

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ANTHONY LINDSAY,

Defendant-Appellant.

UNPUBLISHED
September 6, 1996

No. 177938
LC No. 93-013908

Before: Corrigan, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

Defendant was convicted in a bench trial of attempted breaking and entering, MCL 750.110; MSA 28.305; MCL 750.92; MSA 28.287, and subsequently pleaded guilty to being a fourth habitual offender, MCL 769.12; MSA 28.1084. He was sentenced to five to fifteen years' imprisonment as a fourth habitual offender. He appeals as of right and we affirm.

Defendant first argues that the evidence presented below was insufficient to support a finding that he broke in with intent to commit larceny. We disagree.

We find this case to be indistinguishable from *People v Riemersma*, 104 Mich App 773; 306 NW2d 340 (1981). In that case, this Court found evidence similar to that in the present case to be sufficient to support a finding that the defendant intended to commit larceny when he attempted to break into the victim's home. *Id.* at 780-781. Therefore, the evidence in the present case was also sufficient to support such a finding.

Next, defendant argues that he was denied effective assistance of counsel at sentencing when counsel failed to object to the trial court's scoring of ten points to offense variable 8 (continuing pattern of criminal behavior). Without these points the offense severity level for the breaking and entering charge would have been level I instead of level II. Defendant alleges that he was prejudiced by defense counsel's failure to object because had the offense severity level for the breaking and entering conviction

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

been correctly scored, then the trial court's sentence on the habitual offender conviction may have been lower.

Defendant's argument fails because there was evidence to support the trial court's finding that the offense was "part of a pattern of criminal activities over a period of time from which the offender derives a substantial portion of his or her income." *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). The presentence report indicates that defendant, who has eleven prior felony convictions, has three prior retail fraud convictions and several controlled substances convictions. Further, defendant has not shown that there is a reasonable possibility that his habitual offender fourth sentence would have been shorter had he received a lower score on the underlying offense of attempted breaking and entering with intent to commit larceny. Therefore, defendant has failed to show that he was prejudiced by counsel's failure to object.

Affirmed.

/s/ Maura D. Corrigan

/s/ Kathleen Jansen

/s/ Meyer Warshawsky