STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE MOSLY a/k/a SHAREEF HASSAM,

Defendant-Appellant.

UNPUBLISHED
October 23, 1998

No. 203801
Recorder's Court
LC No. 96-008042

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals by right his conviction following a bench trial of larceny over $100, MCL 750.356; MSA 28.588. The trial court enhanced defendant's sentence as a third habitual offender, MCL 769.11; MSA 28.1083, and sentenced him to a term of imprisonment of 80 to 120 months. We affirm.

The victim hired defendant to repair two apartments in a duplex that he owned. He supplied defendant with an estimated $1,000 worth of tools for use in performing the work, including a $140 chain saw, a lawnmower, and an electric drill. The victim later discovered that the tools were not at the duplex. According to the victim, defendant indicated that he had stored the tools at a friend's house and would bring them to the duplex once new locks were installed. The victim provided defendant with the locks the next day. Over the next two weeks, the victim repeatedly inquired regarding the whereabouts of the tools. Defendant, however, eventually disappeared without returning the tools.

Defendant first argues that the trial court clearly erred in finding that he removed the tools from the duplex and that he intended permanently to deprive the victim of his tools. Defendant further argues that the evidence was insufficient to support his conviction. We disagree.

We initially note that this Court does not apply a heightened standard to determine whether sufficient evidence existed to support a conviction in a bench trial.[1] *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Over twenty years ago, our Supreme Court observed in *People v Garcia*, 398 Mich 250, 262-263; 247 NW2d 547 (1976) (3-2 decision):

> In a bench trial, it is the role of the trial judge sitting as the trier of fact to observe the witnesses and decide the weight and credibility to be given to their testimony. Where sufficient evidence exists to sustain a verdict of guilty beyond a reasonable doubt, the decision of the judge should not be disturbed by an appellate court. The task of the reviewing court must be to examine the record to determine whether the evidence was ample to warrant a verdict of guilty beyond a reasonable doubt of the crime charged.

Although the trial court must make factual findings in support of its verdict, MCR 6.403, the purpose of this requirement is to create a record that demonstrates that the trial court was aware of the issues in the case and correctly applied the law, not to facilitate the application of a different standard of appellate review than that employed in jury trials. *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992). Thus, under MCR 6.403, the trial court need not make explicit findings on each element of the offense. *People v Johnson (On Rehearing)*, 208 Mich App 137, 141; 526 NW2d 617 (1994). Because the trial court's findings in this case reveal that it was aware of the issues and correctly applied the law, compare *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988), we limit our review to determining whether sufficient evidence existed to support the verdict.

In reviewing the sufficiency of the evidence in a bench trial, this Court views the evidence 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. *Hutner, supra* at 282. To support a conviction of larceny over $100, the prosecution must prove: (1) an actual or constructive taking of goods or property worth more than $100, (2) an asportation of the same, (3) with an intent to permanently deprive the owner, (4) of property that does not belong to the defendant, (5) against the will and without the consent of the owner. *People v Brown*, 179 Mich App 131, 132; 445 NW2d 801 (1989); *People v Edwards*, 171 Mich App 613, 617; 431 NW2d 83 (1988).

In this case, the prosecution presented sufficient evidence to support the conviction. The victim testified that he provided defendant with tools needed to repair the duplex. He estimated their value at $1,000. Over a period of two weeks, the victim repeatedly asked defendant for the return of the tools; defendant assured the victim that he would do so. Defendant never returned the tools. The victim subsequently discovered his chain saw at a resale shop. A rational trier of fact could find on the basis of this evidence that defendant took and carried away the victim's property worth more than $100 without the victim's consent and with the intent permanently to deprive him of that property. *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996). It was for the trier of fact to weigh this evidence against defendant's testimony that the victim never requested the tools, that he stored the tools in the duplex's basement, and that he had a friend remove the tools from the duplex after his arrest. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

We likewise reject defendant's contention that the verdict was against the great weight of the evidence. A court will grant a new trial on the basis of the great weight of the evidence only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice

would result from allowing the verdict to stand. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Here, the victim testified that defendant removed the tools from the duplex and failed to grant his repeated requests for their return. Defendant maintained that he had stored the tools in the duplex's basement. We defer to the trial court's resolution of this factual dispute. *People v Shields*, 200 Mich App 554, 558; 504 NW2d 711 (1993). Questions regarding the credibility of witnesses are for the trier of fact. See *Lemmon, supra* at 646-647. Accordingly, we conclude that the trial court's verdict was not against the great weight of the evidence.

Defendant next argues that he was denied the effective assistance of counsel by defense counsel's failure to call witnesses to corroborate his testimony, to meet with him more than once before trial, and to introduce receipts from a hardware store to demonstrate that defendant continued to work for the victim during the period after which he allegedly stole the tools. We disagree. To establish ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced him so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). In doing so, however, defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Further, in this case, review is foreclosed unless the alleged deficiency is apparent on the record because defendant did not raise this issue below.[2] *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

We conclude that defendant was not denied the effective assistance of counsel in this case. Defendant's first claim is without merit because he has not demonstrated that trial counsel's failure to call the witnesses deprived him of a substantial defense. *Daniel, supra* at 58. Defendant's second claim is similarly without merit because he has not shown that counsel's lack of contact with him resulted in inadequate trial preparation. Finally, defendant has not overcome the presumption that counsel's decision not to introduce evidence was a matter of trial strategy. *Daniel, supra* at 58.

Finally, we reject defendant's claim that his 80 to 120 month term of imprisonment violates the principle of proportionality. This Court does not use the sentencing guidelines in reviewing the sentence of an habitual offender. *People v Maleski*, 220 Mich App 518, 526; 560 NW2d 71 (1996). Our review is limited to determining whether the sentence violates the principle of proportionality. *Id.* As enhanced by MCL 769.11(1)(a); MSA 28.1083(1)(a), the trial court had the discretion to sentence defendant to a term of imprisonment of not more than ten years. MCL 750.356; MSA 28.588. In light of the circumstances of this case and defendant's six prior felony convictions, we conclude that defendant's sentence does not violate the principle of proportionality.

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald

[1] Before *People v Petrella*, 424 Mich 221; 380 NW2d 11 (1985), this Court had held that the proper standard of review in a bench trial was for clear error. *People v Hubbard*, 19 Mich App 407, 413;

172 NW2d 831 (1969), aff'd 387 Mich 294 (1972). This Court similarly held that it must review the trial court's findings of fact to support its verdict under the clearly erroneous standard. *People v Bruce Ramsey*, 89 Mich App 468, 473-475; 280 NW2d 565 (1979); see e.g. *People v Snell*, 118 Mich App 750, 755; 325 NW2d 563 (1982) and *People v Anderson*, 112 Mich App 640, 648; 317 NW2d 205 (1981). The Michigan Supreme Court, however, rejected the clear error standard in *Petrella, supra* at 269. Unfortunately, this Court has perpetuated a misunderstanding of the standard of review by continuing to apply the incorrect clear error standard after *Petrella*. E.g. *People v Reeves*, 222 Mich App 32, 35; 564 NW2d 476 (1997), rev'd on other grounds 458 Mich 236 (1998); *People v Lyles*, 148 Mich App 583, 594; 385 NW2d 676 (1986); and *People v Eggleston*, 149 Mich App 665, 667; 386 NW2d 637 (1986).

[2] Defendant has improperly attempted to enlarge the record by attaching to his brief an affidavit and receipt that are not contained in the lower court record. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998). Our review is limited to the lower court record. MCR 7.210(A). Accordingly, we disregard the exhibits. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 18; 527 NW2d 13 (1994).