STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY WAYNE HALL,

Defendant-Appellant.

UNPUBLISHED
July 15, 1997

No. 190157
Macomb Circuit Court
LC No. 93-001215-FH

Before: Hood, P.J., McDonald and Young, JJ.

PER CURIAM.

Defendant appeals by right from his bench trial conviction for attempted breaking and entering with intent to commit larceny, MCL 750.92; MSA 28.287, MCL 750.110; MSA 28.305. Defendant was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to 3 to 7 ½ years' imprisonment. We affirm in part and remanded to the trial court for further proceedings consistent with this opinion.

We first address defendant's claim that he was denied the effective assistance of counsel at trial. To establish a claim of ineffective assistance of counsel, a defendant must show that "counsel's performance fell below an objective standard of reasonableness," *People v Barclay,* 208 Mich App 670, 672; 528 NW2d 842 (1995), and that counsel's deficient performance prejudiced the defendant so as to deprive him of a fair trial with a reliable result. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). A defendant has the burden of overcoming the presumption that he received the effective assistance of counsel. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). A defendant must also show that there is a reasonable probability that, but for the deficient performance, "the result of the proceeding would have been different *and* that the result of the proceeding was fundamentally unfair or unreliable." *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Because defendant did not move for a new trial or a *Ginther*[1] hearing on the basis of ineffective assistance of counsel, appellate review is precluded unless the record is sufficient to support the claim and, if so, review is limited to mistakes apparent on the record. *Barclay*, *supra* at 672; *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991).

We have reviewed the existing record and conclude that it does not support defendant's claim that he was denied effective assistance of counsel at trial. First, counsel's choice of tactics for cross-examining the prosecution's witnesses was a matter of trial strategy that we will not second guess on appeal. *People v Caballero*, 184 Mich App 636, 639-640; 459 NW2d 80 (1990). Second, defendant has failed to establish that counsel's failure to call certain police officers or other defense witnesses deprived him of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Third, defendant has failed to establish that counsel's post-trial suspension was in any way related to his representation of defendant. *People v Pubrat*, 451 Mich 589, 596-601; 548 NW2d 595 (1996). Defendant's remaining arguments, that counsel failed to challenge the complainant's in-court identification or the admissibility of potentially inculpatory statements, are equally unsupported by the record. In sum, defendant has failed to overcome the presumption that he received effective assistance of counsel. We also decline defendant's request to remand the case to the trial court for an evidentiary hearing on the issue because defendant "has not made the prerequisite showing or laid down the proper foundation at the trial level needed to determine whether an evidentiary hearing is appropriate." *People v Ford*, 417 Mich 66, 113; 331 NW2d 878 (1982).

Defendant next argues that his conviction and sentence should be vacated for violation of the 180-day rule, MCL 780.131 *et seq*.; MSA 28.969(1) *et seq*., MCR 6.004, because 452 days elapsed between the time defendant was arrested and jailed on unrelated charges in Eaton County and commencement of the instant bench trial. We disagree. The 180-day rule does not apply to pretrial detainees who are merely awaiting trial in a county jail. *People v Holbrook*, 180 Mich App 710, 711-712; 447 NW2d 796 (1989). Rather, the 180-day period commences when the prosecution has actual knowledge that the defendant is either incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison. MCR 6.004(D)(1). In this case, the record indicates that the prosecution knew about defendant's incarceration on the Eaton County offenses as early as July 28, 1994, and further that trial on the instant offense commenced on January 24, 1995, exactly 180 days later. Since defendant has failed to put forth any record evidence that the prosecution had actual notice of his incarceration before July 28, 1994, defendant has failed to establish a prima facie violation of the rule. See *People v Pelkey*, 129 Mich App 325, 328-329; 342 NW2d 312 (1983).

Next, defendant contends that his 3 to 7 ½ year habitual offender sentence was disproportionate. We disagree. Appellate review of habitual offender sentences is limited to a determination whether the sentence imposed violates the principle of proportionality enunciated in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Zinn*, 217 Mich App 340, 349; 551 NW2d 704 (1996). The sentencing guidelines may not be used in any fashion in reviewing a habitual offender sentence. *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996); *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). A sentence must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, *supra* at 636.

The proportionality of defendant's sentence is supported by the facts of this case. At the time of his sentencing on the instant offense, defendant had already been convicted of breaking and entering with intent to commit first-degree criminal sexual conduct, assault with intent to commit first-degree criminal sexual conduct, assault with a deadly weapon, and assault with intent to commit great bodily

harm less than murder. The basic information report indicates that defendant had been convicted of a total of nine felony offenses, at least one involving breaking and entering and four involving criminal sexual conduct. In addition to these prior offenses, defendant has admitted to experimenting with marijuana and cocaine. Defendant now maintains that he suffers from "voyeurism." His record reflects that defendant is suffering from something more than the desire to view. Therefore, we conclude that defendant's sentence is proportionate considering the circumstances surrounding this offense and this offender. The trial court did not abuse its discretion in sentencing defendant.

We also reject defendant's brief assertion that the trial court failed to articulate the reasons for the sentence it imposed. A trial court is required to articulate on the record its reasoning in imposing a particular sentence. *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989); *People v Coles*, 417 Mich 523, 549; 339 NW2d 440 (1983). In imposing sentence, the trial court in this case stated:

> [T]he criteria utilized by the Court in passing judgment on Mr. Hall is a desire to protect society, punish a wrongdoer, and in view of his record, the Court feels that the penalty is appropriate. . . . I hope you will be able to straighten yourself out.

Thus, the articulation requirement of *Coles* was fulfilled.

Defendant also argues that the evidence presented was insufficient to support his conviction.[2] Specifically, defendant maintains that the evidence was insufficient to connect him with the scene of the attempted breaking and entering or to prove that he intended to commit larceny. We disagree. In reviewing a defendant's challenge of the sufficiency of the evidence to support his conviction following a bench trial, this Court must view the evidence presented in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella* 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

In order to convict a defendant of attempt, the prosecution must prove: "(1) an *intent* to do an act or bring about certain consequences which in law would amount to a crime, and (2) an act in furtherance of that intent which goes beyond mere preparation." *People v Frost*, 148 Mich App 773, 776; 384 NW2d 790 (1985). The elements of breaking and entering with the intent to commit larceny are: "(1) the breaking of an occupied dwelling; (2) an entering of an occupied dwelling; and (3) an intent to commit a larceny." *Id*. Although a presumption of intent to steal does not arise solely from proof of a breaking and entering, minimal circumstantial evidence is sufficient to sustain a conclusion that a defendant entertained the requisite intent. *Id*. at 776-777.

Viewing the evidence in a light most favorable to the prosecution, we first conclude that the evidence in this case clearly established that an attempted breaking and entering occurred and that defendant was the perpetrator. The prosecution's evidence showed that after Sandra Camarda heard the noise from outside the window of the back bedroom, she called to her husband, Vincent Camarda, who came into the room, turned off the lights, looked out the window, and saw someone looking into one of the windows of the storage room. During the chase that ensued, Camarda was able to see

defendant's face several times at close range. Although Camarda lost sight of defendant momentarily, he ran in the direction of some barking dogs, and eventually saw defendant drive off in a dark station wagon. The vehicle's license plate number was registered to defendant. The next morning, the Camardas found that one of the window screens to the adjoining storage room was bent and pried away and the window open. This testimony was sufficient to prove that an attempted breaking and entering had occurred and that defendant was the perpetrator.

We likewise find that a rational trier of fact could have inferred from defendant's actions an intent to commit larceny. The requisite intent to commit larceny may be reasonably inferred from the nature, time, and place of the defendant's acts before and during the attempted breaking and entering. *People v Hughes*, 27 Mich App 221, 222; 183 NW2d 383 (1970). In this case, the attempted breaking and entering took place at approximately 11:00 p.m. Defendant attempted to enter an unoccupied storage room rather than a bedroom, and the window screen of the storage room was pried and the window partially open. Also, defendant's station wagon was parked in the vicinity. These facts support the conclusion that defendant intended to commit larceny but that his actions were thwarted by the return of the complainants. The evidence was sufficient to justify a rational trier of fact in finding the elements of attempted breaking and entering with intent to commit larceny proven beyond a reasonable doubt. We further conclude that the conviction was not against the great weight of the evidence, and that the trial court's findings that the damage to the window screen was discovered the following morning and that defendant intended to commit larceny were not clearly erroneous. MCR 2.613(C).

Finally, defendant argues that he was denied his right to a fair trial because the prosecutor failed to endorse or produce certain res gestae witnesses. Defendant failed to preserve this issue for appeal because he did not raise the issue in a motion for a post-trial *Robinson*[3] hearing or in a motion for a new trial. *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Accordingly, we decline to consider this issue.

Although it is not an issue raised by defendant, we note that the trial court, upon sentencing defendant on the habitual offender conviction, failed to vacate the sentence on the underlying conviction as required by the previous version of MCL 769.13; MSA 28.1085, which was in force at the time the instant offense was committed. Consequently, we remand with instructions to the trial court to vacate the sentence on that underlying conviction.

Affirmed in part and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Robert P. Young, Jr.

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

[2] This issue, among others, was raised by defendant in a supplemental pro per brief pursuant to Standard 11 of the Approved Minimum Standards for Indigent Criminal Appellate Defense Attorneys, AO 1981-7. However, we note that Standard 11 conflicts with the Supreme Court's recognition in *People v Dennany*, 445 Mich 412, 442; 519 NW2d 128 (1994), a plurality opinion, that "a defendant has a constitutional entitlement to represent himself or to be represented by counsel - but not both." *Dennany* was endorsed by a majority of the Court in *People v Adkins*, 452 Mich 702; 551 NW2d 108 (1996).

[3] *People v Robinson*, 390 Mich 629; 213 NW2d 106 (1973).