Counsel): It's fair to say you weren't getting along with him?

A. (Defendant's Brother): Yes, that's fair to say.

Q. Fair to say you don't like him much?

A. That's fair to say, too.

Q. Fair to say that you don't like it much that he accused you of molesting his daughter?

The Prosecutor: Objection, you Honor.

A. (Defendant's Brother): That's fair to say that.

The trial court permitted defendant's brother's response to stand. Thus, defendant was able to get before the jury evidence from which he asserts on appeal was necessary to an evaluation of his brother's bias. See *People v Holliday*, 144 Mich App 560, 569; 570; ___ NW2d ___ (1985). In addition, defendant, his brother and the brother's wife testified about the animosity between the brothers. Moreover, it was brought out that the brother was testifying against defendant pursuant to a plea bargain agreement and that he was permitted to plead to lesser offenses in exchange for his testimony against defendant. Accordingly, there was no abuse of discretion.

Next, defendant argues that his sentences, as enhanced by his habitual-offender status, are invalid because he was never convicted of being an habitual offender by either a jury or a plea of guilty. Defendant's argument is without merit. MCL 769.13; MSA 28.1085, as amended by 1994 PA 110, effective May 1, 1994, makes clear that the habitual offender statutes are simply sentence enhancement mechanisms, and not substantive crimes. *People v Zinn*, 217 Mich App 340, 347; ___ NW2d ___ (1996). Thus, a defendant is not entitled to a trial by jury or the right to be proven by guilty of being an habitual offender beyond a reasonable doubt. *Id.* Rather, the statute provides that the existence of a defendant's prior convictions "shall be determined by the court, without a jury" MCL 769.13(5); MSA 28.1085(5).

In this case, defendant was given notice that the prosecutor intended to enhance his sentence by reason of a previous felony conviction. See MCL 769.13(1); MSA 28.1085(1). Defendant, through defense counsel, stated that he would stipulate to the prior conviction upon presentation of a certified record of conviction. See MCL 768.13(5)(a); MSA 28.1085(5)(a) (the existence of a prior conviction

may be established by a copy of a judgment of conviction). At sentencing, defendant did not challenge the accuracy or constitutional validity of his prior conviction. See MCL 768.13(6); MSA 28.1085(6) (“The defendant shall bear the burden of establishing a prima facie showing that an alleged prior conviction is inaccurate or constitutionally invalid.”). Accordingly, we find no error.

Affirmed.

/s/ Michael R. Smolenski

/s/ George S. Buth