

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MOORE,

Defendant-Appellant.

UNPUBLISHED
November 8, 1996

No. 182252
LC No. 94-130478

Before: Michael J. Kelly, P.J. and Hoekstra and E.A. Quinnell,* JJ.

PER CURIAM.

Defendant was convicted at trial of breaking and entering with intent to commit larceny, MCL 750.110; MSA 28.305, and two counts of unarmed robbery, MCL 750.530; MSA 28.798. The court sentenced defendant to concurrent terms of eight to fifteen years imprisonment. Defendant appeals as of right. We affirm.

The break-in occurred in Southfield, on the evening of January 3, 1994. One of the perpetrators wore a sports jacket with a logo on the back and a black knit cap which covered his forehead. The victims called the police and gave a description of the perpetrators. These descriptions were subsequently broadcast over the police radio. Approximately six minutes after the suspect left the house, the police spotted a man fitting the description of one of the perpetrators, run into a wooded area near the victim's home. The officers stopped the suspect outside of the wooded area, at the time he was visibility excited and physically stimulated. He was detained in the back seat of the police car. A police dog tracked a scent from the victim's home to the wooded area and then to the car where the suspect was seated. In the wooded area the police dog found clothing worn by one of the perpetrators and a silver ring. The suspect was placed under arrest after a thirty minute detention. The defendant had fifty-six dollars in his pockets. The victims identified the jacket and the ring, but could not identify the defendant. Further investigation conducted by the police failed to match the nine fingerprints lifted from the victim's home to the defendant.

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

Defendant, first argues that the trial court erred in denying his motion to suppress the evidence, that his detention constituted an arrest and that probable cause did not exist to justify such arrest. We disagree.

A trial court's determination on a motion to suppress will be upheld unless it was clearly erroneous. *People v Christie (On Remand)*, 206 Mich App 304, 308; 520 NW2d 647 (1994). A trial court's factual findings regarding an officer's suspicion of criminal activity are reviewed for clear error. The question whether the suspicion was reasonable is a question of law subject to de novo review. *People v Bloxson*, 205 Mich App 236, 245; 517 NW2d 563 (1994). The United States and Michigan Constitutions guarantee the right of people to be secure against unreasonable searches and seizures. *People v Champion*, 205 Mich App 623, 627; 518 NW2d 518 (1994). An arrest can only be justified upon the existence of probable cause. *Id.*, 627-628. The question that must be answered is whether a detention is too long in duration and whether the police were diligently pursuing a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain those stopped. *People v Chambers*, 195 Mich App 118, 123; 489 NW2d 168 (1992). An investigatory stop need only be justified by reasonable suspicion that criminal activity is afoot. *Champion, supra*, p 627. In determining whether an "investigatory stop" is reasonable, the court must examine both the character of the official intrusion and its justification.

We find that defendant's detention constituted an investigatory stop, not an arrest, because the police only detained him for thirty minutes while they were "diligently pursuing a means of investigation that was likely to confirm or dispel their suspicions quickly" that defendant was one of the men who committed the robbery. See *Chambers, supra*, p 123. Accordingly, we find that the trial court did not abuse its discretion in denying defendant's motion to suppress.

Defendant next argues that the trial court erred in denying his motion to dismiss on speedy trial grounds. We disagree.

In order to determine whether a defendant has been denied his right to a speedy trial, this Court must consider (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial and (4) any prejudice to the defendant. *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993).

Defendant was arrested on January 3, 1994, and was brought to trial on November 28, 1994. Applying the four part test enumerated in *Wickham, supra*, p109, we conclude that defendant was not denied his right to a speedy trial. Although there was an eleven month delay between defendant's arrest and his trial, most of the delay was due to docket congestion, which was prolonged by defendant's filing of various motions. Since most of the delay was technically caused by docket delay, it is attributed to the prosecution. *People v Simpson*, 207 Mich App 560, 563-564 ; 526 NW2d 33 (1994).. However, it is a neutral factor given only minimal weight. *Id.* Furthermore, defendant did not assert his right to a speedy trial until November 28, 1994, the first day of trial, which weighs against a finding that he was denied a speedy trial. *Wickham, supra*, p 112. The factor weighing most heavily against defendant is his inability to establish prejudice as a result of the delay. *Simpson, supra*, p 564. At trial, when

defendant argued his motion, he was unable to articulate any prejudice suffered due to the delay . After review of the lower court record, we are not convinced that defendant suffered prejudice due to the delay. Accordingly, the trial court correctly denied defendant's motion to dismiss because he was not denied his right to a speedy trial.

Defendant next argues that there was insufficient evidence to convict him of any of the charges . We disagree.

When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Chandler*, 201 Mich App 611, 612; 506 NW2d 882 (1993). The prosecution's burden of proving all the elements of the crimes charged can be satisfied through the introduction of circumstantial evidence alone. *Id.* at 613. The elements of breaking and entering with intent to commit larceny, MCL 750.110; MSA 28.305, are (1) breaking and (2) entering (3) an occupied dwelling (4) with felonious intent. *People v Ferguson*, 208 Mich App 508, 511; 528 NW2d 825 (1995). The elements of unarmed robbery, MCL 750.530; MSA 28.798, are (1) a felonious taking of property of another, (2) by force or violence or assault or putting in fear, and (3) being unarmed. *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994).

Viewed in a light most favorable to the prosecution, we find that the evidence was sufficient from which a rational trier of fact could have concluded beyond a reasonable doubt that defendant was one of the men who broke into the house. Once it is concluded that the defendant was one of the perpetrators, the remaining evidence clearly established the elements of breaking and entering with intent to commit larceny and unarmed robbery beyond a reasonable doubt. In fact, defendant does not argue that these elements were not established. He only argues that he was not the person who committed these crimes. Therefore, we hold that defendant was not convicted on insufficient evidence.

Defendant next argues that the sentence imposed by the trial court constituted an abuse of discretion because the trial court failed to adequately consider defendant's claim of innocence and his possibility of rehabilitation. We disagree.

Under the principle of proportionality, this Court reviews a defendant's sentence to determine whether it is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milborn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Sentences within the guidelines are presumed to be valid. *People v Tyler*, 188 Mich App 83, 85; 468 NW2d 537 (1991). Where a sentence is within the guidelines range, an abuse of sentencing discretion can be shown upon a demonstration of "unusual circumstances" that make the sentence disproportionate. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995).

The sentencing range for each of defendant's convictions was four to ten years. The trial court sentenced defendant to concurrent prison terms of eight to fifteen years on the breaking and entering and on the two unarmed robbery convictions. Since defendant's sentence fell within the guidelines it is

presumed to be proportionate. *Tyler, supra*, p 85. We find that defendant's arguments of innocence, possibility of rehabilitation and the omission of psychological testing, lack merit since none of these reasons constitute "unusual circumstances" rendering the sentence disproportionate. See *Piotrowski, supra*, p 532. Failure of the sentencing court to consider defendant's continued claim of innocence does not constitute "unusual circumstances" since this court has held that "a court cannot base its sentence, even in part, on a defendant's refusal to admit guilt." *People v Hicks*, 149 Mich App 737, 748; 386 NW2d 657 (1986). As to the trial court's failure to have defendant undergo substance abuse or psychological testing to gauge his rehabilitative potential, defendant failed to cite any authority to support the notion that a trial court is bound to order such testing. The trial court did consider the possibility of rehabilitation. Since defendant failed to demonstrate "unusual circumstances" showing that his sentence, which fell within the guidelines range, was disproportionate to the seriousness of the circumstances surrounding the offense and the offender, we hold that the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

/s/ Edward A. Quinnell