STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AMOS BROWN,

Defendant-Appellant.

UNPUBLISHED
May 10, 1996

No. 179811
LC No. 94-131727 FH

Before: O'Connell, P.J., and Hood and C.L. Horn,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), and breaking and entering with felonious intent. MCL 750.110; MSA 28.305. He then pleaded guilty to the charge of habitual offender, third offense. MCL 769.11; MSA 28.1083. Defendant was sentenced to a term of imprisonment of eight to fifteen years for the habitual offender conviction. He now appeals as of right, and we affirm.

Defendant presents a host of alleged errors. First, he argues that the evidence underlying his conviction of breaking and entering with felonious intent is insufficient, specifically with regard to the elements of breaking and felonious intent. See *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993). Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). A defendant who enters a building with a key that he rightfully possesses still may be found to have "broken into" the building if his use of the key exceeded the restrictions on his use of the key. See *People v Rider*, 411 Mich 496, 497-499; 307 NW2d 690 (1981). Here, testimony was presented that defendant's use of the key occurred at an unpermitted time. With respect to intent, which may be inferred from the facts and circumstances surrounding the incident, *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985), testimony was presented that defendant drove the victim to an empty building, forced her into the building, and raped her. From this evidence, a rational jury could conclude that defendant

* Circuit judge, sitting on the Court of Appeals by assignment.

intended to commit the felony of criminal sexual conduct when he entered the building. Therefore, we find the evidence to have been sufficient. *Wolfe, supra*.

Second, defendant contends that incriminating statements he made to a police officer should have been suppressed because these statements were made in violation of his *Miranda*[1] rights. The procedural safeguards set forth in *Miranda* are required only where a suspect is subjected to custodial interrogation. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). The key question when determining whether a defendant was in custody is whether the defendant could have believed that he was free to leave. *People v Mayes (After Remand)*, 202 Mich App 181, 190; 508 NW2d 161 (1993). However, examining the totality of the circumstances, *Id*., p 189, we conclude that defendant could not reasonably have believed that he was in custody, and that, accordingly, *Miranda* does not apply. Officer Jankowski was dressed in street clothes, did not arrive in a squad car, and appears to have questioned defendant while he was walking outside. Given these facts, and the absence of any countervailing evidence, we believe that defendant was not under the impression that he was in custody. Therefore, *Miranda* did not apply.

Defendant also challenges the voluntariness of his statements. However, because he did not first raise this issue before the trial court, the issue may not be considered on appeal. See *People v Ray*, 431 Mich 260, 269; 430 NW2d 626 (1988).

Third, defendant submits that he was deprived of his right to a fair trial where the prosecution failed to give notice of its intent to present evidence of defendant's prior bad acts. It is contended that the evidence of his prior bad acts was also irrelevant. Our review of the record indicates that the prosecution complied with the relevant notice requirements, *People v VanderVliet*, 444 Mich 52, 89; 508 NW2d 114, amended 520 NW2d 338 (1994), and presented only evidence properly admissible pursuant to MRE 404(b). We find no abuse of discretion in the admission of this evidence.

Fourth, defendant alleges that prosecutorial misconduct deprived him of his right to a fair trial. When considering whether prosecutorial misconduct has occurred, this Court examines the lower court record and evaluates the prosecution's remarks in context to determine whether defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). We fail to find evidence of prosecutorial misconduct. The prosecution may properly comment regarding a complainant's credibility, *People v Vaughn*, 186 Mich App 376, 385; 465 NW2d 365 (1990), and may, of course, refer to factual matter supported by the evidence. While defendant argues the contrary, our review of the evidence reveals that this is what occurred. Therefore, we do not find that defendant was deprived of his right to a fair trial.

Fifth, defendant asserts that he is entitled to a new trial because the trial court, sitting as finder of fact, failed to comply with MCR 6.403 where it made inadequate factual findings. Contrary to defendant's assertion, the usual remedy where the bench fails to make adequate factual findings is remand for additional fact-finding, not a new trial. See *People v Armstrong*, 175 Mich App 181, 184; 437 NW2d 343 (1989). A remand is unnecessary where it is manifest that the trial judge was aware of

the factual issues and correctly applied the law. *People v Wardlaw*, 190 Mich App 318, 321; 475 NW2d 387 (1991). Such occurred in the present case. We find no need for remand.

Sixth, defendant argues that the cumulative effect of the errors alleged deprived him of his right to a fair trial. Because we have found defendant's individual allegations of error to be without merit, we cannot find that their cumulative effect deprived defendant of his right to a fair trial.

Seventh, defendant contends that the Oakland County Prosecutor may not uniformly charge all recidivists as habitual offenders. The prosecutor's broad discretion in determining which charges should be brought includes the discretion to charge every repeat offender as an habitual offender. *People v Newcomb*, 190 Mich App 424, 431-432; 476 NW2d 749 (1991); see also *People v Sunday*, 183 Mich App 504, 506; 455 NW2d 321 (1990). Accordingly, we find no merit to defendant's contention.

Eighth, defendant alleges that his plea of guilty of habitual offender, third offense, should be set aside because there was no factual basis for the plea and because he was not properly advised of his constitutional rights prior to tendering the plea. With respect to defendant's factual basis contention, a factual basis for a plea will be found sufficient if an inculpatory inference can be drawn from what the defendant has admitted. *People v Downey*, 183 Mich App 405, 421; 454 NW2d 235 (1990). Our review of the record indicates that defendant admitted directly, and indirectly through defense counsel, sufficient facts to support his conviction. With respect to defendant's contention that the trial court did not properly advise him of his constitutional rights, an imprecise recital of the rights waived by pleading guilty does not mandate reversal if the trial court's advice as a whole adequately informs the defendant that he is waiving his rights to trial or the presumption of innocence. *People v Wilsher*, 183 Mich App 138, 143; 454 NW2d 178 (1990). Our review indicates that the court's imprecise recital of rights was sufficient under the *Wilsher* standard. Additionally, even were we to find error, we would question whether defendant would gain anything considering that his sentence for the habitual conviction was identical to his (vacated) sentence for third-degree criminal sexual conduct. Again, however, we find no error.

Finally, defendant challenges the proportionality of his sentence. A sentence must be proportionate to the seriousness of the crime and the defendant. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). The Supreme Court has recently stated that the guidelines are not to be considered when determining the proportionality of an habitual offender's sentence, albeit for divergent reasons. *People v Gatewood*, ___ Mich ___; ___ NW2d ___ (Docket No. 104913, issued 3/19/96), citing *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995). While it is true, as defendant asserts, that he did not use a weapon and did not injure the victim, one can always conceive of more brutal attacks; this is hardly a mitigating factor. Considering the prolonged pattern of sexual abuse and defendant's past convictions for breaking and entering and criminal sexual conduct, we do not find the sentence imposed to be disproportionately harsh.

Affirmed.

/s/ Peter D. O'Connell
/s/ Harold Hood
/s/ Carl L Horn

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