STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2012
v	Nos. 306614 & 306857 St. Clair Circuit Court
RICHARD DEAN LIVINGSTON, Defendant-Appellant.	LC Nos. 11-000522-FH; 11-001271-FH

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

In these consolidated appeals, defendant Richard Dean Livingston appeals by right his jury convictions in two separate cases that the trial court consolidated for trial.

In Docket No. 306614, Livingston appeals his convictions of first-degree home invasion, MCL 750.110a(2), second-degree home invasion, MCL 750.110a(3), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Livingston as a fourth-offense habitual offender, MCL 769.12, to serve concurrent prison terms of 24 to 36 years for the convictions of first-degree home invasion, second-degree home invasion, and felon in possession. It sentenced him to serve a consecutive 2-year prison term for the felony-firearm conviction and sentenced him to serve all these sentences consecutively to his sentences for three parole violations.

In Docket No. 306857, Livingston appeals his convictions of seven counts of second-degree home invasion. See MCL 750.110a(3). The trial court sentenced Livingston as a fourth-offense habitual offender, MCL 769.12, to serve concurrent prison terms of 18 to 35 years for each conviction. The trial court ordered Livingston to serve all these sentences concurrently to the sentences in Docket No. 306614 and consecutively to his sentences for the parole violations. Because we conclude that there were no errors warranting relief, we affirm.

Livingston's convictions arise from a series of home invasions in St. Clair County between January 14 and January 26, 2011. The homeowners each testified that they arrived home to find that their doors had been kicked in and that several belongings were missing. There were three common items missing among the homeowners: jewelry, electronics, and tools. After receiving leads, police officers began surveillance of two suspects seen driving in a burgundy minivan.

On January 26, 2011, officers saw the minivan leaving a pawnshop, then enter, and leave a residence. Upon investigation, the officers determined that a breaking and entering had just occurred at that residence. Shortly after that, the officers stopped the minivan and arrested the two men in the van; Livingston was one of the men. The officers discovered property from the various home invasions in Livingston's possession or in places he was known to frequent and stay, such as his parents' and ex-wife's residences.

The prosecutor subsequently charged Livingston in two separate cases, which the trial court joined for trial. The jury found Livingston guilty on all counts. And Livingston now appeals.

I. JOINDER

Livingston first argues that he was denied a fair trial when the trial court joined the two cases for trial. "To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute 'related' offenses for which joinder is appropriate." *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). This Court reviews questions of law de novo and the trial court's findings for clear error. *Id.*

The trial court may join offenses "charged in two or more informations" when appropriate "to promote fairness . . . ." MCR 6.120(B). Joinder is appropriate when the offenses are related; and, for purposes of MCR 6.120(B), offenses are related if they are based on "the same conduct or transaction," or "a series of connected acts," or "a series of acts constituting parts of a single scheme or plan." MCR 6.120(B)(1). The trial court should also consider other relevant factors when determining whether to join cases, including "the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial." MCR 6.120(B)(2).

Here, the home invasions involved in the two cases were based on the same conduct and constituted parts of a single scheme. The break-ins all occurred in the same manner—forced entry through a back door when no one was home, shoe print impressions in the snow, and multiple items were removed. There was evidence that Livingston sold some of the items to a store that purchased jewelry. Witnesses from both cases testified about a burgundy minivan that was apparently involved in the home invasions and Livingston was in a burgundy minivan that was registered to his mother when he was arrested shortly after a similar home invasion. Further, Livingston was arrested for a home invasion involved in the second case while wearing boots that were stolen from a residence involved in the first case. Because the home invasions occurred over a short span of time and each involved the same minivan, similar methods, and similar stolen items, the trial court did not clearly err when it found that the offenses were related.

Moreover, consideration of the other relevant factors supported joinder. The trial court adjourned the trial for a month to give Livingston's lawyer additional time to prepare and it was more convenient to have the witnesses testify once, rather than call them to testify a second time to establish the same proofs. In addition, trying the cases together saved the parties' resources and there was otherwise no indication that joinder prejudiced Livingston.

The trial court did not err when it joined the trials.

II. BIND OVER AND DIRECTED VERDICT

Livingston also argues that the district court erred by binding him over for trial and the trial court erred by denying his motion to quash the information. However, "where a defendant has received a fair trial, appellate review is limited to the trial court's denial of the defendant's motion for directed verdict." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). We shall accordingly limit our review to the trial court's decision to deny Livingston's motion for a directed verdict.

This Court reviews de novo a trial court's decision on a motion for a directed verdict by reviewing the evidence in "a light most favorable to the prosecution in order to 'determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.'" *Id.*, quoting *People v Riley* (*After Remand*), 468 Mich 135, 139-140; 659 NW2d 611 (2003). If the evidence is insufficient to support a conviction, defendant is entitled to a verdict of acquittal. *People v Szalma*, 487 Mich 708, 720-721; 790 NW2d 662 (2010).

At the close of the prosecutor's case, Livingston's lawyer moved for a directed verdict on each count of first and second-degree home invasion. Specifically, Livingston argued that there was no evidence, other than that he possessed stolen property, to convict him of home invasion. "It is true that evidence of 'mere possession' of stolen goods does not justify a finding that one is guilty of breaking and entering." *People v Olson*, 65 Mich App 224, 229; 237 NW2d 260 (1975); see also *People v Toole*, 227 Mich App 656, 660; 576 NW2d 441 (1998). However, "[i]t is well established that the jury may infer that the possessor of recently stolen property was the thief." *People v Haydon*, 132 Mich App 273, 283 n 4; 348 NW2d 672 (1984). If there are other facts or circumstances to indicate guilt, the unexplained possession of stolen property is sufficient evidence to support a conviction for home invasion. *People v Hutton*, 50 Mich App 351, 357; 213 NW2d 320 (1973).

Here, the prosecution presented evidence to support the second-degree home invasions. For each home-invasion, the homeowner testified that their doors had been kicked in and that certain items common to each were taken—namely, jewelry, electronics, and tools. Trooper David Vansingel also testified that the break-in at one home used the same method of operation that was used at the previous break-ins. And while conducting surveillance, police officers caught Livingston and his accomplice immediately after the home invasion.

The homeowners also each identified photos of their stolen property, which was recovered in Livingston's possession or in places that he was known to frequent and stay. Livingston's mother was also found to be wearing stolen rings. Livingston's ex-wife also admitted that she knew that a television in her home was stolen and she was also in possession of a stolen printer that Livingston allegedly gave to her as a gift. In addition, when Livingston was arrested, he was wearing a pair of Irish Setter boots, which were very similar to the pair taken from one residence.

Detective David Patterson testified that he searched Livingston's ex-wife's car and recovered a pair of shoes with a unique shoe pattern that was consistent with the shoe pattern he had found at the scenes of the break-ins. And Joseph Koerber, who is in the business of buying precious metals, testified that Livingston came to his store five to ten times prior to January 26, 2011, to sell jewelry, which included two rings taken from one of the involved residences. Lastly, a witness identified the burgundy minivan that Livingston was in when he was arrested as having been at one of the residences on the day of the break-in. Three other witnesses testified that two men in the same van came to their residences, banged loudly and urgently on the door, and asked for directions when they answered. Despite asking for directions, the men turned in the opposite direction as instructed after leaving. One witness also saw the two men peering into her house and garage. Thus, there were other facts and circumstances, besides mere possession of stolen property, to implicate Livingston in each of the home invasions.

The prosecution also presented sufficient evidence to support Livingston's conviction for first-degree home invasion at the residence on Rattle Run Road. In addition to the above evidence and testimony, the homeowner of the residence on Rattle Run Road testified that his door had been kicked in, and that he was missing jewelry and a gun. The homeowner also identified a photo of his gun, which was later recovered at Livingston's ex-wife's home. From this, a reasonable jury could infer that Livingston was the one that stole the gun and that he, therefore, must have possessed it while in the home or leaving. As such, the prosecutor presented evidence sufficient to establish that Livingston was a felon-in-possession, possessed a firearm during the commission of a felony, and committed first-degree home invasion. See *People v Shipley*, 256 Mich App 367, 377; 662 NW2d 856 (2003); MCL 750.110a(2)(a); MCL 750.224f; MCL 750.227b. Accordingly, the trial court properly denied Livingston's motion for a directed verdict.

III. PROSECUTORIAL MISCONDUCT

Next, Livingston argues that he was denied a fair trial due to prosecutorial misconduct. However, because he failed to properly preserve this issue, we must review it for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id.* at 64.

Livingston argues that the prosecutor's late disclosure of an investigative report deprived him of a fair trial because he was unable to adequately investigate the evidence and prepare a defense. The report he refers to is a 24-page investigative report from the St. Clair Sherriff's Office that contained statements from witnesses, particularly Livingston's witnesses.

A party must provide the other party with "a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial . . . ." MCR 6.201(A)(6). Nevertheless, although it is mandatory for the prosecutor to provide a description of the evidence he intends to use at trial beforehand, he cannot do so before the evidence is discovered. The record here does not show that the prosecutor knew of the investigative report before trial and

intentionally withheld it. In fact, Livingston's lawyer admitted that there is no evidence that the prosecutor intentionally suppressed the report. At most, the prosecutor was negligent in failing to conduct a full investigation. However, "[m]ere negligence . . . is not the type of egregious case for which the extreme sanction of precluding relevant evidence is reserved." *People v Callon*, 256 Mich App 312, 328; 662 NW2d 501 (2003). In addition, the trial court adjourned the trial and made a separate record of the two witnesses' testimony, in order to provide Livingston with adequate time to review the report and prepare a defense. Therefore, any error in the failure to present this report earlier did not amount to plain error warranting relief.

Livingston also argues that the prosecutor deprived him of his right to present a defense by failing to serve a timely subpoena to a key defense witness. However, Livingston does not cite any authority that requires the prosecutor to subpoena a defense witness. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). As such, he has abandoned this claim of error on appeal.

IV. LESSER-INCLUDED OFFENSE

Next, Livingston argues that the trial court should have instructed the jury on the lesser-included offense of receiving and concealing stolen property. "Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *Dobek*, 274 Mich App at 82.

There are two types of lesser-included offenses: necessarily and cognate. *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010). "A lesser offense is necessarily included in the greater offense when the elements necessary for the commission of the lesser offense are subsumed within the elements necessary for the commission of the greater offense." *Id.* "Cognate offenses share several elements and are of the same class or category as the greater offense, but contain elements not found in the greater offense. As a result, a cognate offense is *not* an inferior offense under MCL 768.32(1)." *Id.* (emphasis in original). Trial courts may only instruct on necessarily included offenses because conviction of a cognate offense would result in a defendant not having "notice of all of the elements of the offense that he or she was required to defend against." *Id.*

Our Supreme Court has stated that breaking and entering is a necessarily included offense of first-degree home invasion, *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002), but receiving and concealing stolen property is a cognate offense of breaking and entering. *People v Kamin*, 405 Mich 482, 496; 275 NW2d 277 (1979) overruled in part on other grounds, *People v Beach*, 429 Mich 450; 418 NW2d 861 (1988). Therefore, the trial court could not properly instruct the jury on that offense. *Wilder*, 485 Mich at 41.

V. OFFENSE VARIABLE 4

Livingston argues that the trial court erred when it scored 10 points under OV 4 because there was no record evidence that any victim suffered serious psychological injury that required professional treatment as a result of his crimes. This Court reviews de novo a trial court's scoring of offense variables using the statutory sentencing guidelines. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009).

Under MCL 777.34(1), a trial court must score 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim." The Legislature also clarified that the trial court must score "10 points if the serious psychological injury *may* require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2) (emphasis added). The record must contain some evidence that a victim suffered a psychological injury, for example, a victim-impact statement or information contained in the presentence investigation report. *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012).

Only one victim has to suffer serious psychological harm that may require professional treatment, but here the victim-impact statements show that most of the victims suffered serious psychological harm. For example, two of the victims are very fearful and are considering outpatient counseling. Another victim is suspicious of everyone and will not even discuss the incident over the phone, and another victim is afraid to be in her home.

The trial court did not clearly err in finding that at least one victim suffered a serious psychological injury and, therefore, did not err in scoring OV 4 at 10 points.

VI. SENTENCING ERROR

Lastly, Livingston argues that the trial court erred by failing to consider mitigating factors, such as his rehabilitative potential, when it sentenced him.

Under MCL 769.34(10), this Court has a limited ability to review sentencing decisions:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

There is no question that Livingston's sentences are within the respective guidelines ranges, which renders them presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Furthermore, Livingston cannot challenge the scoring of the guidelines or the accuracy of information relied upon in determining his sentence because he failed to raise the issue at sentencing, in a proper motion for resentencing, or in a proper motion

to remand filed with this Court. MCL 769.34(10); *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010).

There were no errors warranting relief.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly