STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY HOWARD,

Defendant-Appellant.

UNPUBLISHED
November 7, 1997

No. 192282
Ingham Circuit Court
LC No. 95-068987-FH

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from a conviction for unlawfully taking or driving away a motor vehicle (UDAA), MCL 750.413; MSA 28.645. Defendant's appointed counsel has filed a brief on defendant's behalf and defendant also filed a brief. After considering all issues raised in both briefs, we affirm.

I

Defendant (by counsel) first asserts that his conviction must be reversed due to prosecutorial misconduct. We disagree.

Defendant's defense is, in essence, that he had purchased the Jeep from a third party with the same name as the true owner. During closing argument, the prosecutor drew attention to certain discrepancies in defendant's testimony. Referring to defendant's testimony about dates, the prosecutor stated, "[h]e has just lied, ladies and gentleman. That's a flat out lie and there is nothing he said that can make it any different." Later, the prosecutor stated, "It's not reasonable, it's a lie, ladies and gentlemen." The prosecutor also noted in his closing argument that defendant testified that he and his son were building a truck, yet defendant did not call his son to support his story. Then he said, "You can use that information in any way you want, but I would suggest to you that he didn't produce his son because the testimony of his son probably won't support his own statements." Later, the prosecutor argued that although defendant chose to present evidence, he chose not to call as witnesses his mother, his son or the person he claimed he bought the vehicle from.

We reject defendant's assertion that the prosecutor impermissibly vouched for defendant's guilt and lack of credibility. See *People v Erb*, 48 Mich App 622, 631; 211 NW2d 51 (1973). Here, the prosecutor argued that it could be inferred from the evidence that defendant had lied; this is permissible and did not deny defendant a fair and impartial trial.

We similarly reject defendant's argument that by questioning why defendant had not called certain witnesses, the prosecutor impermissibly shifted the burden of proof to defendant. Defendant's reliance upon *People v Foster*, 175 Mich App 311, 318; 437 NW2d 395 (1989) is misplaced, in light of *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995) (prosecutor may comment on the defendant's failure to present evidence to corroborate his own testimony without shifting the burden of proof). Defendant was not denied a fair trial.

II

Defendant (in propria persona) contends that there was insufficient evidence to convict him of the wilful driving or taking away of a motor vehicle, MCL 750.413; MSA 28.645, because the Jeep which was taken was not operational[1] and hence did not constitute a "motor vehicle." We find no merit to this contention.

The Penal Code defines "motor vehicle" for purposes of the chapter containing the crime at issue here, as:

> Sec. 412. DEFINITION – The term "motor vehicle" as used in this chapter shall include all vehicles impelled on the public highways of this state by mechanical power, except traction engines, road rollers and such vehicles as run only upon rails or tracks.

MCL 750.412; MSA 28.644. We have previously held that it is "too restrictive" to read into this statutory definition a requirement that the vehicle be capable of self-propulsion at the time of the offense. *People v Matusik*, 63 Mich App 347, 349; 234 NW2d 517 (1975). See also *People v Boscaglia*, 419 Mich 556, 564; 357 NW2d 648 (1984) ("While a vehicle does not have to be immediately operable to be a motor vehicle under the normal definition of a motor vehicle, it must be constituted in such a way that it contains the major essential parts of a self-propelled vehicle.") Therefore, we affirm the trial court's well-reasoned analysis which concludes that the Jeep at issue was a "motor vehicle" for purposes of MCL 750.413; MSA 28.645. Defendant stole a "motor vehicle" and was properly convicted of UDAA.

III

Defendant and his counsel challenge several aspects of defendant's sentence. Defense counsel contends that defendant must be resentenced because the sentencing court relied on incorrect scoring in the Sentencing Information Report. However, since defense counsel filed his brief, the law on this issue has changed. Defendant's claim of error arising out of such scoring no longer states a cognizable claim for relief. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997).

Defendant (in propria persona) also argues that the trial court erred when it sentenced defendant as an habitual offender on the basis of a conviction that he did not admit, and for which the prosecutor presented no proof of identity. We disagree. Defendant is not entitled to a trial by jury or the right to be proven guilty of being an habitual offender beyond a reasonable doubt. *People v Zinn*, 217 Mich App 340, 345-347; 551 NW2d 704 (1996). In fact, MCL 769.13; MSA 28.1085 places the burden on the defendant to file a written motion to challenge the accuracy or constitutional validity of any prior convictions that the prosecutor has included in its notice of intent to seek an enhanced sentence. Here, defendant received notice of four convictions. Defendant admitted the first conviction. He successfully challenged two of the other convictions, but never challenged the accuracy or validity of the May 20, 1980 conviction for assaulting a police officer. This conviction (as well as the first admitted conviction) were therefore properly considered by the sentencing court.

Defendant also argues on his own behalf that the sentencing court erroneously refused to vacate the conviction on the underlying charge, and that the court did not consider probation. We disagree. First, the record reveals that defendant was sentenced on only the enhanced charge, not the UDAA charge. This is sufficient, even where the underlying charge is not technically vacated. See *People v Hardin*, 173 Mich App 774, 778; 434 NW2d 243 (1988). Second, the sentencing court did not err in refusing to place defendant on probation, because although probation was an option, so too was the sentence imposed.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] The Jeep lacked a fuel tank, had a rusted body and frame, had a broken frame and was probably missing other parts as well.