

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDY LEE SPARKS, JR.,

Defendant-Appellant.

UNPUBLISHED

June 25, 1996

No. 176475

LC No. 91-000123-FH

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

PER CURIAM.

Defendant appeals as of right his jury convictions for two counts of delivery of the controlled substance methamphetamine, MCL 333.7401(2)(b); MSA 14.15(7401)(2)(b), and fourth habitual offender, MCL 769.12; MSA 28.1084. For those convictions defendant was sentenced to concurrent prison terms of six to fifteen years' imprisonment. We affirm, but remand for correction of the presentence investigation report.

Defendant first argues that the trial court erred in finding that defendant was not entrapped into committing the instant crimes. Where the affirmative defense of entrapment is asserted, a trial court must consider whether (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated, irrespective of whether the conduct caused the defendant to commit the crime. *People v Fabiano*, 192 Mich App 523, 531; 482 NW2d 467 (1992). Entrapment exists if either prong is met. *Id.* This Court will not disturb a trial court's finding concerning entrapment unless that finding is clearly erroneous. *People v Williams*, 196 Mich App 656, 661; 493 NW2d 507 (1992). Here, we conclude that the trial court's finding that defendant failed to establish by a preponderance of the evidence that either prong was met, was not clearly erroneous. The record shows that the factual basis for defendant's claim of entrapment was disputed by prosecution witnesses on almost every significant point. Thus, resolution of the entrapment claim by the trial court involved deciding issues of credibility, not applying the facts to the test for entrapment. After hearing and

weighing the testimony, the trial court found the testimony of the witnesses for the prosecution to be more believable. Based on this conclusion, the trial court found that defendant failed to establish that he was entrapped into committing the instant offenses. After reviewing the record, and giving deference to the trial court's superior ability to judge the credibility of the witnesses, we conclude that the trial court did not err in finding that defendant failed to establish the defense of entrapment. *People v Martin*, 199 Mich App 124, 125; 501 NW2d 198 (1993).

Defendant next contends that the trial court erred at trial in excluding evidence regarding the police informant's reprehensible conduct toward defendant. Defendant argued that such evidence was necessary to establish his defense that he was entrapped. Because entrapment is a question of law for the judge to decide, we find that the trial court correctly determined that the jury should not hear evidence on that question. *People v Jones*, 203 Mich App 384, 386; 513 NW2d 175 (1994).

Defendant also contends that the trial court erred in failing to sua sponte inform the jury that the jury had the right to disregard the evidence and acquit defendant even if the jury determined that defendant was guilty. Defendant has failed to cite any authority supporting his contention that a trial court should sua sponte issue a jury nullification jury instruction. Because this Court will not search for authority to sustain a defendant's argument, we decline to address this issue. *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 817 (1994). Additionally, we note that Michigan has never recognized the right of a jury to be informed that it has the power to disregard the trial court's instructions. *People v Demers*, 195 Mich App 205, 207; 489 NW2d 173 (1992); *People v St Cyr*, 129 Mich App 471, 472; 341 NW2d 533 (1983).

Defendant next argues that the prosecutor improperly introduced evidence of other bad acts committed by defendant. Specifically, defendant argues that error occurred when a police officer was allowed to testify that he saw marijuana on defendant's kitchen table because the evidence was offered solely to show defendant's propensity to commit crimes. At trial, defendant objected to the admission of this testimony on the ground that the officer was not qualified as an expert in the field of drug identification. Because an objection on one ground is insufficient to preserve appellate review on another ground, we decline to address this issue. *People v Lino (After Remand)*, 213 Mich App 89, 94; 539 NW2d 545 (1995). We also note that any error in the admission of this testimony was harmless given the overwhelming evidence of defendant's guilt. *People v Gilbert*, 183 Mich App 741, 747; 455 NW2d 731 (1990).

Defendant next claims that the prosecutor abused his discretion in charging defendant as an habitual offender because there was no compelling need for the prosecutor to institute recidivist charges against him given that nearly fourteen years had elapsed since his last felony conviction. A prosecutor has wide discretion over what charges to file, and that discretion will not be disturbed absent a showing of clear and intentional discrimination based on an unjustified standard such as race, religion, or some other arbitrary classification. *People v Oxendine*, 201 Mich App 372, 377; 506 NW2d 885 (1993). Here, defendant has not alleged, nor would the record support, that the habitual offender charge was

filed for any discriminatory or arbitrary reason; therefore, we decline to disturb the prosecutor's decision on appeal.

Defendant next argues that the trial court erred at his habitual offender trial in refusing to allow the admission of testimony which would have shown defendant's law-abiding life-style. We find that the trial court did not err in excluding this evidence because a defendant's lack of propensity to commit crimes is not an element of the offense and, therefore, is not relevant to the issue of guilt under the habitual offender statute. *People v Covington*, 70 Mich App 188, 191-192; 245 NW2d 558 (1976).

Defendant next contends that the trial court erred in failing to amend the PSIR after the court determined that it would disregard the challenged information. Here, defendant challenged the inclusion of his juvenile record in the PSIR and the trial court stated that it was not considering defendant's juvenile record in imposing defendant's sentence. When a sentencing court states that it will disregard information in a PSIR challenged as irrelevant, defendant is entitled to have the information stricken from the report. *People v Martinez (After Remand)*, 210 Mich App 199, 202-203; 532 NW2d 863 (1995). Thus, we remand this case to the trial court so that the challenged information may be stricken from the report and a corrected copy transmitted to the Department of Corrections.

Defendant also argues that the trial court erred in scoring the sentencing guidelines. While we agree that some of the guidelines were incorrectly scored, we decline to remand because appellate review of habitual offender sentences using the sentencing guidelines in any fashion is inappropriate. *People v Gatewood (After Remand)*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 193626, issued 05/14/96).

Defendant's final contention of error is that his sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree. This Court's review of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality set forth in *Milbourn*. *Gatewood, supra*. After considering the nature of the offenses and defendant's history of drug abuse and his extensive criminal record, we believe the sentence imposed in this case is proportionate.

Affirmed, but remanded for correction of the PSIR. We do not retain jurisdiction.

/s/ Joel P. Hoekstra  
/s/ Michael J. Kelly  
/s/ James M. Graves, Jr.