STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED March 22, 2002
v	No. 223407 Tuscola Circuit Court
ALLEN NICHOLAS ZIMMERMAN, Defendant-Appellant.	LC No. 99-007479-FC

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of safe breaking, MCL 750.531, breaking and entering with intent to commit larceny, MCL 750.110, and larceny in a building, MCL 750.360. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of thirty to fifty years each for the safe breaking and breaking and entering convictions, and ten to fifteen years for the larceny conviction. He appeals as of right. We affirm.

I

Defendant argues that the evidence was insufficient to show that he was involved in the charged crimes. We disagree.

In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that each essential element of each crime was proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). An appellate court should not interfere with the jury's role as the sole judges of the facts, including the determination of the weight of evidence, and the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748 (1992).

At trial, James Smith testified that he and defendant broke into the Gagetown Inn and stole a safe and other money. They entered through the basement and went upstairs, where defendant broke the lock of an office door and tore down some plywood separating the office from the bar. According to Smith, they wheeled the safe outside and placed it in the trunk of defendant's girlfriend's car. After driving to a remote location, defendant removed a small cutting torch from the car and cut through the bottom of the safe. The two thereafter divided the money. Smith's testimony was corroborated by other witnesses, as well as physical evidence found during a search of defendant's residence. Viewed in a light most favorable to the

prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant was guilty of the crimes charged.

II

Defendant argues that the trial court erred in qualifying a police officer as an expert for purposes of explaining the likelihood of finding fingerprints on particular containers and surfaces. We disagree.

If the trial court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert may testify to the knowledge by opinion or otherwise. MRE 702. A witness may be qualified as an expert based upon a combination of his knowledge, skill, experience, training or education. MRE 702; *People v Haywood*, 209 Mich App 217, 224-225; 530 NW2d 497 (1995).

In this case, the witness testified that he had been a state policeman for nineteen years, and had been trained to determine which substances usually retain clear fingerprint impressions and which do not. Additionally, the witness stated that, in his position with the state police department, he was involved in ongoing communications with Michigan State Police Crime Laboratory personnel, which included discussions about the types of surfaces that would be expected to preserve fingerprint impressions. Moreover, he had personally attempted to fingerprint various materials, including paper. The trial court did not abuse its discretion in determining that the officer was qualified as an expert based upon his training and experience.

III

Defendant next argues that he was denied the effective assistance of counsel because trial counsel failed to object to testimony that, during searches of defendant's garbage and bedroom, the police found letters addressed to defendant from the Michigan Department of Corrections.

Because defendant failed to raise this issue in a motion for a new trial or an evidentiary hearing, our review is limited to the existing record. *People v Thew*, 201 Mich App 78, 90; 506 NW2d 547 (1993). To justify reversal, defendant must first show that counsel's performance was deficient. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). This requires a showing that counsel made errors "so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. To meet this burden, defendant must overcome a strong presumption that counsel's decisions constituted sound trial strategy. *Id.* at 690. Defendant must also show that the deficient performance "prejudiced the defense," i.e., the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*. at 687, 694; *People v Toma*, 462 Mich 281, 310-311; 613 NW2d 694 (2000).

Here, the testimony was relevant to the question of identification, i.e., to link defendant to incriminating items of evidence. It was not intended to emphasize that defendant had a prior criminal history. Defendant has not overcome the presumption that counsel's decision not to object to the testimony mentioning the source of the letters was a matter of sound strategy, so as

not to draw undue attention to the fact that defendant had a prior criminal history. Thus, defendant has failed to show that defense counsel was ineffective.

Defendant also argues that defense counsel was ineffective for not challenging the constitutionality of the warrantless searches of four garbage bags that were from defendant's residence pursuant to a "trash pick." We disagree.

Although the question of whether a warrantless search of garbage taken from the rear of a residence violates the Fourth Amendment continues to be a viable one, see e.g., *US v Certain Real Property Located at 987 Fisher Road, Grosse Pointe, Mich*, 719 F Supp 1396 1397 (ED Mich, 1989), the propriety of garbage searches of trash taken from the curb is well settled under federal and Michigan law. *California v Greenwood*, 486 US 35, 38-41; 108 S Ct 1625; 100 L Ed 2d 30 (1988); *In re Forfeiture of $10,780*, 181 Mich App 761, 764-765; 450 NW2d 93 (1989); *People v Pinnix*, 174 Mich App 445; 436 NW2d 692 (1989).

Here, the record is devoid of any indication that the garbage was seized under questionable circumstances. On the contrary, the trial testimony indicates that the police simply accompanied an employee of defendant's regular garbage service to defendant's house where they took control of the garbage bags on the regularly scheduled day for pick up, thus supporting the conclusion that the seizure was lawful. *In re Forfeiture of $10,780, supra* at 764-765. Because it is not apparent from the record that defense counsel could have successfully challenged the garbage searches, defendant has not demonstrated that defense counsel was ineffective for not challenging the searches.

IV

Defendant also argues that his sentences are disproportionate and resulted from improper judicial bias at sentencing. We disagree.

Although the trial court's comments at sentencing were harsh, they do not support a finding that the court was improperly biased against defendant. Indeed, as this Court observed in *People v Antoine*, 194 Mich App 189, 191; 486 NW2d 92 (1992), the language used by a court when imposing sentence need not be tepid. Viewed in context, the trial court's comments simply reveal that the court did not believe that defendant could be rehabilitated, given his lengthy and repetitive criminal history. Further, because defendant's lengthy criminal record amply demonstrates that he is unable to conform his conduct to the law, we find that his sentences are proportionate to the circumstances surrounding the offense and the offender. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997); *People v Bennett*, 241 Mich App 511, 515; 616 NW2d 703 (2000).

V

Defendant lastly argues that the trial court erred in denying his motion for a new trial based upon newly discovered evidence. We disagree.

To justify a new trial on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) including the new evidence on retrial would probably cause a different

result; and (4) the party could not with reasonable diligence have discovered and produced the evidence at trial. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995). After considering the evidence presented by defendant at the post-trial hearing, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Id.* Apart from the question of whether the alleged newly discovered evidence could have been discovered before trial with due diligence, we agree with the trial court that defendant failed to show that the evidence probably would have caused the jury to reach a different result.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot