STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 27, 2000
v	No. 219008 Ingham Circuit Court
MICHAEL COVINGTON, Defendant-Appellant.	LC No. 98-073711-FH

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant Michael Covington appeals as of right. A jury convicted him of breaking and entering a building with the intent to commit larceny therein.[1] The trial court sentenced him as a fourth habitual offender to twenty to thirty years' imprisonment and ordered him to pay $1,800 in restitution in addition to the ordinary $60 assessment for Crime Victim Rights Fund.[2] We affirm.

I. Basic Facts And Procedural History

The prosecutor charged Covington with breaking and entering at the Downtown Tire and Services (DTS), a business in Lansing, on the night of May 18-19, 1998. The prosecutor alleged that Covington stole cash and undeposited checks from DTS.

At trial, Steven Carrasco, DTS's owner, testified that, as always, he was the last person out of the DTS building on May 18, 1998. He turned out the lights, locked the doors, closed the register, and checked all doors to make sure they were closed and locked. He estimated that he left sometime between 6:30 p.m. and 7:15 p.m. and did not return to the store until the next morning at approximately 7:15 a.m. When he did return to the store, Carrasco testified, he noticed that the service department door was propped open with a tire but undamaged and that another door appeared to have been pried open. He also saw a crowbar, a trail of change, and that every drawer in the building had been opened.

[1] MCL 750.110; MSA 28.305.

[2] MCL 769.12; MSA 28.1084.

Carrasco said that the perpetrator had taken the petty cash fund, daily starting cash funds, the previous night's deposits, and parking funds he left in a file cabinet in the back office. He saw that the first two drawers of the file cabinet had been pried open, the third drawer also had pry marks, and it looked like the perpetrator realized the remaining drawers were unlocked and so did not have to force them open. He stated that the desk drawers were also opened. In total, Carrasco was missing approximately $1,400 in cash and approximately $6,000 worth of uncashed checks were taken. He never recovered any of the cash but someone later found some of the uncashed checks, although they were in such poor condition they could not be taken to the bank.

Carrasco stated that only he, his bookkeeper, and his partner had access to the office where he kept the money. He did not know anyone named Covington at the time of the break-in, Covington never worked for him, Covington was not a DTS customer, and he had never seen Covington before the preliminary examination. Carrasco also noted that he had never given Covington permission to enter his business on that date nor permission to take any items from his business.

Beth Jill Rios, a detention officer with the Lansing Police Department, testified that she took Covington's fingerprints and identified him in the courtroom as the man from whom she took the fingerprints. The following exchange then took place:

> *Q*. Did you type all the information on this card?
>
> *A*. No, it comes on the computer.
>
> *Q*. So the computer prints out the information?
>
> *A*. Right.
>
> *Q*. And do you then fill out any information at all?
>
> *A*. I sign my name where my badge number is. I put them on the computer, run it through the computer. *Where his name is on the computer already, all that information is already on the computer*.[3]

Covington did not object to this testimony, nor did he request a limiting instruction. Neither of the parties asked any additional questions about the information in the computer, or how or why it was entered in the computer. On cross-examination, Rios was only asked if she had taken Covington's fingerprints successfully the first time or if she had to take them additional times, to which she answered that she needed only one attempt to take his fingerprints.

Kenneth Lucas, a fingerprint technician with the Lansing Police Department, explained his qualifications, what latent prints were, and how he identified fingerprints from inked prints on a fingerprint card taken by the police. Lucas stated that he had to find eight or more corresponding points

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[3] Emphasis supplied.

between a latent unknown print and an inked known print before he could determine that the latent print came from the same person who provided the inked print. He said that he had reviewed Covington's inked fingerprints on the fingerprint card and the latent fingerprint taken from the crime scene and determined that there were more that twenty-five identification points; he stopped counting when he reached point twenty-five because he had concluded that the finger print belonged to Covington. On cross-examination, Lucas testified that he originally identified the latent print by comparing it to a fingerprint card taken previously from Covington as well as with the fingerprint card prepared for this case. Lucas denied that he had a preconception that the newer fingerprint card would be a match based on the identification he made with the older card.

After close of the prosecutor's proofs, Covington moved for directed verdict of acquittal. He argued that the prosecutor had failed to present evidence that he was the person who committed the breaking and entering. He also claimed that there was no evidence that he intended to commit a larceny in the DTS store, noting that the only evidence linking him to the crime was one fingerprint. The prosecutor argued in response that there was sufficient direct and circumstantial evidence to prove the crime charged and asked the trial court to deny Covington's motion.

The trial court denied Covington's motion reasoning that evidence had been presented on every element of the crime, including that Covington was the person who committed the crime; a reasonable jury could find beyond a reasonable doubt that he was the one who broke into the building and took the money. Further, reasonable jurors could infer his intent to keep the money without the owner's permission. The following exchange then took place:

> *The Court:* Do you have any desire for any instructions other than the principal charge, Mr. VanErp [defense counsel], entering without breaking or attempted?
>
> *Mr. VanErp*: *None, Your Honor*.[4]

Covington rested his defense without presenting any evidence.

During closing arguments, neither party mentioned Rios' statement concerning the preexisting information in the police computer concerning Covington. The trial court gave the following instruction, among others:

> The Defendant, Mr. Covington, is charged with a crime of breaking and entering. To prove this charge, the Prosecution must prove each of the following elements beyond a reasonable doubt. First, that the Defendant broke into the building. It does not matter whether anything was actually broken. However, some force must have been used. Opening the door, raising the window, taking off a screen, are all examples of enough force to count as a breaking [sic] entering a building through an already open door or window without using any force does not count as a breaking.

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[4] Emphasis supplied.

> Second, that the Defendant entered the building. It does not matter whether the Defendant got his entire body inside. If the Defendant put any part of his body into the building, after the breaking, that is enough to count as an entry.
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> Third, that when the Defendant broke and entered the building, he intended to commit the crime of larceny. Larceny is defined as the taking of a property of another without their consent, with the intent to permanently deprive that person of their property.

After the trial court excused the jury for a moment, defense counsel specifically stated that he had no objections to the instructions the trial court had just given. Covington also stated on the record that he understood that he had the right to testify and that he was declining to exercise that right. The trial court then summoned the jury to give additional instructions on the verdicts they could render and then were excused for deliberations. The jury ultimately returned with a guilty verdict.

At sentencing, defense counsel asked the trial court to impose a lenient sentence, noting that the crimes at issue were nonviolent property crimes that occurred at times when no one was likely to be threatened. Defense counsel also mentioned that Covington had a lengthy record that made him unlikely to receive consideration or special favors while in prison. Covington did not address the trial court.

Before imposing sentence, the trial court noted that Covington had escaped prison twice, had eight prior felonies and ten prior misdemeanors, and had been engaged in a life of crime for over twenty-five years. Contrary to defense counsel's suggestion, the trial court concluded, this was not a victimless crime and Covington's conduct caused a great deal of problems for DTS because it was a relatively new business and it had sustained damages of $1,800 to $1,900. The trial court stated that it thought that Covington's life of crime was not likely to change and that he should be "put out of harm's way for some considerable period of time." The trial court acknowledged that, while the maximum sentence was life, the probation agent did not recommend a specific term of incarceration, only that it should be a lengthy term. The trial court then sentenced Covington to twenty to thirty years' imprisonment and ordered him to pay restitution.

On September 10, 1999, Covington moved for a new trial arguing that (1) the trial court had improperly admitted evidence of prior bad acts, (2) the trial court erred when it denied his motion for directed verdict because there was insufficient evidence with which to convict him, (3) the trial court failed to instruct jurors on lesser included offenses, and (4) the sentence was disproportionate.

The trial court, with a different judge presiding, stated that it thought this matter was disposed of by the previous order, but proceeded to rule on the motion "so that we don't see it back here again and the Court of Appeals may exercise its wisdom on this matter." The trial court ruled that the evidentiary issue was not preserved because there was no objection, but stated that it saw no substantial prejudice to Covington because, even if a juror were listening carefully, the juror could only suspect that he had been previously arrested but would not know if it were for speeding, drunk driving, or a felony, and further noted that neither party dwelled on the testimony. The trial court ruled that the claim of instructional error was waived because the trial court specifically asked if a lesser included offense

instruction was wanted and defense counsel said no; the trial court also thought this was trial strategy on the part of defense counsel. The trial court further ruled that Covington's motion for directed verdict had been properly denied and that his sentence was not disproportionate, noting that the maximum sentence was life imprisonment and that the trial court did not impose the maximum sentence despite his criminal record. Covington now raises these same issues on appeal.

II. Motion For Directed Verdict

A. Standard Of Review

Covington contends that the trial court erred when it denied his motion for directed verdict. We review a trial court's ruling on a motion for directed verdict by testing the validity of the motion by the same standard as the trial court.[5] In effect, this is review de novo because this Court does not extend any deference to the trial court's findings or conclusions on this issue.

B. Legal Standard

When ruling on a motion for directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the defendant made the motion in order to determine whether a rational jury could conclude that prosecutor proved the essential elements of the charged crime beyond a reasonable doubt.[6] In so doing, the trial court must view this evidence in the light most favorable to the prosecutor[7] and may not weigh the evidence or determine whether witnesses were credible.[8] In concrete terms, the trial court in this case had to determine whether a rational jury could conclude that the prosecutor had proved beyond a reasonable doubt that (1) Covington broke into a building, (2) he entered the building, and (3) he intended to commit a larceny in the building when he committed the breaking and entering.[9] However, these elements could be proved by circumstantial evidence and reasonable inferences that could be drawn from it.[10]

C. Sufficiency Of The Evidence

Given that the review we must apply to the evidence is favorable to the prosecutor, we conclude that the evidence adduced at trial was sufficient to deny the motion for a directed verdict of acquittal. A reasonable jury could find that Covington was the person who perpetrated this crime because the police found his fingerprint at the scene, he had never worked at DTS, and he was not a

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[5] *People v Warren*, 228 Mich App 336, 345-346; 578 NW2d 692 (1998), aff'd in part and rev'd in part on other grounds 462 Mich 415 (2000).

[6] *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

[7] *Id*.

[8] *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997).

[9] *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998).

[10] *Jolly*, *supra* at 466.

DTS client. Accordingly, there was no other way to explain his fingerprint at the scene of the crime other than to conclude that he committed the crime. Having tied Covington to the crime with circumstantial evidence, the rest of the elements of the crime are easy to discern from the remaining evidence. The open doors, including the pry marks on one door, show a breaking. The open desk and file cabinets drawers, as well as the fact that Covington's fingerprint appeared on a file cabinet inside the business, demonstrate that Covington entered the building. The missing cash and checks constitute circumstantial evidence that Covington intended to commit a larceny at the time he broke into and entered the building. Consequently, the trial court did not err when it denied Covington's motion for directed verdict.

III. Prior Bad Acts Evidence

A. Preservation Of The Issue And Standard Of Review

Covington asserts that the trial court erred when it allowed Rios to testify that the police computer system had automatically entered information onto Covington's fingerprint card because it implied that he had been arrested previously. Thus, he contends, this was evidence of a prior bad act excludable under MRE 404(b).[11] Because Covington did not object to this testimony at trial, he failed to preserve this evidentiary issue for appeal. MRE 103(a)(1). Accordingly, our review is limited to determining whether permitting this testimony was prejudicial and resulted in a miscarriage of justice, meaning that any error was outcome determinative.[12]

B. The Fingerprint Card Testimony.

MRE 404(b) provides in relevant part

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

As the Supreme Court explained in *People v VanderVliet*,[13] prior acts evidence is admissible if: (1) a party offers it to prove "something other than a character to conduct theory" as prohibited by MRE

[11] Given the nature of Lucas' testimony, we thought it possible that Covington might argue that the trial court erroneously permitted him to testify to a prior bad act. However, after reading Covington's brief closely, we cannot discern any attempt to challenge that testimony and, thus, do not decide whether the trial court erred by allowing it.

[12] *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

[13] *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

404(b); (2) the evidence fits the relevancy test articulated in MRE 402, as "enforced by MRE 104(b)"; and (3) the balancing test provided by MRE 403 demonstrates that the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is offered, Covington in this case. A fourth factor articulated in *VanderVliet*, which does not fully conform to the idea of a test expressed in the preceding three factors, suggests that a party may request a limiting instruction under MRE 105 if the trial court decides to admit the challenged evidence.[14]

The problem we encounter with applying this test for prior acts evidence is that we cannot be certain that Rios actually referred to any prior act that Covington committed, much less an act that generally fits the profile of inappropriate propensity evidence. While a juror might be able to infer that Covington had been to the police station on a previous occasion, nothing Rios said indicated that he had had contact with the police because he committed a crime, was a suspect in a crime, or had committed any improper conduct. Even if we assume that this was inadmissible propensity evidence, this fragment of Rios' testimony does not overshadow the properly admitted evidence to the extent that we can conclude that it was outcome determinative.[15] Consequently, there is no error requiring reversal in this instance.

IV. Lesser Included Offense Instructions

Covington claims that the trial court erred when it did not instruct the jury on a variety of lesser offenses in addition to the breaking and entering charge. However, not only has he failed to preserve this issue for appeal by asking the trial court to instruct on these other offenses, he affirmatively waived any error in the instruction when defense counsel stated on the record that the defense did not object to the instructions as given.[16] Further, we agree with the trial court that this decision *not* to request lesser offense instructions was likely a trial strategy.

V. Sentencing

A. Standard Of Review

Covington also argues that his sentence is disproportionate to his crime and based solely on his status as an habitual offender without regard to his offense. We review a trial court's sentence imposed on an habitual offender for an abuse of discretion.[17] "[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender."[18]

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[14] *Id*. at 75.

[15] *Lukity, supra*.

[16] *People v Carter*, 462 Mich 206, 208-209; 612 NW2d 144 (2000).

[17] *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997).

[18] *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

B. Covington's History

The trial court enhanced the length of the prison sentence it imposed on Covington because he falls under the fourth habitual offender statute.[19] Contrary to Covington's argument, the trial court did not apply the habitual offender enhancement statute without giving any attention to Covington as an individual and the circumstances of this crime. Rather, the trial court noted Covington's long criminal history, which implied a resistance to rehabilitation and made incarceration necessary, as well as the circumstances of this crime. The sentence in this case also conformed to the principle that when an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate.[20] Further, the trial court exercised its discretion not to impose the maximum penalty under permitted MCL 769.12; MSA 28.1084, which is life imprisonment. There was no abuse of discretion here.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

[19] MCL 769.12; MSA 28.1084.

[20] *Hansford*, *supra* at 326.