

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY L. GARRETT,

Defendant-Appellant.

UNPUBLISHED

June 23, 1998

No. 199366

Oakland Circuit Court

LC No. 96-147007 FH

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

A jury convicted defendant of receiving and concealing stolen property, MCL 750.535; MSA 28.803. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a prison term of three to twenty years. Defendant appeals as of right. We affirm the conviction, reverse the sentence only as it pertains to the order of restitution, and remand for further proceedings.

I

Defendant argues that his conviction is not supported by sufficient evidence. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

A conviction for receiving and concealing stolen property required the jury to find the following: (1) the property was stolen; (2) the property's fair market value exceeded \$100; (3) defendant bought, received, possessed, or concealed the property with knowledge that it was stolen; and (4) the property was identified as being previously stolen. *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993).

Viewed in a light most favorable to the prosecution, there was sufficient evidence to support the jury's verdict. Evidence was presented that defendant maintained the car at various locations and kept the keys to the car. Rachel and Reanna Padilla each testified to defendant working on the car in the backyard of the house on Poplar Street. Rachel Padilla, who roomed with defendant's girlfriend, testified that defendant drove the car to Longfellow Street following arguments over the car being kept at their house.

Kevin Stephens reported seeing defendant "wiping the trunk or doing something" to the car in front of the house on Poplar Street in October 1995. On November 15, 1995, defendant gave the keys to the car to Stephens.

Moreover, evidence was presented that defendant knew that the car was stolen. Defendant told Rachel Padilla that he stole the car from an apartment complex in Auburn Hills. Reanna Padilla testified that she overheard defendant say that he had stolen the car. Stephens testified that defendant told him that he stole the car from an apartment building.

Defendant argues that the lack of physical evidence connecting him to the 1987 Oldsmobile prevented the jury from reasonably concluding that he was guilty of the crime of possessing or concealing stolen property. However, a reasonable trier of fact may consider circumstantial evidence for the purpose of convicting a person of a crime of receiving and concealing stolen property. See *People v Toodle*, 155 Mich App 539, 553-554; 400 NW2d 670 (1986); see also *McKenzie*, *supra*.

Defendant asserts that Stephens is the guilty party, and argues that Rachel and Reanna Padilla lacked credibility because Reanna is Stephens' girlfriend. However, questions of credibility are left to the trier of fact and will not be resolved anew by this Court. *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997).

II

Next, defendant contends that he did not receive a fair trial as a result of the prosecution's use of the rebuttal testimony of a police officer with respect to his only witness in his defense at trial. We agree that the evidence was erroneously admitted. Rebuttal evidence is limited to refuting, contradicting, or explaining evidence presented by the opposing party. *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). Whether the witness had contacted Officer Garcia was collateral to whether defendant received and concealed stolen property.

However, defendant did not object to Officer Garcia's rebuttal testimony in the trial court. A plain, unpreserved error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases where prejudice is presumed or reversal is automatic. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Because the error does not fall under the category of cases where prejudice is presumed or reversal is automatic, and we find that the error was not decisive of the outcome, reversal is not required.

III

Defendant next asserts that the trial court improperly enhanced his sentence for his refusal to admit guilt. We disagree. The record does not support defendant's assertion that the trial court based its sentence on his failure to admit guilt. When its comments are read in context, it is clear that the trial court was merely agreeing with the prosecutor that, because of defendant's extensive criminal history, the probation department's sentencing recommendation was too lenient.

The sentencing guidelines do not apply to habitual offenders. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). In considering defendant's criminal history and potential for rehabilitation, the trial court did not abuse its discretion. See *id.* at 627. In light of the circumstances surrounding the offense and offender in this case, we conclude that defendant's sentence does not violate the principle of proportionality. See *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

IV

Finally, defendant claims that the trial court erred in ordering his probation officer to determine the amount of restitution pursuant to the Crime Victim's Rights Act, MCL 780.751 *et seq.*; MSA 28.1287(751) *et seq.* We agree.

At the time defendant was sentenced,¹ the act provided:

- (1) The court, in determining whether to order restitution under section 16 and the amount of that restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources and earning ability of the defendant, the financial needs of the defendant and the defendant's dependents, and such other factors as the court considers appropriate.
- (2) The court may order the probation officer to obtain information pertaining to the factors set forth in subsection (1). The probation officer shall include the information collected in the presentence investigation report or in a separate report, as the court directs. [MCL 780.767; MSA 28.1287(767).]

There is no indication on the record that the trial court engaged in the necessary consideration of the factors set forth in subsection (1). Moreover, the act does not include any provision for the amount of restitution to be determined by a probation officer. Accordingly, the trial court erred when it failed to consider the factors enumerated in the act and when it delegated the authority to determine the amount of restitution to the probation officer. We therefore reverse the sentencing order as it pertains to the issue of restitution and remand for the limited purpose of determining restitution in compliance with MCL 780.767(1)-(2); MSA 28.1287(767)(1)-(2). Cf. *People v Orweller*, 197 Mich App 136, 141; 494 NW2d 753 (1992).

We affirm the conviction and sentence in part. We reverse that portion of the sentence pertaining to the order of restitution and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh

¹ The act was subsequently amended by 1996 PA 562, effective June 1, 1997.