STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEINO TIYWAN NABORS,

Defendant-Appellant.

UNPUBLISHED
August 12, 2021

No. 354377
Kalamazoo Circuit Court
LC No. 2019-000136-FH

Before: TUKEL, P.J., and K. F. KELLY and GADOLA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of breaking and entering into a building with intent to commit a larceny, MCL 750.110, conspiracy to commit breaking and entering into a building with intent to commit a larceny, MCL 750.157a, larceny in a building, MCL 750.360, and conspiracy to commit larceny in a building, MCL 750.157a. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 42 months to 15 years' imprisonment for each conviction, to be served concurrently. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant's convictions arose from his involvement in the breaking and entering of a Checkers restaurant and the larceny of the contents of the restaurant's safe. Defendant's girlfriend, Keeana Fruge, worked as a shift manager at the restaurant. Fruge was one of a few employees that had access to a code for entry into the building, a code to disarm the alarm system, and a key to open the restaurant's safe. Fruge was acquainted with Abraham Saffold, who testified at trial in exchange for dismissal of the charges related to the burglary of the Checkers. Saffold admitted that he entered the restaurant and he used the passcodes and safe key to take $2,800.00 in cash and store coupons. Saffold's actions were recorded on surveillance video. Although Saffold admitted that he obtained the idea to rob the restaurant from a man he knew as "KI" and Fruge, he declined to identify defendant as the accomplice known as KI at trial. Nonetheless, Saffold testified that: (1) Fruge dropped him and KI off near the restaurant; (2) KI acted as the lookout while Saffold committed the crimes; (3) KI handled the bag of money after the larceny was committed; (4) Fruge picked up Saffold and KI; and (5) after being picked up, the three split the money.

Fruge admitted to driving defendant, her boyfriend, and Saffold the night before the larceny from Kalamazoo to a Grand Rapids nightclub. She acknowledged having a conversation with Saffold and defendant about potentially burglarizing the Checkers which she claimed amounted to nothing more than a "joke." Fruge testified that she dropped Saffold and defendant off together near the restaurant the morning of the theft and she picked them up 30 to 45 minutes later. When she picked up the men, defendant had cash that she had not previously seen.

Investigating police detectives examined the phone logs between Saffold, Fruge, and defendant and found contact between Saffold's and defendant's phones on the evening before the incident and on the day of the incident. It was also determined that Saffold's, defendant's, and Fruge's phones were in Kalamazoo on the evening leading up to the incident. But later that night, all three of their phones were in Grand Rapids. Finally, the phones were traced back to Kalamazoo before 5:00 a.m. on the day of the incident. Additionally, Fruge's phone records revealed text messages from defendant at around 4:00 a.m. The first message said, "F**k him let me do it. We can keep it all," and the second message said, "It would be worth it FRFR for just us." Although Fruge initially denied that defendant played any role in the crimes, she changed her story when confronted with these text messages.

Defendant testified in his own defense and denied any participation in the crimes. Further, defendant explained that the text messages did not provide evidence of his intent to commit the crimes on his own without the aid of Saffold. Rather, he contended that another man was renting a hotel room for Fruge, and defendant offered to pay for the room. Despite this denial of culpability, the jury convicted defendant as charged.

II. SUFFICIENCY OF THE EVIDENCE

Defendant alleges that the prosecution failed to provide sufficient evidence that he committed, aided and abetted, or conspired to commit breaking and entering or larceny in a building. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Thorne*, 322 Mich App 340, 344; 912 NW2d 560 (2017). The evidence is examined in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the prosecutor proved the elements of the crime beyond a reasonable doubt. *People v Miller*, 326 Mich App 719, 735; 929 NW2d 821 (2019). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

In order to convict on the breaking and entering with intent charge, the prosecutor must show that the defendant broke into a building, the defendant entered the building, and during the commission of the breaking and entering, the defendant intended to commit a larceny therein. MCL 750.110; *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998). The elements of larceny include the trespassory taking and carrying away of the personal property of another with the intent to steal that property. *People v March*, 499 Mich 389, 401; 886 NW2d 396 (2016). For purposes of MCL 750.360, there is an additional requirement that the taking occur within the confines of a building. *March*, 499 Mich at 401.

In light of the video surveillance capturing Saffold's theft of money from the safe, the prosecutor theorized that defendant's participation in the crimes was as an aider and abettor. "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and upon conviction shall be punished as if he had directly committed such offense." MCL 767.39. To prevail on an aiding and abetting theory, the prosecutor must present evidence that: (1) the offense was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement assisting in the commission of the crime; and (3) the defendant either intended the commission of the crime or had knowledge that the principal intended its commission at the time that defendant gave aid and encouragement. *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999).

In order to convict on a conspiracy charge, the prosecutor must prove the intent to accomplish the illegal objective as well as the intent to work with others in accomplishing it. *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). A conspiracy offense does not require that each coconspirator have full knowledge of the extent of the conspiracy or even the identities of the other coconspirators in order to be guilty. *People v Hunter*, 466 Mich 1, 7; 643 NW2d 218 (2002). "[D]irect proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties." *People v Justice*, 454 Mich 334, 347; 562 NW2d 652 (1997).

Defendant contends that there was insufficient evidence to support his convictions because there was no physical evidence linking him to the crimes or the location, there was no evidence of assistance, and there was no evidence of his agreement to conspire with Saffold and Fruge. Although there was no physical evidence linking defendant to the crime, the jury was entitled to draw inferences from both direct and circumstantial evidence alike. *Hardiman*, 466 Mich at 428. Moreover, in a case relying on circumstantial evidence, the prosecutor need not negate every reasonable theory consistent with the defendant's innocence, but need only present sufficient evidence to convince a reasonable jury in light of whatever contradictory evidence defendant submits. *Id*. at 423-424.

Despite defendant's challenge to a lack of physical evidence, when examined in context with other evidence, both Saffold[1] and Fruge testified that a third man, defendant, acted as a lookout while Saffold committed the theft, and that Fruge picked them up shortly after the crimes were committed. Fruge acknowledged that she dropped off Saffold and defendant near the restaurant where defendant acted as a lookout during Saffold's commission of the crimes. Additionally, Fruge acknowledged that defendant had extra cash on his person when she picked him up from that same location. Any deficiencies in Saffold's testimony regarding coconspirators were supplied by Fruge's statement and testimony.

The cell phone evidence introduced at trial also allowed the jury to conclude that defendant was with Fruge and Saffold the prior evening and through the morning when the crimes occurred. Nonetheless, the defense explored the limitations of cell phone tower data with the police. Indeed,

[1] Although Saffold did not identify defendant at trial, Fruge's testimony and the cell phone records allowed the jury to conclude defendant was the lookout.

defense counsel argued that the direction of the cell phone signal or the receiving tower was information beyond the knowledge of the police and could only be explained by an engineer. The validity and import of the cell phone data presented an issue for resolution by the jury. *Id*.

With regard to the challenge to the evidence of conspiracy, defendant contends that the jury could not conclude that he knowingly agreed to commit the breaking and entering with intent and larceny offenses. However, the prosecutor presented evidence that defendant and Fruge communicated through text messages. Fruge received messages from defendant at around 4:00 a.m. before the crimes were committed, stating "F**k him let me do it. We can keep it all," and "It would be worth it FRFR for just us." Defendant testified that the text messages reflected his insecurities in his relationship with Fruge and his request that he pay for a hotel room. However, the prosecution submitted that these messages directly referenced the planned burglary of the Checkers Restaurant. It is apparent from the jury verdict that this conflict in the evidence was resolved in favor of the prosecution and that the evidence reflected defendant's involvement in the planning and commission of the crimes. Indeed, when viewed in a light most favorable to the prosecution, the evidence was sufficient to satisfy the elements of the crimes beyond a reasonable doubt.

III. SENTENCING PREMISED ON REFUSAL TO ADMIT GUILT

Defendant contends that he is entitled to resentencing because the trial court erred in sentencing him, in part, based on his refusal to admit guilt, violating his right to due process. We disagree.

Questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A court cannot base its sentence even in part on a defendant's refusal to admit guilt." *People v Hatchett*, 477 Mich 1061 (2007).[2] When determining whether sentencing was improperly influenced by the defendant's failure to admit guilt, an appellate court focuses on three factors: "(1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987).

During defendant's sentencing, the court stated:

> Okay, when I sentence you, [defendant], I balance the principles of punishment, rehabilitation, protection of society, as well as deterrents. I've certainly considered the guideline range, which of course incorporates your criminal history. And the Prosecutor is correct, it is an atrocious one. You have prior to this incident, five adult felony convictions that go along with 16 adult misdemeanors. Your juvenile history is atrocious as well, five mis – excuse me – five felony adjudications. I note that four of them arose out of the same, um,

[2] Although this conclusion was rendered in a Michigan Supreme Court order, it constitutes binding precedent because it contained an understandable rationale. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006).

> petition, one misdemeanor. When this incident occurred, you were on parole. According to [the probation officer], as far as parole is concerned, you've already been sanctioned as a result of your behavior here. I note that you're in generally good physical health, you have a number of mental health concerns, I take that into consideration as well. I note that [the probation officer] found you to be cooperative in the preparation of the presentence report.
>
> There still appears to be, as far as the Court is concerned, no remorse on your part as a result of your involvement in this case. It is obvious that the Jury did not believe your version of the events, and – and subsequently then found you guilty of not one, but four criminal charges that you're facing in this case.

The trial court's statement at sentencing demonstrates that the failure to express remorse was merely made in passing and a more severe sentence was not imposed. It is important to note that both before and after this statement, the court explicitly stated which factors were taken into consideration regarding defendant's sentencing. There was no mention of defendant's lack of remorse being considered as a factor in his sentencing, and the trial court did not equate it with a refusal to admit guilt. In fact, at the hearing on the motion to correct an invalid sentence, the trial court expressly clarified that it "did not impose a sentence based on failure to admit guilt." The court also stated that it did not impose a more severe sentence because defendant maintained his innocence.

Even if a lack of remorse is indistinguishable from failure to admit guilt as defendant maintains, it is of no import here because the "record shows that the court did no more than address the factor of remorsefulness as it bore upon defendant's rehabilitation[.]" *Id*. In the context of lack of remorse bearing upon a refusal to admit guilt, the court's reference to a persistent claim of innocence does not rise to error requiring reversal. *Id*. at 713-714. Here, the court's own admission and a casual reading of the sentencing transcript demonstrate that the court simply remarked on defendant's lack of remorse. The court neither tried to get defendant to proclaim his guilt, nor did the court suggest leniency if defendant was to admit his guilt. Accordingly, defendant is not entitled to resentencing.

IV. DISPROPORTIONATE SENTENCING

Lastly, defendant submits that his sentences are disproportionate when considering his circumstances, including his mental health issues, and the nature of the offenses, thereby entitling him to resentencing. We disagree.

The appellate court reviews the proportionality or reasonableness of a sentence under the abuse of discretion standard of review. *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017); *People v Milbourn*, 435 Mich, 630, 636; 461 NW2d 1 (1990). An abuse of discretion occurs where a trial court's sentencing decision "falls outside the range of reasonable and principled outcomes." *People v Everett*, 318 Mich App 511, 516; 899 NW2d 94 (2017).

The principle of proportionality "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Steanhouse*, 500 Mich at 459. Defendant asserts that while the applicable sentencing guidelines

range is a "highly relevant consideration" to proportionality, there is no longer a presumption of reasonableness for a sentence that falls within the sentencing guidelines. *Milbourn*, 435 Mich at 636, 661. However, when a trial court imposes a sentence within the minimum sentencing range, the only factors for determining whether resentencing is required due to a disproportionate sentence are inaccurate information relied upon in determining the sentence and error in scoring the sentencing guidelines. See MCL 769.34(10); *People v Schrauben*, 314 Mich App 181, 196, n 1; 886 NW2d 173 (2016). Defendant does not allege a scoring error nor a claim that inaccurate information served as the basis of his sentence.

Consequently, there is a presumption of proportionality which can only be overcome if defendant demonstrates something unusual about the circumstances of the case which renders the sentence disproportionate. *People v Bowling*, 299 Mich App 552, 558; 830 NW2d 800 (2013). Defendant submits that several mitigating factors were not considered, including his need for mental health treatment, his failure to present a danger to the community, and his strong potential for rehabilitation. However, the factors cited by defendant are not unusual, and he failed to cite circumstances of the case which would make the sentences imposed disproportionate. Defendant has not shown abuse of discretion in light of *Schrauben*, *Milbourn*, and *Steanhouse*.

Affirmed.

/s/ Jonathan Tukel
/s/ Kirsten Frank Kelly
/s/ Michael F. Gadola