

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY COPELAND,

Defendant-Appellant.

UNPUBLISHED

October 1, 1996

No. 181481

LC No. 94-001026-FC

Before: Wahls, P.J., and Fitzgerald and L.P. Borrello,* JJ.

PER CURIAM.

Defendant was charged with assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of burglar's tools, MCL 750.116; MSA 28.311. After the prosecution's case-in-chief, the judge dismissed the possession of burglar's tools charge. Defendant was convicted of assault with intent to rob while armed and was sentenced to five to fifteen years in prison. Defendant appeals as of right. We affirm.

The incident in question occurred at the Eagle Tavern parking lot in Battle Creek on December 16, 1993, between 10:20 p.m. and 11:00 p.m. There, a black male pointed a gun at the face of Margaret Willis and told her to give him money or he would shoot her. At this time Larry Rasey and Mark Kohloff exited the bar, and the man with the gun walked away. Officer Broderick received a dispatch that the suspect was last seen heading toward the area of Michigan and Division streets. Broderick saw defendant only two or three blocks from the Eagle Tavern and crossing Division Street in a hurried manner. Defendant was apprehended after Broderick saw him drop a gun, which turned out to be a toy model of a .38 caliber handgun.

I

Defendant claims that the trial court denied him a fair trial by refusing to dismiss the possession of burglar tools charge until after the prosecution presented its case-in-chief. Specifically defendant argues that Broderick's testimony, that the tools found on defendant are often used in burglaries, was

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

prejudicial. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989). Defendant argues that the burglar's tools charge should have been dismissed earlier in the case because there was no evidence of defendant's intent to use the tools in committing a burglary.

In *People v Donovan*, 216 Mich 231, 234; 184 NW 863 (1921), a case involving possession of burglar's tools, the Michigan Supreme Court held:

The jury in the present case had before them the suspicious circumstances attending his arrest, and the fact that he had secreted in his clothing tools adapted to the business of burglary. We are of the opinion that these proofs were sufficient to submit to the jury on the question of felonious intent. When a man goes about with burglars' tools secreted in his clothing, it is fair to infer that he intends to use them for the purpose for which they are adapted.

While there was no direct evidence on the element of intent, the court did not error in allowing the prosecution to proceed with the charge in its case-in-chief and in permitting Officer Broderick to give opinion testimony concerning tools used in burglaries. Defendant was found walking down the street in a hurried manner at 11:00 p.m. with a hammer, screwdriver and channel pliers hidden in his waistband. It is fair to infer that defendant intended to use the tools for the purpose for which they are adapted, and thus, Broderick's testimony was proper. *Id.* Therefore, the trial court did not abuse its discretion in admitting Broderick's testimony nor by refusing to dismiss the charge at the beginning of the trial. *Watkins, supra*, 176 Mich App 430.

II

Defendant next claims that the evidence of the assault with intent to rob while armed was insufficient to support his conviction. Defendant argues that the element of force and violence was not met because there was no physical harm done to the victim. We disagree. Despite the lack of physical contact, defendant's actions constituted an assault. The language of the statute reads "who shall assault another" and makes no indication that the assault has to be physical. MCL 750.89; MSA 28.284. An assault is defined as either (1) an attempt to commit a battery or (2) an unlawful act which places another in reasonable apprehension of receiving an immediate battery. *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). In addition, defendant's reliance on CJI2d 17.14 is misplaced because those are the instructions for battery cases, not assault cases.

In this case there was evidence that the assault took place and that the assault was done with force or violence. Willis testified that the man in the parking lot got right in her face, pointed a gun at her and told her to give him her money or he would shoot her. Kohloff and Rasey testified that they saw the man next to Willis in the parking lot and heard her say that the man tried to rob her. Broderick testified that he saw defendant only minutes after the incident drop a gun from his side as he hurried down the street. Viewing all the evidence in a light most favorable to the prosecution, sufficient evidence was

presented to prove defendant assaulted Willis with use of force or violence, and a rational trier of fact could have found that the essential elements of assault with intent to rob while armed were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

III

Defendant next claims that the trial court erred by admitting his prior breaking and entering conviction for impeachment. The trial court's decision to allow impeachment by evidence of a prior conviction is within its sound discretion and will not be reversed on appeal absent an abuse of that discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). The trial court properly allowed the prosecution to admit evidence, pursuant to MRE 609(a), of defendant's prior conviction for breaking and entering a building with intent to commit a larceny. Defendant's prior felony was for a crime which contained an element of theft and occurred within the last ten years. MRE 609(a)(2) and (c).

In addition, the court did not abuse its discretion when it determined that the probative value of admitting the previous conviction outweighed its prejudicial effect. *People v Bartlett*, 197 Mich App 15; 494 NW2d 776 (1992). The court considered the age of the conviction and found that the crime had significant probative value on the issue of credibility and veracity. In addition, the court discussed how the underlying charge and the previous conviction were not similar crimes, thus reducing the prejudicial effect. Therefore, we conclude that the trial court did not abuse its discretion in admitting defendant's prior conviction for impeachment. *Coleman, supra*, 210 Mich App 6.

IV

Defendant next claims that the prosecutor's cross-examination of defendant improperly suggested that defendant had the burden to explain his defense to the police and to produce evidence of his innocence. Appellate review of allegedly improper remarks is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In this case defense counsel did not object to the prosecutor's questions elicited from defendant during cross-examination. Therefore, we decline to review issue because a failure to review the issue would not result in a miscarriage of justice. *Id.*

Where a defendant testifies at trial or advances an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). The prosecutor's questions on cross-examination in this case were proper. They did not require an improper adverse inference and did not shift the burden of proof. The prosecutor did not suggest that defendant had a duty to produce an alibi to police, nor was he commenting on defendant's failure to produce evidence. The prosecutor's cross-examination was directed to the weaknesses inherent in the defense theory. Such questioning is proper. *Fields, supra*, 450 Mich 115.

V

Defendant also claims that his sentence of five to fifteen years in prison is disproportionate. A given sentence constitutes an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 650-651; 461 NW2d 1 (1990). Sentences which fall within the guidelines range are presumed to be neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Nevertheless, a sentence within a guidelines range can conceivably violate the principle of proportionality in unusual circumstances. *Milbourn, supra*, 435 Mich 661. A defendant who believes that unusual circumstances exist such that a sentence within the guidelines is disproportionate must specify those circumstances in open court before sentencing. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Defendant presented no unusual circumstances. Therefore, the trial court did not abuse its discretion in sentencing defendant to five to fifteen years' incarceration. *Milbourn, supra*, 435 Mich 650-651.

Affirmed.

/s/ Myron H. Wahls

/s/ E. Thomas Fitzgerald

/s/ Leopold P. Borrello