STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM ROBERT JOHNSON,

Defendant-Appellant.

UNPUBLISHED
May 14, 1996

No. 173407
LC No. 93007646 FH

Before: Fitzgerald, P.J., and Corrigan and C.C. Schmucker,* JJ.

PER CURIAM.

Defendant appeals as of right his conviction by jury of breaking and entering an occupied dwelling with intent to commit larceny, MCL 750.110; MSA 28.305, his subsequent plea of habitual offender, third offense, MCL 769.11: MSA 28.1083, and his sentence to a 15 to 30 year term of imprisonment. We affirm.

Defendant's conviction arises from the November 9, 1992, burglary of a single family home in Hartland Township in Livingston County. The numerous stolen items included: a microwave oven, two television sets and a VCR, jewelry, a portable Casio keyboard, a black luggage bag, and a compact disc player and 70 compact discs stored in crates in a son's bedroom. When the son arrived home about 2:00 p.m., he reported the burglary to his mother and the local sheriff.

At nearly the same time, a Dearborn police officer in an unmarked car observed defendant and his companion outside a compact disc resale store in Dearborn. The two men were crouched down near a silver Toyota, removing crates of compact discs from the Toyota. The officer also observed that the car was overloaded with household items. After ascertaining that the license plate on the Toyota was invalid, the officer requested other officers to stop the car. Defendant and his companion were subsequently detained on the charge of invalid plates. During a search of the car, the officers recovered property stolen from the victims' home, as well as a splitting maul, bolt cutters and tin snips. They also found a "Hartland Pride" button among the household goods inside the vehicle. Recognizing that

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

Hartland Township was in Livingston County, one officer contacted the sheriff's department and confirmed that every item inside the Toyota matched the description of the stolen items. Police then arrested defendant and his companion for the offense of receiving and concealing stolen property and thereafter transported them to the Livingston County Sheriff's Department. During a search of defendant at the police station, officers recovered two women's watches from defendant's coat pockets which the victim wife identified as hers. She also identified a personal note of sentimental value from her husband that had been stolen from her jewelry box.

Authorities gathered certain physical evidence from the Hartland house. A muddy shoe imprint near the south door of the home was photographed and lifted. Police observed defendant wearing black Spalding brand tennis shoes; the sheriff's department later obtained a search warrant and seized those shoes. A police evidence chemist testified that a portion of the lifted shoe imprint was consistent with the pattern on the seized shoes.

Defendant initially contends that the court erred in permitting impeachment with his two-year-old conviction of receiving and concealing stolen property. In response to defendant's motion in limine, the prosecutor argued that receiving and concealing stolen property involved an element of dishonesty under MRE 609. On appeal, defendant contends that a theft offense is admissible for impeachment purposes only under the balancing test of MRE 609(a)(2). Defendant further contends that the court failed to recognize and exercise its discretion whether to admit or exclude the conviction. Defendant complains that this error was not harmless because the evidence against him was purely circumstantial and was not overwhelming.

This Court reviews the decision whether to allow impeachment by evidence of a prior conviction is reviewed under an abuse of discretion standard. *People v Bartlett*, 197 Mich App 15; 494 NW2d 776 (1992). Although the trial court apparently failed to recognize it had discretion to exclude defendant's conviction of receiving and concealing stolen property, the court did not abuse its discretion in permitting impeachment with this conviction. Defendant had numerous prior convictions, including a 1980 conviction for attempted burglary, a 1982 conviction for receiving and concealing over $100, attempted breaking and entering, entry without breaking, 1983 convictions for armed robbery and felony firearm, and a 1991 conviction for receiving and concealing. The trial court explicitly recognized the standard of *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988). The court excluded all but the 1991 conviction, but incorrectly found that that crime involved a matter of dishonesty.

This Court has recognized that a balancing test applies to the offense of receiving and concealing stolen property. *People v Clark*, 172 Mich App 407; 432 NW2d 726 (1988); *People v Dinsmore*, 172 Mich App 561; 432 NW2d 324 (1988). The trial court thus erred in concluding that a receiving and concealing conviction is admissible without regard to a balancing test, and defense counsel failed to notify the court of the controlling authority.

Nonetheless, the error is harmless because the admission of the conviction would not have been an abuse of discretion under the balancing test. The 1991 conviction was of recent vintage, a factor that adds to its probative value. It was also dissimilar to the offense being tried. *People v Cross*, 202 Mich App 138; 508 NW2d 144 (1993). Further, the court excluded all defendant's other convictions from the jury's consideration. Although defendant was the only witness to testify about his version of the events, a factor weighing in his favor, on balance, both the recent vintage of the conviction and dissimilarity of the two offenses indicate that discretion appropriately could have been exercised in favor of admission. Accordingly, we decline to disturb defendant's conviction on this basis.

Defendant next contends that the court erred in admitting defendant's blurted out statement that the Spalding tennis shoes belonged to him. During the evidentiary hearing on defendant's motion to suppress, while one of the detectives was testifying, the prosecutor showed a bag containing the black Spalding tennis shoes to defense counsel. As defendant's attorney opened the bag, defendant said in a loud tone of voice, "Yes, those are mine." The detective and the prosecutor heard defendant's statement, although it was not picked up on the tape recording in the courtroom. Defendant contends that the admission of this overheard statement violated the attorney-client privilege and his right to be present and testify. Defendant also contends that his rights to effective assistance of counsel and to due process of law were violated. Defendant preserved this issue by his contemporaneous objection to the admission of the testimony.

This Court will not reverse on appeal the decision to admit evidence absent an abuse of discretion. *People v Coleman*, 210 Mich App 1; 532 NW2d 885 (1995). The trial court did not abuse its discretion. In reviewing this issue during defendant's motion for new trial, the court stated:

> In the case sub judice, the defendant's statement was not testimony. He had not yet been sworn and was not responding to a question in the capacity of a witness . . . . [T]his court is not satisfied that the exclusionary rule should be extended to include communications between a defense attorney and the defendant which [are] overheard by the opposition. Defendant's claim that the prosecution's eavesdropping in the suppression hearing deprived him of the ability to communicate with his attorney during trial appears not to be supported by the record.

The policy of protecting the confidentiality of attorney-client communication warrants the exclusion of substantive evidence of inadvertently overheard communication between an attorney and a client where the communication was intended to be confidential and was made in a manner reasonably believed to promote confidentiality. In this case, the trial court did not abuse its discretion in concluding that defendant did not take reasonable precautions to secure the secrecy and confidentiality of his loud comment. He was easily overheard by the detective and the prosecutor. Because defendant's blurted out statement was not sworn testimony, the admission of this testimony did not run afoul of *Simmons v United States*, 390 US 377; 88 S Ct 967; 19 L Ed 2d 1247 (1968).

Finally, defendant complains about the sentence imposed. He contends that his 15 to 30 year sentence as an habitual offender, third offense, was disproportionate. We disagree. Defendant has been convicted of at least eight previous felonies. Defendant also makes several claims relating to the scoring of the guidelines. The court did not abuse its discretion in sentencing defendant. The scoring of OV 8, 17 and 25 was supported by the evidence. In the early 1980's, defendant had five breaking and entering or theft offense convictions in fewer than two years. He then escaped from a prison camp program and was thereafter convicted in North Carolina of receiving and concealing stolen property over $100. Defendant remained in custody in North Carolina and in Michigan until his parole in 1990. Within one year, he was again convicted of receiving and concealing stolen property. Given his past history and the large amount of property taken from the victims' home, the court fairly concluded that defendant derived a substantial portion of his income from a pattern of criminal activities. The scoring of OV 8 was supported by the evidence. Moreover, the overwhelming proofs established that the property stolen was worth somewhere between $1,000 and $5,000. The electronic appliances and the 70 compact discs had a value exceeding $1,000; together with the pearl earrings, garnet earrings and antique pin, the court's findings regarding value are supported by the record. Further, the court correctly scored OV 25, contemporaneous criminal acts. Defendant committed at least two other criminal offenses within 24 hours of the breaking and entering, including conspiracy to commit breaking and entering and receiving and concealing stolen property.

Defendant has not established, given his past criminal history and the nature of this conviction, that the sentence imposed on him as an habitual offender third was an abuse of discretion. *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995). Applying *Cervantes*, the court's choice to impose a habitual sentence amounted to the exercise of discretion, not an abuse of discretion. Defendant has been incarcerated repeatedly but has never been rehabilitated. The court sufficiently articulated the factors that influenced its consideration.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Maura D. Corrigan
/s/ Chad C. Schmucker