STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DORAN R. COLLINS,

Defendant-Appellant.

UNPUBLISHED
October 6, 1998

No. 188080
Macomb Circuit Court
LC No. 94-002712 FC

Before: Hoekstra, P.J, and Murphy and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305, and possession of a burglar's tools, MCL 750.116; MSA 28.311. He was sentenced to twenty to forty years' imprisonment as a fourth habitual offender, MCL 769.12; MSA 28.1084. Defendant now appeals as of right. We affirm in part, reverse in part, and remand.

I

Defendant argues that his breaking and entering conviction should be reversed because he was charged with breaking and entering an unoccupied dwelling when, in fact, his alleged offense only involved an occupied structure. However, defendant did not move to quash the information or otherwise raise this issue at trial and, absent manifest injustice, it is not preserved for appellate review. *People v Miller*, 130 Mich App 116, 118; 342 NW2d 926 (1983). There is no manifest injustice in this case where the charged offense carried a lesser penalty than the offense defendant now claims should have been brought against him and where there was ample evidence at trial to support the conviction.

II

Defendant claims that the evidence presented at trial was insufficient to prove him guilty of breaking and entering beyond a reasonable doubt and that, alternatively, the verdict was against the great weight of the evidence. Regardless of defendant's arguments regarding the necessity of his having

a lock pick and the contradictory testimony about whether he in fact had one when he returned to the van, the testimony of a police witness who observed defendant through binoculars at the door, considered in a light most favorable to the prosecutor, is sufficient to support the verdict and, further, review of the record does not show that the verdict was against the great weight of the evidence. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (sufficiency of the evidence); *People v Harris*, 190 Mich App 652, 658-659; 476 NW2d 767 (1991) (great weight of the evidence); *People v Finney*, 113 Mich App 638, 639; 318 NW2d 519 (1982) ("[t]he use of any force at all . . . is sufficient to constitute the element of breaking").

III

Defendant argues that the breaking and entering verdict was void for uncertainty because the verdict form did not specify that defendant was found guilty of breaking and entering "with the intent to commit larceny." In the absence of any objection to the verdict form by defendant at trial, we review for manifest injustice and, in so doing, we consider the pleadings, the court's charge to the jury, and the entire record to determine whether the jury's intent can be clearly deduced. *People v Rand*, 397 Mich 638, 640, 643; 247 NW2d 508 (1976). Because the jury's verdict can be clearly deduced by reference to the record, we find no manifest injustice and the verdict was not deficient. The trial court did instruct the jury that the breaking and entering charge required proof of a specific intent to commit larceny. However, defendant claims the court improperly failed to fully define "larceny." Because no objection was raised on this issue at trial, we review under the miscarriage of justice standard. *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). We find no miscarriage of justice. Defining "larceny" as the "intent to steal," as the trial court did in this case, is not error requiring reversal, *People v Jones*, 98 Mich App 421, 425-426; 296 NW2d 268 (1980), and the instructions considered as a whole were sufficient to advise the jury that it had to find that the defendant broke and entered with the intent to commit a larceny, *People v Rabb*, 112 Mich App 430, 434-436; 316 NW2d 446 (1982).

IV

We also review for a miscarriage of justice defendant's other arguments regarding jury instructions against which there were no objections made at trial. *Grant, supra*. If the transcript of the trial court's instruction is correct, there was a misstatement of the statute's definition of burglar tools as being "adopted or designed" rather than "adapted and designed" for breaking and entering. Nonetheless, the trial court went on to correctly explain what was required by these terms, i.e., that the jury had to conclude that the tools "are not only capable of being used for breaking and entering but are also designed or are expressly planned to be used for this purpose." No injustice occurred because the jury instructions viewed in their entirety fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v McFall*, 224 Mich App 403, 412-413; 569 NW2d 828 (1997). Similarly, read in their entirety, the instructions sufficiently informed the jury of the necessity of finding that defendant possessed the burglary tools knowingly and for the purpose of using them to break and enter a building with the intent to commit larceny and regarding the concept of reasonable doubt. With respect to the reasonable doubt argument, we find no error in the trial court's instructing the jury with CJI2d 3.2(3) and without equating "reasonable doubt" with "moral certainty." *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991). Finally, any slight confusion resulting from the trial

court's instructions regarding past crimes defendant had "committed" rather than for which he had been "convicted" does not constitute a miscarriage of justice requiring reversal of defendant's conviction.

V

Defendant argues that the trial court improperly allowed a police sergeant to testify as an expert witness in burglary surveillance, relying on precedents dealing with "drug profiles." We find those precedents inapposite as there was no testimony regarding defendant fitting within any such "profile" here and further conclude that the police witness was properly considered an expert by the trial court exercising its sound discretion. *People v Cyr*, 113 Mich App 213, 226; 317 NW2d 857 (1982).

VI

Defendant claims that the trial court abused its discretion in allowing a locksmith to demonstrate how a lock can be picked, pointing out differences between the lock used in the demonstration and the actual lock allegedly picked at the condominium building. We find no abuse of discretion in allowing this demonstration. Contrary to defendant's assertion, the demonstration was relevant because it illustrated the prosecutor's theory of how defendant could have easily and quickly gained access inside the building by picking the outside door lock. *People v Ng*, 156 Mich App 779, 788; 402 NW2d 500 (1986). Further, defendant had ample opportunity to cross-examine the locksmith regarding the lock and the demonstration. *People v Castillo*, ___ Mich App ___; ___ NW2d ___ (Docket No. 200254, issued 6/23/98), slip op at 2. In addition, the similarity between the lock used in the demonstration and the lock on the door of the building was explained at trial and there was no attempt to deceive the jury with regard to the demonstration. *Id.* Any differences between the two locks at issue go to the weight placed on the evidence by the jury and not to the admissibility. *Ng, supra*. We also conclude that the demonstration was not more prejudicial than probative. *Castillo, supra*, slip op at 3; *Ng, supra*. Further, unlike *Duke v American Olean Tile Co*, 155 Mich App 555, 559-560; 400 NW2d 677 (1986), the case relied upon by defendant, the present case did not involve a scientific experiment.

VII

Defendant argues that the trial court improperly allowed his two prior convictions of breaking and entering an occupied dwelling and operating a chop shop to be automatically admitted to impeach him under MRE 609(a)(1). Although we agree that the trial court should not have automatically admitted the prior convictions, we find the error to be harmless. Because neither of the offenses of breaking and entering an occupied dwelling and operating a chop shop contain an "actual element" of dishonesty or false statement pursuant to MRE 609(a)(1), the prior convictions could not be automatically admitted to attack defendant's credibility. *People v Allen*, 429 Mich 558, 594 n 15, 605; 420 NW2d 499 (1988), amended on other grounds sub nom *People v Pedrin*, 429 Mich 1216 (1988); *People v Bartlett*, 197 Mich App 15, 18-19; 494 NW2d 776 (1992) (prior conviction of breaking and entering involved theft under MRE 609 (a)(2) and not dishonesty or false statement); MCL 750.535a(1)(b) and (2); MSA 28.803(1)(1)(b) and (2) (no "actual element" of dishonesty or false statement is found in the chop shop statute). However, because the evidence against defendant

was overwhelming, the error was harmless. *People v Parcha,* 227 Mich App 236, 247; 575 NW2d 316 (1997); *Bartlett, supra* at 19-20.

VIII

We find meritless defendant's argument that the trial court abused its discretion in allowing the introduction of similar acts evidence. *People v Starr,* 457 Mich 490, 494; 577 NW2d 673 (1998). Our review of the record convinces us that this evidence was properly admitted to prove defendant's intent and knowledge rather than to merely show that he had a propensity to commit bad acts. *Id.* at 496; *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). Further, we do not conclude that the similar acts evidence at issue here presented any danger of unfair prejudice that would outweigh its probative value. *Starr, supra; VanderVliet, supra*. We also note that, upon defendant's request, the court provided a limiting instruction to the jury.

IX

Defendant argues that testimony regarding his silence at the police station following the discovery of lock picking devices in his jacket was admitted in violation of his constitutional rights. Although defendant failed to object to the testimony in question on constitutional grounds, appellate review is nevertheless appropriate where a significant constitutional question is involved. *People v Schollaert*, 194 Mich App 158, 162; 486 NW2d 312 (1992); *People v Westbrook*, 175 Mich App 435, 440; 438 NW2d 300 (1989).

During its case-in-chief, the prosecution elicited testimony from a police officer that defendant did not "say anything specifically" about two metal objects that were found on defendant after the officer searched him at the police station and that defendant did not show any surprise when the objects were found. Although defendant's silence occurred after his arrest, there is nothing in the record to indicate that defendant had received his *Miranda*[1] warnings such that his silence was in reliance on the warnings. *Schollaert*, *supra* at 165-166. Nor is there anything in the record that indicates that defendant was being subjected to custodial interrogation during the time in question. *Id*. Therefore, because "defendant's silence or nonresponsive conduct did not occur during a custodial interrogation situation, nor was it in reliance on the *Miranda* warnings, . . . defendant's silence . . . was not a constitutionally protected silence." *Id*. at 166; see, also, *People v Stewart (On Remand)*, 219 Mich App 38, 43; 555 NW2d 715 (1996). Defendant's constitutional rights were not violated when evidence of his silence was admitted as substantive evidence.[2] *Schollaert, supra* at 167; *Stewart, supra*.

Even assuming that defendant had received his *Miranda* warnings and that the silence in question was given in reliance on the *Miranda* warnings, we conclude that any error was harmless beyond a reasonable doubt. *People v Davis,* 191 Mich App 29, 37; 477 NW2d 438 (1991); cf. *People v Belanger*, 454 Mich 571, 578; 563 NW2d 665 (1997). Given the innocuous remarks in question and the fact that defendant does not assert that the prosecutor made any extensive argument from that silence to the jury, "there is no 'reasonable possibility that the evidence

complained of might have contributed to the conviction.'" *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994), quoting *Chapman v California*, 386 US 18, 23; 87 S Ct 824; 17 L Ed 2d 705 (1967).

X

Defendant's argument that he was entitled to twelve peremptory challenges is without merit. *People v Oswald (After Remand)*,188 Mich App 1; 469 NW2d 306 (1991). Regardless of recent statutory amendments, it is still true that the "habitual-offender statute does not create a substantive offense that is separate from and independent of the principal charge" and that "the current court rule, MCR 6.412(E)(1), expressly base[s] the number of peremptory challenges to which a defendant is entitled on the potential penalty for the charged *offense*." *Id*. at 12 (emphasis in original). Accordingly, "[d]efendant, charged as a fourth-felony habitual offender, was only entitled to five peremptory challenges." *Id.*

XI

We have reviewed defendant's many allegations of prosecutorial misconduct and conclude that, even if misconduct occurred, it did not deny defendant a fair and impartial trial. *People v Mack*, 190 Mich App 7, 19; 475 NW2d 830 (1991). Reference to defendant being under "surveillance" as a "suspected" or "alleged" burglar was offered to explain the actions of the police in following defendant and observing him attempting to enter the condominium; the prosecutor expressly explained that purpose before the jury and stated that this background information was not being offered to establish that prior burglaries had, in fact, occurred.

Further, defendant has not established that police authorities acted in bad faith in failing to produce the lock that he allegedly picked or that the lock was exculpatory. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992); *People v Leigh*, 182 Mich App 96, 97-98; 451 NW2d 512 (1989). Apparently, the failure to produce this item was not made an issue until defendant requested post-trial relief from his conviction. Moreover, defendant did not produce evidence suggesting that, assuming defendant's account of his actions at the condominium doorway were truthful, examination of the lock would have corroborated that account. See *Leigh*, *supra* at 98. There was thus no "reasonable probability" that production of the lock would have altered the case outcome and denial of post-trial relief was proper. See *Kyles v Whitley*, 514 US 419, 434; 115 S Ct 1555; 131 L Ed 2d 490 (1995).

With respect to alleged improprieties regarding evidence surrounding the 1987 Oak Park break-in, we have reviewed defendant's arguments and do not conclude that any impropriety would justify a reversal of his conviction and a new trial. The testimony in question was stricken, and any resulting error was harmless. With regard to the other alleged instances of prosecutorial misconduct involving defendant's brother as a perpetrator and the prosecutor making improper arguments, we conclude, after considering the arguments made by the prosecutor in context and in their entirety, *People v Siler*, 171 Mich App 246, 258; 429 NW2d 865 (1988), that defendant's arguments fail to raise any issue requiring reversal. Finally, the prosecutor's failure to locate and identify a condominium

resident who was apparently at home at the time of defendant's alleged break-in was not raised at the trial court, and we will not consider it or the myriad factual questions surrounding defendant's claim in this regard on appeal. *Grant, supra* at 546.

XII

To prevail on his ineffective assistance claim, defendant must establish that his counsel's performance at trial fell below an objective standard of reasonableness and that he was so prejudiced as a result that he was deprived a fair trial. *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994). He first argues that counsel was deficient for failing to seek suppression of the lock pick taken from his van. However, the search of the van occurred as defendant returned to it after the police concluded, as a result of their direct observation of the alleged crime, that defendant had picked the condominium door lock. Unlike the defendant in *People v Fernengel,* 216 Mich App 420, 422-424; 549 NW2d 361 (1996), the case relied on by defendant, instant defendant was not twenty to twenty-five feet away from his vehicle at the time of the arrest and his vehicle was within his immediate control at the time of his arrest. Thus, no improper search resulted. We also find no merit to defendant's argument that defense counsel should have challenged the seizure of the lock pick because the incriminating nature of the lock pick was not immediately apparent to the officers. Although the officers may not have had "expertise" with respect to lock picking devices, the officers did recognize the item in question as something that could be used to pick locks.

Further, we have reviewed the available record surrounding the failure to produce the lock allegedly picked and do not conclude that this failure would have formed the basis for a dismissal of the charges or an instruction to the jury that production would have been adverse to the prosecution's case. As previously stated in issue XI above, it has not been shown that the evidence was exculpatory or that the police acted in bad faith. *Johnson, supra*. Accordingly, there was no ineffectiveness of counsel in failing to raise these arguments at trial. Defendant's arguments about the manner in which his trial counsel impeached police authorities seek to second-guess matters of trial strategy and do not constitute valid claims of ineffective assistance. *People v Coddington,* 188 Mich App 584, 608; 470 NW2d 478 (1991). With respect to defendant's arguments that trial counsel was ineffective in failing to object to prejudicial evidence and improper jury instructions and failing to move for production of a res gestae witness, we have already addressed these arguments above in issues III, IV, and XI and find them to be without merit. Defendant has not established that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced to the extent that he was denied a fair trial. *Pickens, supra.*

XIII

Defendant argues that, because the prosecutor's original written notice specified only two valid convictions, the fourth habitual offender conviction must be reversed and this case remanded for sentencing of defendant as a third habitual offender. See MCL 769.13; MSA 28.1085. We agree. The prosecutor's argument that the later amendment of the habitual offender notification should suffice to support the fourth habitual offender conviction fails under *People v Ellis,* 224 Mich App 752; 569

NW2d 917 (1997). In light of our determination that this matter must be remanded for resentencing on this ground, we need not consider defendant's arguments regarding the proportionality of his sentence.

XIV

We affirm defendant's convictions of the underlying offenses but reverse his conviction as a fourth habitual offender and remand for resentencing as a third habitual offender.[3] We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Richard A. Bandstra

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] Although not raised by defendant on appeal, we also conclude that the testimony was admissible under the Michigan Rules of Evidence. *Schollaert, supra* at 167; see, also *People v McReavy*, 436 Mich 197, 213-214, 222; 462 NW2d 1 (1990). Defendant's demeanor was properly admitted as substantive evidence that was relevant to a determination of whether defendant possessed the burglary tools knowingly. *Schollaert, supra*.

[3] Although defendant requests that resentencing occur before a different judge, we find no reason to grant such relief. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).