STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v	No. 216054 Wayne Circuit Court
GRADY HUDSON, Defendant-Appellant.	LC No. 98-004887

Before: Collins, P.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to forty to sixty years' imprisonment for the murder conviction, to be served consecutively to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court committed error requiring reversal when it gave a deadlocked jury instruction that substantially departed from the ABA standard jury instruction. We disagree. "Whether any deviation from ABA standard jury instruction 5.4 is substantial in the sense that reversal is required depends upon whether the deviation renders the instruction unfair because it might have been unduly coercive." *People v Hardin*, 421 Mich 296, 316; 365 NW2d 101 (1984). In other words, "could the instruction given cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement?" *Id*. at 314. "Where additional language contains 'no pressure, threats, embarrassing assertions, or other wording that would cause this Court to feel that it constituted coercion,' . . . that additional language rarely would constitute a substantial departure." *Id.* at 315, quoting *People v Holmes*, 132 Mich App 730, 749; 349 NW2d 230 (1984) (citation omitted). Another relevant factor to be considered in determining if the instruction was coercive "is whether the trial court required, or threatened to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals." *Hardin*, *supra* at 316.

Here, the trial court did not require, or threaten to require, the jury to deliberate for an unreasonable length of time or at unreasonable intervals. After the jury reported that it was

"hung," the court noted that the trial had lasted three days and that the jury had only been deliberating for an hour and a half, which was "really a very short period of time considering the nature of the case, the charges and the time that we spent trying the case." The court informed the jury that it would break for lunch, return an hour and a half later at 2:00 p.m., deliberate until 4:00 p.m., and if a verdict was not reached by that time, they would return the next day and continue deliberating. We do not find the court's schedule to be unreasonable. Although the instruction given departed from the ABA instruction, the instruction, as a whole, does not contain any pressure, threats, embarrassing assertions, or other wording that would constitute coercion. While we do not endorse departures from the standard instruction, we believe that the effect of the jury instruction given in this case "was not to coerce the jury, but to stress the need to engage in full-fledged deliberations while maintaining the integrity of the judicial system." *Id.* at 315, quoting *People v Bookout*, 111 Mich App 399, 404; 314 NW2d 637 (1981). Because the instruction given in this case was not unduly coercive, reversal of defendant's convictions is not required.

Defendant next argues that the trial court abused its discretion when it prevented defense counsel from inquiring on cross-examination whether prosecution witness Dion Smothers had committed robberies other than the robbery of defendant's girlfriend's father's home, which he admitted committing on direct examination. This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion and will reverse only where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). The scope of cross-examination is within the discretion of the trial court. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). Neither the Sixth Amendment's Confrontation Clause nor due process confers on a defendant an unlimited right to cross-examine on any subject. *Id.*

Here, Smothers testified on direct examination that defendant had threatened him and told him to stay out of the neighborhood after he caught Smothers stealing from his girlfriend's father's home. On cross-examination, defense counsel asked why Smothers had broken into that home, and Smothers responded that he needed money for Christmas. Defense counsel then repeatedly inquired whether Smothers had broken into other homes and "robbed" others in the neighborhood. The court sustained the prosecution's objections to defense counsel's questions.

Defendant contends that he was entitled, under MRE 608(b), to challenge Smothers' credibility on cross-examination with specific instances of conduct, and that theft crimes may be probative of a witness' truthfulness. See *People v Allen*, 429 Mich 558, 595-596; 420 NW2d 499 (1988). However, nothing in Smothers' testimony on direct examination suggested that he had committed other robberies. Defendant made no offer of proof to the court that it he had reason to believe that Smothers had actually committed or been accused of committing other theft crimes. See MRE 103(a)(2). Further, as this Court explained in *People v Parcha*, 227 Mich App 236, 241-244; 575 NW2d 316 (1997), not all theft crimes contain an element of dishonesty such that convictions of those crimes are probative of a witness' credibility. Only those theft crimes that involve "dishonesty by word," not just "dishonesty by conduct," are probative of credibility. *Id.* at 242-243. Again, because defendant made no offer of proof, there was no indication whether any alleged theft crimes, evidence of which defense counsel sought to elicit on cross-examination of Smothers, were probative of Smothers' credibility. Accordingly, we find that the court did not abuse its discretion in precluding questioning of Smothers with regard to other thefts.

In any event, even assuming that the court erred in not allowing defendant to question Smothers regarding other thefts, such error was harmless. Even if defendant succeeded in damaging Smothers' credibility in the eyes of the jury, given the strength and weight of the other eyewitness testimony presented at trial, it is not "more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Defendant next argues that he must be resentenced because his sentence is disproportionate. Defendant argues specifically that his sentence exceeds the sentencing guidelines. This Court reviews a trial court's sentence imposed on an habitual offender for an abuse of discretion. *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000). Our review of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), without reference to the guidelines. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Under the principle of proportionality, a sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *Milbourn, supra* at 635-636. "[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." *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

We find that defendant's sentence is proportionate to the offense and the offender. Defendant was sentenced, within the statutory limits, to forty to sixty years' imprisonment.[1] Further, defendant's criminal history reflects that defendant is unable to conform his conduct to the laws of society. Defendant was convicted in 1989 of possession of less than twenty-five grams of cocaine. He was sentenced to five years' probation, but violated probation twice. In January 1996, defendant pleaded guilty to receiving stolen property less than $100. In August 1997, while on probation, defendant attacked a man because the man stepped on defendant's friend's lawn. Defendant struck the man and the man fell and hit his head on the cement sidewalk; he died in the hospital the next day. Defendant pleaded guilty to manslaughter. Defendant was out on bond for the manslaughter charge when he committed the instant offense. As the trial court noted at sentencing, the victim in this case was an innocent bystander. Other innocent bystanders were also present and their lives were put in danger due to defendant's

[1] Second-degree murder is punishable by imprisonment for life or any term of years, in the discretion of the trial court. MCL 750.317; MSA 28.549. The third habitual offender statute, MCL 769.11; MSA 28.1083, provides that a court may sentence a defendant to imprisonment for life or a lesser term, where the subsequent felony, here second-degree murder, is punishable upon first conviction by imprisonment for life.

disregard for the laws of society. The sentence imposed by the trial court did not constitute an abuse of discretion.

Affirmed.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ William C. Whitbeck