# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 20, 2010 |
| v | No. 290300<br>Muskegon Circuit Court |
| DAVID NICHOLAS SNOW,<br><br>Defendant-Appellant. | LC No. 07-055241-FC |

Before: SERVITTO, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of safe breaking, MCL 750.531, breaking and entering with intent to commit a larceny, MCL 750.110, and fleeing and eluding, MCL 750.479a. He was sentenced as an habitual offender, third offense, MCL 769.11, to prison terms of ten to 27 years for the safe breaking conviction, five to 20 years for the breaking and entering conviction, and three to ten years for the fleeing and eluding conviction. Defendant now appeals his convictions and sentence as of right. We affirm defendant's convictions and remand for reconsideration of the scoring of offense variable (OV) 13, MCL 777.43.

## I. FACTUAL BACKGROUND

In January 2007, a police task force began investigating a series of burglaries near Muskegon, Michigan. On July 20, 2007, after receiving new information related to the investigation, police officers searched the duplex where defendant and his codefendant, Ryan Armstrong, resided. After the search, the officers put the duplex under surveillance. In the late evening hours of July 26 or early morning hours of July 27, Detective Anthony Nanna observed a red truck with two occupants drive away from the duplex. Detective Julie Sanderson, along with several other officers, followed the truck as it made numerous stops in the Muskegon area. She believed that the occupants of the truck were males and that defendant was the driver. When the truck momentarily disappeared near the Lincoln Golf Club, Officer Brian Cribbs exited his vehicle, walked down the road, and observed the truck on a railroad bed, unoccupied. He then retreated to the forest and waited. Officers set up a perimeter around the area and waited for someone to approach the truck.

Thereafter, police officers observed two men riding in a golf cart on the roads near the railroad bed. Lieutenant Cam Henke observed the golf cart traveling north on Whitehall Road and then east on Michillinda Road. Officer Cribbs could hear the men talking, and observed the

golf cart traveling east on Michillinda Road, whereafter it drove into the woods on the north side of the road. The men left the golf cart, walked to the truck, backed the truck up to the golf cart, where they had a discussion about bolt cutters, and then left the area in the truck. When the truck turned into a driveway, officers approached the truck and said, "police . . . hands up." The truck then sped away, and the officers followed. The men in the truck looked back at the officers and threw items out of the truck windows. The truck eventually crashed and the passenger fled. The driver, later identified as defendant, was arrested. He was not wearing any shoes. Officers found cash, packs of cigarettes, liquor, and shoes in the truck and along the side of the road where the chase occurred. Shortly after defendant's arrest, Detective Nanna observed a man dressed in dark clothes and gloves and not wearing any shoes limp to the side of the duplex and crawl in through a window. The man, later identified as Armstrong, was arrested.

During the chase and defendant's arrest, police officers discovered a break-in at the Lincoln Golf Club. Maintenance sheds were open and various tools, including bolt cutters, had been taken. A pair of gloves and cash were taken from the pro shop, and a large plasma television was taken from the clubhouse wall. Doors were damaged, the contents of drawers dumped out, and a safe in a clubhouse storage room broken into. Officers also discovered an abandoned golf cart on Whitehall Road. They found a large plasma television on the cart and pop, liquor, candy, and crackers on and around the cart.

Following a jury trial, defendant was convicted and sentenced as described. He now appeals as of right.

## II. STATEMENTS ADMITTED UNDER MRE 801(d)(2)(A) AND (d)(2)(E)

Defendant argues that the trial court abused its discretion in admitting Officer Cribbs' testimony regarding two statements he overheard while hiding in the forest. We disagree.

Officer Cribbs testified that when he was hiding in the forest near the truck, he heard two men talking. They drove up in a golf cart, stopped, and got out of the cart. Both men entered the truck, the truck backed up, and then one man got back out. The officer heard the man that exited the truck ask: "Dave, do you want these bolt cutters[?]" He then heard the other man respond: "[N]o, get rid of them." Before the truck drove away, the officer heard something hit the ground. Later in the investigation, he found bolt cutters on the ground, near the abandoned golf cart and the area where the truck had been parked. Defense counsel objected to the admission of the two statements, arguing that they constituted inadmissible hearsay. The trial court admitted the first statement as the statement of a co-conspirator under MRE 801(d)(2)(E), and admitted the second statement as the statement of a party opponent under MRE 801(d)(2)(A).

Defendant argues that the trial court improperly admitted both statements. We review the admission of evidence for an abuse of discretion. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006). An abuse of discretion occurs "when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Under MRE 801(d)(2)(E), a statement is not hearsay if it is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." A party claiming that a statement is admissible under

this hearsay exclusion must establish three things. First, the proponent of the statement "must establish by a preponderance of the evidence that a conspiracy existed through independent evidence." *People v Martin*, 271 Mich App 280, 316-317; 721 NW2d 815 (2006). Second, the proponent of the statement must establish that it "was made during the course of the conspiracy." *Id*. at 317. "The conspiracy continues until the common enterprise has been fully completed, abandoned, or terminated." *Id*. (internal quotation marks and citation omitted). Third, the proponent of the statement must establish that it furthered the conspiracy. *Id*.

The trial court properly exercised its discretion in admitting the first statement as the statement of a co-conspirator. "Conspiracy is defined by common law as a partnership in criminal purposes . . . . Under such a partnership, two or more individuals must have voluntarily agreed to effectuate the commission of a criminal offense." *People v Justice*, 454 Mich 334, 345-346; 562 NW2d 652 (1997). Although there is no direct evidence that defendant and Armstrong agreed to commit an offense, "[c]ircumstantial evidence and inference may be used to establish the existence of [a] conspiracy." *Martin*, 271 Mich App at 317. Testimony at trial established that the duplex where defendant and Armstrong resided was under surveillance as part of an investigation into a series of breaking and enterings. During the surveillance, officers observed two men, believed to be defendant and Armstrong, drive away from the duplex in a truck. The men then parked the truck in a railroad bed. When the men returned, they were riding in a golf cart together, and then left the scene together in the truck. They fled from police in a high speed chase, throwing shoes and stolen items out the truck windows. It was later discovered that during the time the men were away from the truck, there was a break-in at the golf club. After his arrest, defendant admitted to the officers guarding him that during the police chase, it was "pretty exciting," Armstrong told him to "go, go, go, go," and he told Armstrong, "thanks for getting me into all this kind of stuff." Based on this circumstantial evidence, the trial court properly found that defendant and Armstrong conspired to break into the golf club, steal goods, and then escape the scene.

Additionally, we agree with the trial court that the statement, "Dave, do you want these bolt cutters[?]" was made during the course of the conspiracy and in furtherance of the conspiracy. See *id*. Defendant argues that at the time the statement was made, any conspiracy was already complete. But in *People v Woodfork*, 47 Mich App 631, 633-634; 209 NW2d 829 (1973), this Court suggested that codefendants may conspire to commit a crime and successfully escape capture. See also *United States v Carter*, 760 F2d 1568, 1581 (CA 11, 1985) (holding that statements made during the defendants' escape from drug agents were made during the course of and in furtherance of their conspiracy to import marijuana because arriving undetected, or in the alternative escaping, is a primary objective in every drug smuggling operation). Here, there was evidence that defendant and Armstrong conspired to flee the scene with their stolen goods and escape arrest. Thus, the statement about the bolt cutters was made during the course of the conspiracy. Further, considering the evidence that the bolt cutters referred to were stolen from the golf club, it is reasonable to conclude that Armstrong asked defendant about the bolt cutters to determine which stolen goods they would keep and which they would dispose of, or

whether to dispose of incriminating evidence. Accordingly, we hold that the trial court properly admitted the first statement under MRE 801(d)(2)(E).[1]

Under MRE 801(d)(2)(A), a statement is not hearsay if it is offered against a party and is the party's own statement. Defendant argues that the trial court improperly admitted the second statement, "no, get rid of them," under MRE 801(d)(2)(A) because there was insufficient evidence that defendant made the statement. We disagree. As indicated, officers followed the red truck from the duplex where defendant and Armstrong resided. Detective Sanderson testified that she believed there were two men in the truck and that defendant was the driver. After finding the truck unoccupied in the railroad bed and hiding in the forest, Officer Cribbs heard two men talking. He saw them drive up in the golf cart, stop, get out of the cart, and then enter the truck. After one man got back out the truck, the officer heard the exchange regarding the bolt cutters. The man who made the first statement, allegedly Armstrong, referred to "Dave." [Defendant is David Snow.] Thus, it is reasonable to assume that defendant was the person responding to the first statement. Further, after the truck drove away and crashed during the high speed chase, police confirmed that defendant was the driver. There was sufficient evidence establishing that defendant made the second statement and it was properly admitted.

Finally, even if the trial court had abused its discretion in admitting either or both of the statements, any error was harmless. Reversal is not required for a preserved, nonconstitutional error unless it is more probable than not that the error was outcome determinative. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In light of the substantial amount of evidence establishing defendant's guilt, he cannot prove that the outcome of the proceedings would have been different, but for the admission of these two isolated and very brief statements. See *id*.

## III. OVs 12 AND 13

Defendant challenges the scoring of OVs 12 and 13. The sentencing court has discretion in determining the number of points to be scored for the sentencing variables provided that there is evidence on the record that adequately supports the scoring. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). We review de novo the proper interpretation and application of sentencing guidelines. *People v Gullett*, 277 Mich App 214, 217; 744 NW2d 200 (2007).

### A. OV 12

Defendant first argues that the trial court improperly scored OV 12 at ten points. We disagree.

[1] The trial court noted that the first statement might also be admissible to give meaning to the second statement. Although we agree that that may have been a legitimate reason to admit the first statement, the jury was not instructed to consider the statement for that limited purpose.

OV 12 considers contemporaneous felonious criminal acts. MCL 777.42. Ten points may be scored if a defendant committed "[t]hree or more contemporaneous felonious criminal acts involving other crimes." MCL 777.42(1)(c). Contemporaneous, for purposes of this OV, means that the "act occurred within 24 hours of the sentencing offense," MCL 777.42(2)(a)(*i*), and "has not and will not result in a separate conviction," MCL 777.42(2)(a)(*ii*).

At sentencing, the prosecution argued that ten points should be scored for OV 12 based on defendant's breaking into one of the golf club's maintenance sheds and driving away of two golf carts, specifically the carts found on Whitehall Road and Michillinda Road near the truck. Defense counsel objected, arguing that those three acts were "part and parcel of the entire operation" for which defendant was convicted, and therefore, should not be counted in scoring OV 12. The trial court agreed with the prosecution, stating that the "testimony this Court heard was that at least two buildings were broken into and at least two carts were moved so regardless of how the jury verdict equates with the jury instruction, factually, I think those things are true . . . ." Defendant did not argue at sentencing, nor does he argue on appeal, that he did not commit the three acts. Rather, defendant argues that there is only one "unit of prosecution" arising from his actions, for which he has already been convicted.[2]

In regard to breaking into the maintenance shed, defendant concedes that a shed may be considered a building or structure within the meaning of the breaking and entering statute, MCL 750.110. See *People v Adams*, 75 Mich App 736, 738; 255 NW2d 752 (1977). Furthermore, as noted by the prosecution, "breaking and entering is not a continuing offense. It is completed once the actor has entered the building." *People v Patterson*, 212 Mich App 393, 395; 538 NW2d 29 (1995). Thus, the breaking and entering of separate buildings, albeit on the same grounds, could give rise to separate convictions under MCL 750.110. In this case, defendant was initially charged with breaking and entering "the golf pro-shop and/or dining facility." There was no mention of a maintenance shed in the charging documents. At trial, the prosecution presented evidence that defendant and Armstrong broke into more than one of the golf club's buildings, including at least one maintenance shed. The jury verdict form asked whether defendant was guilty of "Breaking and Entering a Building," as did the jury instructions. Thus, although the jury heard evidence relating to more than one building, it was instructed to consider whether defendant broke into *a* building. Because defendant was convicted of breaking and entering only one of the golf club's buildings, it was not an abuse of discretion to conclude that his breaking and entering of a second building constituted a contemporaneous felonious criminal act for purposes of OV 12.

In regard to driving away the two golf carts, the prosecution argued at sentencing that defendant may not have intended to steal the carts, but his actions constituted "unlawful use of a

[2] All of the cases cited by defendant on appeal discuss the "unit of prosecution" rule in the context of double jeopardy challenges and are not directly applicable here. Even if we applied the analysis in those cases here, the dispositive question in determining the proper "unit of prosecution" is whether the Legislature intended that more than one conviction result under the circumstances presented in the case. See, e.g., *People v Barber*, 255 Mich App 288, 292-293; 659 NW2d 674 (2003) (considering whether the Legislature intended multiple convictions of arson stemming from a single building fire that spread to two more buildings).

motor vehicle." The trial court accepted the prosecution's argument. Presumably, the prosecution intended to argue that defendant's actions constituted two distinct violations of either MCL 750.413 or MCL 750.414. MCL 750.413 provides that "[a]ny person who shall, wilfully and without authority, take possession of and drive or take away, and any person who shall assist in or be a party to such taking possession, driving or taking away of any motor vehicle, belonging to another, shall be guilty of a felony." The offense requires an intent to take the vehicle unlawfully, but does not require an intent to steal the vehicle or permanently deprive the owner of his or her vehicle. *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993). MCL 750.414 governs the taking or use of a motor vehicle without authority but without intent to steal, or being party to such unauthorized taking or use. Defendant was not charged with either offense, but the evidence presented at trial established that at least two golf carts were driven off the golf club grounds onto public roads, used to transport stolen goods and to transport defendant and Armstrong to the truck, and then abandoned. Again, defendant does not dispute on appeal that he committed the offenses. Thus, the trial court did not abuse its discretion in concluding that defendant's taking of the carts constituted two contemporaneous felonies under OV 12.[3]

The trial court properly scored OV 12 at ten points.

B. OV 13

Defendant further argues that the trial court improperly scored OV 13 at 25 points. OV 13 considers a continuing pattern of criminal behavior. MCL 777.43. Twenty-five points may be scored if the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c) (formerly MCL 777.43(1)(b)).[4] "[A]ll crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

In scoring 25 points for OV 13, the trial court considered defendant's prior conviction for resisting and opposing, his conviction for safe breaking in this case, and a charge for first-degree home invasion. Defendant's presentence investigation report (PSIR) indicates that he was arrested for first-degree home invasion on July 9, 2004, and lists a disposition of: "Nolle Pros. Per plea agreement in instant case."[5, 6] At sentencing, defense counsel argued that the home invasion charge should not be counted in scoring OV 13 because although the PSIR "says per plea agreement," defendant asserts the case "was dismissed due to an evidentiary issue long

[3] Because neither party has raised the issue, we decline to address whether a golf cart may be considered a "motor vehicle" as the term is defined in MCL 750.412.

[4] MCL 777.43 was amended effective April 1, 2009. [Defendant was sentenced in March 2008.] The changes to the statute do not affect our analysis in this case.

[5] Nolle prosequi, often shortened to nolle pros, is a "legal notice that a lawsuit or prosecution has been abandoned," or a "docket entry showing that the plaintiff or the prosecution has abandoned the action." Black's Law Dictionary (8th ed), p 1074.

[6] The "instant case" referenced in the PSIR was a prior case involving defendant, not the case at hand.

before he agreed to make any plea agreements . . . because it couldn't be proven because it didn't happen. Or he wasn't responsible for it . . . ." The trial court stated that while there was an "information gap" in regard to the home invasion charge, it would count the charge for purposes of OV 13, pursuant to the statement in the PSIR that the charge was dismissed "per plea agreement, per instant case." The court made no findings regarding whether defendant committed the charged home invasion. On appeal, defendant reiterates that the charge should not be counted in scoring OV 13 because there is no record evidence that the crime actually occurred.

MCL 777.43 provides that all offenses "shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Thus, under the plain language of the statute, charges that have been dismissed can be counted for purposes of OV 13. However, factors used in sentencing must have support in the record, *Hornsby*, 251 Mich App at 468, and where effectively challenged, must be proved by a preponderance of the evidence, *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). In *People v Ratkov (After Remand)*, 201 Mich App 123, 125-126; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994), this Court explained:

> A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial. The contents of the presentence report are presumptively accurate if unchallenged by the defendant. However, once a defendant has effectively challenged an adverse factual assertion contained in the presentence report or any other controverted issues of fact relevant to the sentencing decision, the prosecution must prove by a preponderance of the evidence that the facts are as asserted. If the record provides insufficient evidence upon which to base the decision supporting or opposing the scoring, the court in its discretion may order the presentment of further proofs. [Citations omitted.]

In *People v Walker*, 428 Mich 261, 268; 407 NW2d 367 (1987), abrogated in part on other grounds by *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997), our Supreme Court described an "effective" challenge to an adverse factual assertion:

> Thus, a defendant who seeks to challenge a proposed scoring decision bears the burden of going forward with an "effective challenge." Whether that requirement is satisfied with a flat denial of an adverse factual assertion, or whether an affirmative factual showing is required, will depend upon the nature of the disputed matter. Some negatives are obviously difficult or impossible to demonstrate by affirmative proof.

In this case, defendant challenged the assertion in his PSIR that the July 9, 2004, home invasion charge was dismissed pursuant to a plea agreement, arguing that the offense never occurred and the charge was dismissed because of evidentiary issues long before any plea agreement. Defendant offered nothing in support of his argument (nor has he on appeal), other than his own assertion that the PSIR is incorrect. Arguably, defendant's challenge was ineffective, because he failed to put forth any evidence regarding the timing of the dismissal in

relation to any plea proceedings or the true reason for the dismissal of the charge. We conclude, however, that even if the PSIR is presumed true, there is insufficient record evidence establishing that defendant actually committed the charged home invasion. The only evidence the prosecution presented indicating that defendant committed the offense was the statement in the PSIR that he was arrested and that the charge was subsequently dismissed per the alleged plea agreement. Factors used in sentencing must have adequate support in the record, *Hornsby*, 251 Mich App at 468, and a dismissed charge, without something more, cannot be said to constitute actual evidence of the commission of a crime.

Accordingly, we remand for reconsideration of the scoring of OV 13.[7] If the trial court determines that the home invasion has not been shown by a preponderance of the evidence, the court shall consider whether to resentence defendant. If the court determines that the offense has been proved by a preponderance of the evidence, then OV 13 was properly scored and the trial court may deny resentencing. See *People v Chesebro*, 206 Mich App 468, 474; 522 NW2d 677 (1994).

We affirm defendant's convictions and remand for reconsideration of the scoring of OV 13. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

[7] On the sentencing grid for Class C offenses, MCL 777.64, without the scoring of 25 points for OV 13, defendant's OV level is reduced from level IV to level II.