

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON R.HONER,

Defendant-Appellant.

UNPUBLISHED

June 18, 1996

No. 175687

LC No. 93-124404

Before: Hoekstra, P.J., and Michael J. Kelly and J.M. Graves, Jr.,* JJ.

PER CURIAM.

Defendant appeals as of right from his March 15, 1994, jury trial conviction of larceny in a building, MCL 750.360; MSA 28.592, and his guilty plea conviction of habitual offender, fourth offense, MCL 769.12; MSA 28.1084, in the Oakland Circuit Court. On April 7, 1994, the court sentenced defendant to two to four years in prison for the larceny conviction. However, the sentence was vacated in lieu of a sentence of two and one-half to fifteen years for the habitual offender conviction.

On March 20, 1993, at approximately 5:30 a.m., Angela Allen was asleep at the apartment of Shalinski Alexander, her aunt. Defendant was Allen's boyfriend. Allen stated that she and defendant were "tussling and fighting in the apartment". Defendant told her to get the phone in the bedroom, while he took the phone from the front part of the apartment. Allen put the phones in a trash bag, and defendant told her to take them out of the apartment. During cross-examination, defense counsel asked Allen "were you going to keep these telephones?" to which Allen replied "no". He then asked "were you going to return them?" and Allen said "yes".

Defendant claims there was insufficient evidence to convict him of larceny from a building because the prosecution did not prove beyond a reasonable doubt that defendant intended to permanently deprive Shalinski Alexander of her telephones. Allen testified that she and defendant did not intend to steal the telephones. Defendant claims he and Allen intended to temporarily remove the

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

phones to prevent anyone from interfering with the argument. The prosecutor, in her opening statement, inferred that defendant didn't intend to steal the phones, but took them to stop others from interfering with him. Defendant moved for a directed verdict at trial.

When determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether any 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).

Here, the evidence was sufficient for a rational trier of fact to determine that defendant committed the crime of larceny in a building beyond a reasonable doubt. The larcenous intent element is satisfied by taking and carrying away the phones without the owner's consent. *People v Pohl*, 202 Mich App 203, 205; 507 NW2d 819 (1993). Defendant ripped the owner's phone from the wall and ordered Allen to put them in a trash bag and remove them from the apartment. The trier of fact could find the necessary intent implied in defendant's words and acts.

Defendant also claims he is entitled to resentencing because the sentencing court failed to recognize its sentencing discretion when it sentenced him to the maximum allowable term under the habitual offender statute.

Whether the sentencing court was aware that it had discretion to impose a maximum sentence is reviewed de novo. See *People v Green*, 205 Mich App 342, 345-346; 517 NW2d 782 (1994).

The court did not fail to exercise its discretion in sentencing defendant to the maximum sentence pursuant to the habitual offender statute.

MCL 769.12; MSA 28.1084 provides, in relevant part:

- (1) If a person has been convicted of any combination of 3 or more felonies,...and that person commits a subsequent felony within this state, the person *shall* be punished...as follows:
- (b) If the subsequent felony is punishable upon a first conviction by imprisonment for a term that is less than 5 years,...the court... may sentence the person to imprisonment for a maximum term of not more than 15 years. (Emphasis added.)

The language of the habitual offender statute, indicating that the court "may" impose a higher maximum sentence, is permissive and not mandatory.

The court initially sentenced defendant to two to four years in prison, which was within the sentencing guidelines' recommended range of six months to two years. The court then vacated that sentence and increased defendant's minimum term to two and one-half years and his maximum term to fifteen years, stating:

The Habitual increases the maximum up to 15 and it could be any number of years because the guidelines don't apply. So it could be two-thirds of 15 years.

* * *

It will be two to four and I vacate that sentence; and on the Habitual, it will be two and a half to 15 with credit for 382 days.

The court correctly noted that it was required to vacate defendant's larceny in a building sentence in order to impose the habitual offender sentence because the habitual offender statute, MCL 769.12; MSA 28.1084, mandates that a person convicted of a fourth felony "shall" be punished in accordance with that statute. There is no indication on the record that the court believed imposing the fifteen-year maximum was mandatory. The court acknowledged that the maximum term under the habitual offender statute could be any number of years, including two-thirds of fifteen years. Thus, the court recognized that it had discretion in setting defendant's maximum sentence to a term less than fifteen years.

The trial court exercised its discretion in imposing defendant's sentence, and defendant is not entitled to resentencing. The conviction and sentence is affirmed.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Michael J. Kelly

/s/ James M. Graves, Jr.