STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2011
v	No. 296684 Saginaw Circuit Court
ANTHONY BOLES, Defendant-Appellant.	LC No. 09-032163-FH

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of larceny in a building, MCL 750.360, and conducting a criminal enterprise, MCL 750.159i(1). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 78 months to 15 years for the larceny convictions and 78 months to 20 years for the criminal enterprise conviction. Defendant appeals as of right. We affirm in part, reverse in part, and remand for vacation of defendant's conviction and sentence for conducting a criminal enterprise.

I. BASIC FACTS

On September 9, 2008, Jennie Sumner, a surgical assistant for two oral surgeons, saw a male walk out of the surgeons' interior office and leave the building through a back door. The man drove away in a "black older style Lincoln, Cadillac type" vehicle. After the man left, it was discovered that $300 from an employee's purse, a laptop, and a cellular telephone were missing.

On September 13, 2008, Ellen Haelein, an employee of Angela's flowers, heard the store's delivery door open. After she heard the delivery door "close again," Haelein walked to the back room. She did not see anybody, but she noticed that her purse was gone. The contents of her purse included a digital camera, eyeglasses, and $180. That same day, Michael Westendorf, an employee of Barewood Furniture, and Kim Gregory, owner of Spartan Pools, encountered a man in a backroom of the respective businesses. The man drove away from Barewood Furniture and Spartan Pools in a black Cadillac.

A police officer observed a 1995 Cadillac at a party store near Spartan Pools; the driver of the vehicle was defendant. Haelein's digital camera and eyeglasses were found in the

Cadillac, and Haelein's purse was found in a nearby dumpster. In addition, the tread of the shoes defendant was wearing matched shoeprints left at Spartan Pools. Defendant was driven to Spartan pools for "identification or elimination." Gregory identified defendant as the man he saw in the store's backroom.

II. ANALYSIS

Defendant argues that the on-the-scene identification procedure at Spartan Pools was unduly suggestive, violating his right to due process. We disagree.

A trial court's decision to admit identification evidence is reviewed for clear error. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

An identification procedure violates a defendant's right to due process when, under the totality of the circumstances, "it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998); *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). This Court has repeatedly recognized the importance of on-the-scene identifications. In *People v Libbett*, 251 Mich App 353, 359; 650 NW2d 407 (2002), it stated that on-the-scene identifications are "reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime, and subject to arrest, or merely an unfortunate victim of circumstance" (quotations marks and citation omitted). See also *People v Purofoy*, 116 Mich App 471, 480; 323 NW2d 446 (1982); *People v Johnson*, 59 Mich App 187, 189-190; 229 NW2d 372 (1975). Here, there is nothing in the record to suggest that the police acted for any reason other than to determine whether defendant was connected to the crimes. *Libbett*, 251 Mich App at 363. Police officers brought defendant to Spartan Pools for identification by Gregory less than 20 minutes after defendant was stopped by the police. In addition, while the police officers informed Gregory that they had a suspect they wanted him to identify, they made no suggestive comments during the identification procedure. Under the totality of the circumstances, the trial court did not clearly err in allowing the identification testimony.

Defendant also argues that he was denied the effective assistance of counsel because trial counsel did not object to Brian Wakeman's identification of him as the perpetrator of a 2006 breaking and entering. According to defendant, Wakeman's pretrial identification of defendant was unfairly suggestive because Wakeman had been told by a police officer that his description of the perpetrator matched defendant. We disagree.

Because no *Ginther*[1] hearing has been held on defendant's ineffective assistance claim, our review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Here, defendant relies on the transcript of the hearing on his motion to suppress identification in the 2006 case concerning the breaking and entering of the Wakeman

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Funeral Home. The transcript is not a part of the record in this case and, therefore, cannot be considered. *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009). There is nothing in the record to suggest that counsel's failure to object to Wakeman's identification of defendant at trial fell below an objective standard of reasonableness. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).[2] We find no merit to defendant's claim of ineffective assistance of counsel.

Next, defendant argues that his conviction for conducting a criminal enterprise was not supported by sufficient evidence because there was no evidence that he was associated with or employed by someone other than himself. We agree.

In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). We review de novo issues of statutory interpretation. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010).

MCL 750.159i(1) provides: "A person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity." A "person" is defined by MCL 750.159f(d) as "an individual, sole proprietorship, partnership, cooperative, association, corporation, limited liability company, personal representative, receiver, trustee, assignee, or other legal or illegal entity." An "'[e]nterprise' includes an individual, sole proprietorship, partnership, corporation, limited liability company, trust, union, association, governmental unit, or other legal entity or a group of persons associated in fact although not a legal entity. . . ." MCL 750.159f(a).

There is no binding case law analogous to the present situation. Consequently, whether defendant's conviction was supported by sufficient evidence is entirely dependent on statutory interpretation. In interpreting a statute, this Court's primary goal is to determine and effectuate the legislature's intent. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). When ascertaining the legislature's intent, we first look to the language used in the statute. *People v Droog*, 282 Mich App 68, 70; 761 NW2d 822 (2009). Plain and unambiguous language, like that present in this statute, must be enforced as written, *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004), and we must enforce all the words contained in the statute. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998); *Helder v North Pointe Ins Co*, 234 Mich App 500, 504; 595 NW2d 157 (1999).

We hold that the evidence contained in the record was not sufficient to convict defendant of operating a criminal enterprise. Under the plain terms of the statute, defendant clearly could be an "enterprise", because that term includes an individual, and clearly he is a "person" because that also includes an individual. However, the statute requires that a person be "employed by, or

[2] Similarly, defendant fails to establish that there is a reasonable probability that, absent Wakeman's identification of him, the result of his trial would have been different. *Uphaus*, 278 Mich App at 185.

associated with, an enterprise", and here there is no evidence that defendant was employed by or associated with an enterprise while committing these crimes.

"Associate" means "to come together as partners, friends or companions." Webster's New Collegiate Dictionary (8th Edition, 1980). This definition recognizes that to associate with means to "come together" with someone else, whether it be an individual, sole proprietorship, or other entity coming within the statutory definition of enterprise. MCL 750.159f(a). Clearly defendant was not "associated" with an enterprise because he did not come together with anyone falling within the definition of enterprise.

In order to have been properly convicted, then, defendant would have to have been "employed by" an enterprise. Using the applicable definitions, the jury would have to conclude that defendant ("a person" which means an "individual") was "employed by" defendant (an "enterprise", which also means an "individual"). To "employ", however, means "to use or engage the services of" an individual. Webster's New Collegiate Dictionary (8th Edition, 1980). In the normal course of things, one does not "use or engage the services of" oneself. But, any one of the other entities (or other individual) set forth in the definition of "enterprise" could "use or employ the services" of an individual. Had defendant been operating a business entity of some form, such as a "sole proprietorship" or other entity or group defined as an enterprise, and utilized that entity while engaging in a pattern of criminal behavior, defendant's conviction could be sustained.[3] But, where this defendant was not associated with any distinct enterprise as defined by statute, we cannot conclude that this statute is applicable to this defendant's actions.

Additionally, because a sole proprietorship means "a business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity," Black's Law Dictionary (7th Edition, 1990), the statute's reference to "individual" in the definition of enterprise cannot cover a self-employed individual, otherwise the inclusion of "sole proprietorship" in that same definition would be surplusage. We cannot read the statute in such a manner, *Priority Health v Comm of Office of Fin and Ins Serv*, 489 Mich 67, ___; ___ NW2d ___ (2011), as we must give effect to all the words contained in the statute. *State Treasurer v Shuster*, 456 Mich at 417.

Accordingly, defendant's conviction of conducting a criminal enterprise is not supported by sufficient evidence and is therefore reversed.[4]

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[3] Thus, for example, an individual operates a sole proprietorship by himself, but with such an entity there exists some evidence of a business operation, and no such evidence exists here. Defendant was merely driving his vehicle and committing larcenies.

[4] We need not address defendant's argument that due process requires correction of the presentence investigation report (PSIR) because the PSIR inaccurately listed defendant's 1976 conviction for burglary as a felony. Defendant has already received the relief requested. After this Court granted in part defendant's motion for remand, *People v Boles*, unpublished order of the Court of Appeals, entered January 21, 2011 (Docket No. 296684), the trial court entered an order requiring correction of the PSIR.

III. STANDARD 4 BRIEF

Defendant claims that his right against self-incrimination was violated when he was subjected to interrogation in the back of a police car without being advised of his *Miranda*[5] rights. "Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *Harris*, 261 Mich App at 55. "[I]nterrogation refers to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998) (quotation marks and citation omitted). Here, defendant fails to identify any statements made by him that were used against him. Instead, he complains that the police violated his right against self incrimination when they compared his shoes to photographs of shoeprints taken at Spartan Pools. This is not a *Miranda* issue. Defendant's argument that his right against self incrimination was violated is without merit.

Defendant also argues that he is entitled to withdraw his no contest plea to a 2006 breaking and entering charge. The issue is not related to defendant's convictions in this case. Therefore, it is not properly before the Court and will not be addressed.

Affirmed in part, reversed in part, and remanded for vacation of defendant's conviction and sentence for conducting a criminal enterprise.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens

[5] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).