# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 28, 2000 |
| v | No. 208973<br>Mecosta Circuit Court |
| SCOTT MICHAEL BARBER,<br><br>Defendant-Appellant. | LC No. 96-003891-FH |

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of breaking and entering a building with the intent to commit larceny, MCL 750.110; MSA 28.305. He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to three concurrent prison terms of thirty to fifty years and ordered to pay restitution of $28,500. Defendant now appeals as of right. We affirm.

Defendant's convictions arose from three separate incidents, all in close proximity to one another, which allegedly occurred during a three-day period in July 1996. Defendant was convicted through circumstantial evidence.

I

Defendant first challenges his sentences. He argues that he should be resentenced because of inaccuracies in his presentence investigation report (PSIR) and because he was not provided adequate time to review the PSIR before sentencing. We disagree. While MCR 6.425(B) requires the court to permit "the defendant to review the PSIR at a reasonable time before the day of sentencing," defendant does not allege any inaccuracies in the PSIR beyond those which were presented to the trial court at sentencing. The trial court addressed the claimed inaccuracies raised at sentencing, and the record indicates that defendant was satisfied with the court's response to those challenges.

Next, defendant challenges the length of his sentences. We review a sentence for an abuse of discretion. *People v Rice (On Remand),* 235 Mich App 429, 445; 597 NW2d 843 (1999). A sentence constitutes an abuse of discretion when it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*,

435 Mich 630, 636; 461 NW2d 1 (1990); *Rice, supra*. The sentencing guidelines do not apply to the sentencing of an habitual offender. *People v Hansford(After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997).

Defendant's sentences are substantial, particularly in light of the fact that he was convicted of nonviolent offenses. However, we cannot find that the trial court abused its broad discretion in sentencing merely because we might have imposed a less harsh sentence. See *Hansford, supra* at 323-326 (holding that the trial court did not abuse its discretion in sentencing the defendant to forty to sixty years for entering an occupied dwelling without the owner's permission and receiving or concealing stolen property over $100 when his criminal history consisted of only property crimes) and *People v Alexander*, 234 Mich App 665, 679-680; 599 NW2d 749 (1999) (holding that the defendant failed to show that his 15 to 22 ½ year sentence for second-degree home invasion was disproportionate when he had never been convicted of a violent offense). We have carefully reviewed the PSIR and cannot conclude that the trial court abused its discretion.

Defendant, who was twenty-five years old at the time of the instant offenses, has an extensive criminal history, including four felony convictions, several misdemeanor convictions, and a significant juvenile record.[1] At the time of the offenses, he was on lifetime parole[2] as the result of a conviction in Alabama for receiving stolen property. At the time of sentencing in the present case, defendant was under two sentences: a twenty- to forty-year sentence as a fourth habitual offender for carrying a concealed weapon and a ten- to fifteen-year sentence as a fourth habitual offender for receiving and concealing stolen property. Defendant has served several terms of jail time.

The trial court clearly considered defendant's substantial criminal history and failure, despite repeated opportunities, to conform his conduct to the law. This was a proper consideration. *Hansford, supra* at 325-326; *Alexander, supra* at 679-680. In *Hansford*, our Supreme Court stated:

> We believe that a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society. [*Hansford, supra* at 326.]

Here, defendant's sentences are within the limit of "imprisonment for life or for a lesser term" expressed in MCL 769.12(1)(a); MSA 28.1084(1)(a). Considering defendant's several prior

[1] We recognize that defendant challenged whether he was actually convicted of some of the criminal activity referenced in the PSIR below. Even without considering the few convictions and charges that defendant challenged, the report indicates that defendant's criminal history is extensive. Defendant did not challenge the statement within the PSIR that he had four prior felony convictions.

[2] While we are not certain of the conditions of such a sentence, suffice it to say that defendant was convicted of a felony in Alabama prior to the instant offenses.

convictions and periods of imprisonment and probation, it is abundantly clear that prior attempts to rehabilitate defendant have failed and that probationary supervision is not effective for him. Given defendant's substantial criminal history, his lack of intent to reform his conduct, and the circumstances of the offenses, we do not consider the fact that defendant has shown a propensity to commit mostly property crimes particularly relevant to our determination of the proportionality of the present sentences. See *Hansford, supra* at 323-326 and *Alexander, supra* at 679-680. Defendant's present convictions, in the context of his previous felonies, evidence that defendant is unable to conform his conduct to the laws of society. Under these circumstances, we cannot say that the trial court abused its discretion in sentencing defendant. *Hansford, supra* at 326.

We further consider defendant's argument that his sentences are disproportionate when compared to the sentence given to his codefendant.[3] A second perpetrator involved in the break-in at the Grange convenience store was convicted of one count of breaking and entering a building with the intent to commit larceny, MCL 750.110; MSA 28.305, and was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to forty months to fifteen years' imprisonment. While we recognize that there is a significant disparity in that sentence and the sentences defendant received, that disparity does not compel us to conclude that defendant's sentences are disproportionate. The record does not indicate that second individual has as extensive a criminal history as defendant. By all indications, the second perpetrator had one prior conviction for breaking and entering at the time he took part in the Grange break-in. See *People v Ludington*, unpublished opinion per curiam of the Court of Appeals, issued 5/12/00 (Docket No. 211907), p 2. There is no indication as to the level of the second perpetrator's involvement in the Grange break-in. Moreover, nothing suggests that the second perpetrator was involved in the other two break-ins for which defendant was convicted or had a prior record or pending charges comparable to defendant. It is well-settled that a defendant's sentence must be based on individualized facts. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). A sentencing court is not required to consider the sentence given to a co-participant in a crime. *People v Bisogni*, 132 Mich App 244, 245-246; 347 NW2d 739 (1984).

Defendant further asserts that his sentences constitute cruel and unusual punishment. However, he has not developed an argument on this claim. Defendant may not simply announce a position and leave this Court with the task of developing the rationale for the argument. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999).

II

Next, defendant argues that his trial counsel rendered ineffective assistance of counsel. We disagree. To establish that his counsel was ineffective, defendant must first demonstrate, through the record, that counsel's performance was deficient by showing that counsel made

[3] While it is apparent that a second individual was tried and convicted in connection with the break-in at the Grange convenience store, the trials were held separately. See *People v Ludington*, unpublished opinion per curiam of the Court of Appeals, issued 5/12/00 (Docket No. 211907) (affirming the conviction and sentence). Therefore, the two men were not tried as "codefendants."

errors so serious that he was not functioning as the counsel to which defendant was constitutionally guaranteed. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Next, defendant must establish that his counsel's deficient performance prejudiced his defense by showing that the errors were so serious that they deprived him of a fair trial with a reliable result. *Hoag*, *supra*. Defendant must also overcome the presumption that the alleged error was trial strategy. *Id*. at 6. He must show a reasonable probability that, but for counsel's deficient performance, the outcome of the trial would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Contrary to defendant's argument, the admission of evidence of a receipt from a business in Paw Paw would not have affected the outcome of the trial. Defendant's presence in Paw Paw at 7:09 p.m. on the evening of the Lewis International break-in does not preclude the possibility that defendant traveled approximately two hours to Big Rapids to commit that offense.

In addition, the failure to present evidence that defendant bought two new tires for his car after the break-ins does not constitute ineffective assistance of counsel. Only two tires were replaced, and the tire track left at the scene matched the tread of one of the old tires on defendant's car.

Defendant further asserts that his counsel was ineffective for failing to move to sever the trials of these offenses. However, his failure to cite any authority to support this position constitutes a waiver of this argument on appeal. *Griffin*, *supra* at 45. Similarly, defendant's failure to provide authority to support his claim that counsel was ineffective for failing to object to the admission of evidence constitutes a waiver of appellate review of this argument. *Id*.

Defendant also claims that his counsel was ineffective for failing to request an instruction on the lesser included offense of receiving or concealing stolen property. On remand, trial counsel explained his reasons for declining to request the instruction. He determined that the evidence more strongly supported convictions of receiving or concealing stolen property than convictions of breaking and entering. Because defendant was charged as an habitual offender, he faced a substantial sentence regardless of the offense of which he was convicted. Therefore, counsel and defendant decided that the best strategy would be to opt for an all or nothing verdict. Clearly, this decision was a matter of trial strategy, and we will not find counsel ineffective on this basis. The fact that a trial strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant also argues that trial counsel was ineffective for failing to present his alibi defense. On remand, trial counsel explained that, based on information he had, he knew that proposed alibis would have been untruthful. Counsel cannot be found to be ineffective for failing to present testimony known to be false. *People v LaVearn*, 448 Mich 207, 217; 528 NW2d 721 (1995).

Defendant asserts as part of his ineffective assistance of counsel claim that the trial court's denial of his trial counsel's motion to withdraw deprived him of his right to counsel and

right to assist and direct his own defense. This particular claim does not pertain to whether defendant received effective assistance of counsel. Also, it is not stated in the statement of questions involved section of defendant's brief on appeal and, therefore, it is not properly presented for our review. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999); see MCR 7.212(C)(5).

III

Defendant further argues that the trial court erred in denying his motion to suppress evidence. First, defendant challenges the search of his and his girlfriend's motel rooms, arguing that the consent given for the searches was coerced. The prosecution bears the burden of establishing that consent to a search was given freely and voluntarily. *People v Farrow*, 461 Mich 202, 208; 600 NW2d 634 (1999), quoting *Bumper v North Carolina*, 391 US 543, 548-550; 88 S Ct 1788; 20 L Ed 2d 797 (1968). A reviewing court must give deference to the trial court's resolution of factual issues, especially where those issues involve witness credibility and there is conflicting testimony. *Id*., citing *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983). In deciding whether defendant's girlfriend voluntarily gave consent to search the motel rooms, the trial court was required to analyze the credibility of the testimony of the girlfriend and the police officers involved in the search. We cannot say that the trial court clearly erred in finding that the girlfriend freely and voluntarily consented to the search and in denying defendant's motion to suppress evidence seized during the search. *Farrow, supra* at 208. Moreover, the record does not support defendant's contention that the police violated the scope of the consent to search the motel.

Defendant also challenges the search of his vehicle. Unreasonable searches and seizures are forbidden by Fourth Amendment of the United States Constitution, US Const, Am IV, and the Michigan Constitution, Const 1963, art 1, § 11. Subject to specific exceptions, a search and seizure generally must be conducted pursuant to a warrant based on probable cause. *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). One of the exceptions to the warrant requirement is the automobile exception. *Id*. at 418. Police are permitted to search an automobile if probable cause to support the search exists. *Id*. at 418-419. The basis for this exception is the automobile's ready mobility and pervasive regulation. *Id*. at 418. A search of an automobile when probable cause exists "is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." *People v Levine*, 461 Mich 172, 179; 600 NW2d 622 (1999), quoting *United States v Ross*, 456 US 798, 809; 102 S Ct 2157; 72 L Ed 2d 572 (1982). For probable cause to exist, there must be a substantial reason for concluding that a search will uncover evidence of wrongdoing and a fair probability that contraband or evidence of a crime will be found. *People v Garvin*, 235 Mich App 90, 102; 597 NW2d 194 (1999), citing *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). Whether probable cause exists should be determined upon consideration of the totality of the circumstances. *Id*. In addition, the automobile exception extends to a search of the trunk of a vehicle. *People v Lucas*, 188 Mich App 554, 574-575; 470 NW2d 460 (1991).

In the present case, the circumstances provided the police sufficient probable cause to search defendant's car. The police were alerted to a possible breaking and entering of a vehicle at a car dealership in the early morning hours. A witness testified to seeing a person near a car

and explained to the police when they first arrived that the person crouched behind the car and ran away when an officer approached. The police found cars at the dealership that appeared to have been tampered with. They discovered tools and a portable hand-held police scanner on the ground. As they walked through the parking lot, they noticed an Oldsmobile with the driver's window rolled down. Keys were in the ignition of the car. When the suspect first ran, he ran in the direction of this car. On the basis of this evidence, the officers had probable cause to believe that the person seen in the lot was committing a crime, the Oldsmobile was that person's car, and evidence of a crime would be found in the car. Therefore, the initial search was proper. *Garvin, supra* at 102. Moreover, there was evidence that the officers observed a handgun and speed loader in the car when they looked through the windows and shined a flashlight inside. The seizure of these items without a warrant was legal under the plain view doctrine. *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996).

IV

Next, defendant argues that the prosecution presented insufficient evidence to convict him of these three offenses. We disagree. To determine whether the prosecution presented sufficient evidence of guilt to sustain a conviction, this Court must consider the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have concluded that all the elements of the offense were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended 441 Mich 1201 (1992). A guilty verdict may survive a challenge based on the sufficiency of the evidence where it is established through circumstantial evidence and reasonable inferences drawn from the evidence. *People v Noble*, 238 Mich App 647, 655; 608 NW2d 123 (1999). To prove that a defendant committed the offense of breaking and entering with the intent to commit larceny, the prosecution must present evidence that the defendant (1) broke into and (2) entered a building, and that, at the time of the breaking and entering, (3) the defendant intended to commit a larceny therein. *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998).

Considering all three offenses, the evidence supported a finding of defendant's guilt. The tire track evidence and defendant's possession of the pay telephone keys and binoculars allowed a jury to find that defendant committed the break-in at the Grange convenience store. The similarities in timing and proximity of the break-in at the Grange and the break-in at Lewis International, as well as defendant's possession of items stolen from Lewis International, allowed the jury to find defendant guilty of the offense at Lewis International. Further, considering the timing and proximity of the break-in at Fenstermacher's business and defendant's possession of the driver's license stolen from that business, the jury could also properly convict defendant of that offense. Consequently, the evidence presented in this case was sufficient to establish beyond a reasonable doubt defendant's guilt of all three offenses.

V

Finally, defendant's challenge to the jury instructions was not preserved for our review because defendant neither requested instructions on the lesser included offenses nor objected to the instructions as given. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995). Unpreserved claims of instructional error are forfeited unless the defendant can demonstrate plain error that

affected his substantial rights. *People v Carines*, 460 Mich 764, 774; 597 NW2d 130 (1999). Defendant argues that the trial court erred in failing to instruct the jury on lesser included offenses. However, a trial court need not sua sponte instruct on lesser included offenses. *People v Stephens*, 416 Mich 252, 261; 330 NW2d 675 (1982). Defendant also argues that the trial court erred in instructing the jury on the theory of aiding and abetting. Defendant has not demonstrated that, even if the evidence did not support a finding of guilt on a theory of aiding and abetting,[4] any error in giving the instruction caused him prejudice. *Carines, supra*. Therefore, we find no error requiring reversal.

Affirmed.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra
/s/ Jeffrey G. Collins

[4] We note that the prosecution admitted evidence that there were two sets of foot prints found at the scene of the Grange break-in. This could be interpreted by the fact finder as establishing that more than one person committed the offense.