STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK WAYNE WETHERWAX,

Defendant-Appellant.

UNPUBLISHED
July 21, 1998

No. 191195
Oakland Circuit Court
LC No. 94-132903 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE F. PICKARD,

Defendant-Appellant.

No. 191196
Oakland Circuit Court
LC No. 94-132920 FC

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendants were tried in a joint trial before a single jury. In docket no. 191195, defendant Wetherwax appeals as of right from convictions of conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1) and MCL 750.529; MSA 28.796, and involuntary manslaughter, MCL 750.321; MSA 28.553. He was sentenced to fifteen to thirty years' imprisonment for the conspiracy to commit armed robbery conviction and seven to fifteen years' imprisonment for the manslaughter conviction. He was also ordered to pay restitution in the amount of $2,500.

In docket no. 191196, defendant Pickard appeals as of right from convictions of involuntary manslaughter, MCL 750.321; MSA 28.553, conspiracy to commit armed robbery, MCL 750.157a;

MSA 28.354(1) and MCL 750.529; MSA 28.796, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to fifteen to fifty years' imprisonment for the conspiracy to commit armed robbery conviction and to ten to fifteen years' imprisonment for the manslaughter conviction. These sentences were then vacated and defendant Pickard was sentenced to fifteen to fifty years' imprisonment as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was also sentenced to two-years' imprisonment for the felony-firearm conviction. We affirm.

Docket No. 191195

Defendant Wetherwax first contends that he was unfairly prejudiced by the admission of certain evidence regarding codefendant Pickard. We disagree. Defendant Wetherwax's argument that the evidence was irrelevant is misplaced. The evidence was only offered against codefendant Pickard and, in each instance, the trial court instructed the jury that it was to consider the evidence only with respect to codefendant Pickard. Accordingly, the relevance of the evidence to the case against defendant Wetherwax is of no moment. Codefendant Pickard's guilt was not a "fact of consequence to the determination of the action" against defendant Wetherwax. See MRE 401. Moreover, the trial court's limiting instructions cured any unfair prejudice to defendant Wetherwax.[1]

Defendant Wetherwax next argues that the trial court erred in admitting (1) the hearsay testimony of two witnesses and (2) a statement made by codefendant Sam Sword.[2] We disagree. There was no error with respect to Sword's statement, because that statement was never introduced into evidence at trial. Further, although defendant Wetherwax objected at trial to the testimony of the other two witnesses, he did not do so on the basis of hearsay. Accordingly, this issue was not preserved for appeal. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Regardless, the testimony was properly admissible pursuant to MRE 801(d)(2)(E), because there was sufficient independent proof of a conspiracy.

In his third issue on appeal, defendant Wetherwax appears to argue that the probative value of certain "statements" admitted at trial was substantially outweighed by the danger of unfair prejudice caused by the statements.[3] See MRE 403. The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.* Here, defendant Wetherwax has failed to sufficiently identify in his brief on appeal the "statements" he now alleges to have been erroneously admitted. Therefore, this issue is not properly presented for review. See *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). We note, however, that if defendant Wetherwax meant to challenge the trial court's admission of the testimony of the two witnesses referred to in his second issue on appeal, we would hold that the trial court did not abuse its discretion.

Next, defendant Wetherwax argues that the trial court abused its discretion in admitting evidence of codefendant Pickard's "flight" from police to a closet in his girlfriend's bedroom. We disagree. On defendant Wetherwax's request for a cautionary instruction, the trial court instructed the jury that the evidence was to be considered against Pickard only. Jurors are presumed to have

followed the instructions of the trial court until the contrary is clearly shown. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431(1994). Given the trial court's cautionary instruction, we conclude that the admission of the evidence was not unfairly prejudicial to defendant Wetherwax.

Defendant Wetherwax next contends that he was denied due process when his trial was not severed from that of codefendant Pickard. We disagree. Although the record indicates that trial court granted codefendant Sword's motion for a separate jury, nothing in the record indicates that defendant Wetherwax moved for a separate trial. Accordingly, appellate review is precluded. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Moreover, it is apparent from the record that Wetherwax's and Pickard's defenses were not "mutually exclusive" or "irreconcilable." Thus, Wetherwax would not have been entitled to a separate trial if he had requested one. *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994).

Next, defendant Wetherwax argues that he was denied due process when he was bound over for trial on insufficient evidence. We disagree. Because defendant Wetherwax received a fair trial, at which sufficient evidence of both charges was presented, any error in the decision to bind him over for trial was harmless. See *People v Hall*, 435 Mich 599, 601; 460 NW2d 520 (1990).

Defendant Wetherwax also argues that the trial court erred in denying his motion for a directed verdict of acquittal on the charge of felony murder. We disagree. When reviewing a trial court's ruling on a motion for a directed verdict, this Court views all of the evidence presented up to the time of the motion in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996). In this case, that evidence was sufficient for the trial court to allow the jury to consider the charge of felony murder. The fact that no robbery was completed is immaterial, as the first-degree murder statute only required that the murder be committed in "the perpetration, or *attempt* to perpetrate" an enumerated felony (including robbery). MCL 750.316; MSA 28.548 (emphasis added).[4] Furthermore, the jury was entitled to infer the existence of malice from evidence that defendant Wetherwax participated in the attempted robbery with knowledge that one of his co-participants was armed with a gun. See *People v Kelly*, 423 Mich 261, 278-279; 378 NW2d 365 (1985); *People v Turner*, 213 Mich App 558, 572; 540 NW2d 728.

Next, defendant Wetherwax argues that the trial court erred in failing to read certain instructions to the jury. We disagree. Because defendant Wetherwax made no request for the instructions at trial, and failed to object to the instructions that were given, our review is limited to the issue whether relief is necessary to avoid manifest injustice. *People v Johnson*, 215 Mich App 658, 672; 547 NW2d 65 (1996). In this case, we conclude that no relief is necessary to avoid manifest injustice because the instructions described by defendant Wetherwax on appeal were not warranted at trial.

Defendant Wetherwax next contends in successive questions presented that (1) he was arrested in the absence of probable cause and (2) the trial court should have suppressed his statement to police as the product of an unlawful arrest. We disagree. A trial court's ruling on a motion to suppress evidence will not be disturbed on appeal unless it is found to be clearly erroneous. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). Here, the trial court's finding that there was probable

cause for defendant Wetherwax's arrest was not clearly erroneous. Kim Logan's tip that defendant Wetherwax was an associate of Gregorio Riojas, whom she had tentatively identified as the shooter, combined with the evidence of defendant Wetherwax's possession of the jacket seen in the store video, and his arrival at his apartment in company with Riojas, constituted probable cause for his arrest. Cf. *People v Davis*, 146 Mich App 537, 543-544; 381 NW2d 759 (1985).

Defendant Wetherwax also suggests that the trial court abused its discretion in refusing to strike from his statement references made to other robberies that took place on the night of the incident. We disagree. The admission of defendant Wetherwax's fleeting reference to the other robberies on the night of the incident was relevant to show defendant Wetherwax's continuing involvement with the other parties, and his willing participation in the events of that evening. It was not offered as evidence of character to show action in conformity therewith. Accordingly, we hold that the trial court did not abuse its discretion in allowing the entire statement to be read into evidence. See *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994); cf. *People v Smith*, 120 Mich App 429, 435-438; 327 NW2d 429 (1982); *People v Plato*, 114 Mich App 126, 135; 318 NW2d 486 (1981); *People v Hooper*, 21 Mich App 276, 279; 175 NW2d 889 (1970).

Finally, defendant Wetherwax argues that the trial court erred when it ordered that he pay restitution. We disagree. The trial court is entitled to rely on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). Here, Wetherwax did not object at sentencing to the information in the presentence report regarding restitution, nor did he request an evidentiary hearing regarding the amount of restitution that was properly due. Accordingly, he cannot now argue that he was denied due process. *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997). Absent a dispute, the trial court is not required to make express findings regarding the amount of restitution. *Grant*, *supra* at 235.

Docket No. 191196

On appeal, defendant Pickard first argues that the trial court erred in denying his motion for a directed verdict of acquittal on the charge of felony murder. We disagree. His specific contention is that there was insufficient evidence of the underlying felony (in this case, armed robbery or attempted armed robbery) to allow the charge to be presented the jury. An attempt consists of an intent to commit a crime and an act in furtherance of that intent which goes beyond mere preparation. *People v Mearl Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). Viewed in a light most favorable to the prosecution, the evidence showed that, pursuant to a plan to rob the store, defendant Pickard and Sword entered the store armed with guns. On this evidence, a rational trier of fact could find that defendant Pickard intended to commit armed robbery and that he engaged in an action that went beyond mere preparation to commit an armed robbery. Accordingly, defendant Pickard is not entitled to relief on this issue. *Peebles*, *supra* at 664.

Next, defendant Pickard argues that there was insufficient evidence to support his conviction of involuntary manslaughter. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine

whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Involuntary manslaughter consists of a death caused by the defendant, without legal justification or excuse, while the defendant was acting in a grossly negligent manner or while committing an unlawful act that was inherently dangerous to human life. *In re Gillis*, 203 Mich App 320, 321; 512 NW2d 79 (1994). As noted above, when viewed in a light most favorable to prosecution, the evidence showed defendant Pickard to have been an active participant in the attempted commission of an armed robbery which resulted in the death of the victim. On this evidence, a rational trier of fact could find that defendant Pickard's actions caused the victim's death and that defendant Pickard was acting in a grossly negligent manner with respect to the life of the victim. Therefore, the evidence was sufficient to support defendant Pickard's conviction on the charge of involuntary manslaughter. *Gillis*, *supra* at 321.

Finally, Pickard argues that his sentence is disproportionately severe. We disagree. Sentencing decisions are subject to review by this Court on an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of the trial court's discretion if it violates the principle of proportionality. The principle of proportionality requires sentences to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 636.

As an initial matter, we note that defendant Pickard's reliance on the sentencing guidelines is misplaced. When a defendant is sentenced as an habitual offender, the sentencing guidelines have no bearing with regard to whether an abuse of discretion has occurred. *People v Edgett*, 220 Mich App 686, 694; 560 NW2d 360 (1996). Pursuant to MCL 769.12(1)(a); MSA 28.1084(1)(a), a fourth time habitual offender may be sentenced "to imprisonment for life or for a lesser term." The purpose of habitual offender sentence enhancements is to deter recidivism by increasing the punishment for subsequent offenders. *People v Hendrick*, 398 Mich 410, 416-417; 247 NW2d 840 (1976). In this case, defendant Pickard's prior record reflects the need for such deterrence. Further, considering the heinous circumstances of the instant offense, we conclude that defendant Pickard's sentence does not violate the principle of proportionality. *Milbourn*, *supra* at 636.

Affirmed.

/s/ Richard A. Griffin
/s/ Roman S. Gribbs
/s/ Michael J. Talbot

[1] Defendant Wetherwax does not clearly contest this point on appeal.

[2] Codefendant Sword was tried in a different proceeding.

[3] The specific legal basis of defendant's argument is not entirely clear from his brief on appeal.

[4] The first degree murder statute was amended by 1994 PA 267, effective October 1, 1994. Because the offense in this case occurred on March 15, 1994, defendants were tried under the prior version of the statute.