STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DION H. RIGGEN,

Defendant-Appellant.

UNPUBLISHED
December 17, 1996

No. 176754
LC No. 93-129398 FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

MARK D. JACKSON,

Defendant-Appellant.

No. 178528
LC No. 93-129397 FH

Before: O'Connell, P.J., and Smolenski and T.G. Power,* JJ.

PER CURIAM.

In these consolidated cases, defendants appeal as of right their bench-trial convictions of breaking and entering business property with intent to commit larceny, MCL 750.110; MSA 38.305, and burning real property, MCL 750.73; MSA 28.268.[1] In Docket No. 176754, defendant Riggen also pleaded guilty to habitual offender, third offense, and was sentenced to five to twenty years' imprisonment. In Docket No. 178528, defendant Jackson also pleaded guilty to habitual offender, third offense, and was sentenced to 30 months to 240 months' imprisonment. We affirm the convictions and sentences of each defendant.

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

I

Defendants and codefendant Eddie Hough were riding in a rented Ryder van when they were stopped by a Birmingham police officer at approximately 3:00 a.m. The officer testified that she ran their license plate through her mobile computer terminal, as she often did while working her shift, and discovered that the Southfield police reported the van as being a "failure to return." After the police dispatcher confirmed the van's status and reported that the Southfield police had requested impoundment of the van, officers began to inventory the van's contents. In the passenger compartment, they discovered blank checks from a Pontiac business, a coin box of the type used in stores, three pairs of gloves, and what they believed to be marijuana. The rear of the van contained computers, boxes of beepers, and clothing. A call to the Pontiac police confirmed that the business named on the blank checks had been burglarized and set on fire on the same evening. Two Pontiac officers went to Birmingham to arrest the three men and to impound the van.

The next day, a Pontiac detective attempted to interview all three men. Both Riggen and Jackson refused to speak with him. Hough was the last to be interviewed and, after being read his *Miranda* rights, made two oral statements to the detective, the second recorded on a tape recorder. Both statements inculpated all three defendants in the burglary and arson, although Hough minimized his own role. At the preliminary examination, Hough denied the truth of his custodial statement and said he had been coerced by the detective. He claimed that, while alone in the van, he had found the stolen merchandise abandoned in the road and retrieved it with the idea of selling it. Hough's custodial statement was admitted as substantive evidence in the prosecution's case against all three defendants. His preliminary examination testimony was admitted in defendants' cases-in-chief.

II

Both defendants Riggen and Jackson now contend that the trial court erred in admitting Hough's custodial statement as substantive evidence against them. For Hough's custodial statement to be admissible as substantive evidence against Riggen and Jackson, it "must be admissible under the Michigan Rules of Evidence, and admission of the statement cannot be violative of [Riggen and Jackson's] rights under the Confrontation Clause." US Const, Am VI; Const 1963, art 1, § 20; *People v Poole*, 444 Mich 151, 157; 506 NW2d 505 (1993). Hough's statement was admitted pursuant to the hearsay exception for statements against penal interest made by an unavailable declarant.[2] MRE 804(b)(3). Those portions of the statement that are against Hough's penal interest are clearly admissible. Those portions that inculpate Riggen and Jackson are admissible under the hearsay exception "only if the circumstances under which the statement was made vouch for its reliability." *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994).

The following factors favor admission of a statement against penal interest that inculpates the declarant and another person: "whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates -- that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener." *Poole*, *supra* at 165. Conversely, the presence of any of these factors favor the exclusion of the statement: "whether the

statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth." *Id.*

We find that Hough's custodial statement was not admissible against Riggen and Jackson under the Michigan Rules of Evidence. Hough made his statement while in police custody and to a law enforcement officer; its form is not a narrative, but a response to the detective's questions; and he downplayed his role in the offenses to the detriment of Riggen and Jackson. Moreover, Hough may have been motivated by revenge, in that he contended that the detective told him that one of his associates had already made a statement implicating him.

However, defendants not only did not object to the admission of Hough's custodial statement, they agreed to its admission at trial. This issue is therefore reviewed only to the extent that a substantial right of the defendants was affected. MRE 103(a)(1). Defendants may not assign error on appeal to something that their own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). "An error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). This Court can, however, consider unpreserved "claims of constitutional error for the first time on appeal when the alleged error could have been decisive of the outcome." *Id.* at 547.

Because defendants did not object to the admission of the statement, our review is limited to determining whether defendants were denied their constitutional right to confrontation. The Confrontation Clause "countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *People v Petros*, 198 Mich App 401, 409; 499 NW2d 784 (1993), citing *Ohio v Roberts*, 488 US 56, 63, 100 S Ct 2351; 65 L Ed 2d 597 (1980). Hearsay statements that fall within "a firmly rooted hearsay exception" are presumptively reliable. Statements that do not fall within one of these exceptions "must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.*, citing *Ohio v Roberts, supra*, 488 US 66.

We have previously suggested that MRE 804(b)(3), covering statements against penal interest, is not a "firmly rooted" hearsay exception. *People v Richardson*, 204 Mich App 71, 77; 514 NW2d 503 (1994). Nor is Hough's custodial statement marked with such guarantees of trustworthiness as to satisfy the defendants' right to confrontation. However, we recognized "an additional and alternative ground" for satisfaction of the Confrontation Clause in *Petros, supra* at 417-418. "When a confessing codefendant has testified at an earlier proceeding and is subject to cross-examination about the statement, the earlier opportunity to examine may well satisfy the Confrontation Clause because the witness under oath, has been given an opportunity to explain or deny the prior statement." *Id.* Hough testified at the preliminary examination and a Walker hearing and both times was subject to cross-examination by Riggen and Jackson. During both proceedings, Hough denied that his earlier statement was true and testified in a manner favorable to Riggen and Jackson. As noted in *Perlos* at 406, such a

recantation "achieve[s] every purpose a searching cross-examination could . . . .", rendering actual cross-examination "superfluous.". "In these circumstances, the prior opportunities for cross-examination will furnish the trier of fact a satisfactory basis to evaluate the truth of the prior statement." *Id.* at 418. In our view, the Confrontation Clause was satisfied by the opportunities these defendants had to cross-examine Hough at the two earlier proceedings.

Defendant Jackson argues alternatively that Hough's statement was not truly voluntary and therefore should not have been admitted. The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired. *People v Cipriano,* 431 Mich 315, 334; 429 NW2d 781 (1988). The trial court found that Hough's statement was voluntary and not coerced and that Hough was not intoxicated when he gave the statement. We will not reverse the finding of the trial court on the voluntariness of a confession unless the finding is "clearly erroneous. Absent a definite and firm conviction that the trial court erred, the Court of Appeals will affirm." *People v Hayden,* 205 Mich App 412, 416; 522 NW2d 336 (1994). We do not find that the trial court clearly erred in ruling that Hough's custodial statement was voluntarily given.

Defendant Riggen contends alternatively that he was denied effective assistance of counsel because of his counsel's acquiescence in the admission of Hough's custodial statement. At trial, Riggen's counsel explained to the court that he would not object to the admission of the statement because he intended to use Hough's preliminary examination testimony. Counsel's acquiescence in the admission of this testimony was a matter of trial strategy. This Court will not second guess counsel in matters of trial strategy. *People v Calhoun,* 178 Mich App 517, 524; 444 NW2d 232 (1989). A court cannot conclude that effective assistance of counsel was denied merely because a certain trial strategy backfired. *People v Barnett,* 163 Mich App 331, 338; 414 NW2d 378 (1987). Defendant Riggen was not denied effective assistance of counsel because of his attorney's agreement to the admission of Hough's custodial statement.

III

As his second issue, defendant Riggen argues that he was denied his constitutional right to be free from unreasonable search and seizure when the Birmingham police stopped and searched the van, which had been leased in his name. We disagree.

The Fourth Amendment to the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures. US Const, AM IV; Const 1963, art 1, § 11. In order to justify an investigatory stop, the police must have a particularized suspicion, based on objective observations, that the person stopped has been, is, or is about to engaged in some type of criminal activity. *People v Armendarez,* 188 Mich App 61, 66-67; 468 NW2d 893 (1991). The officer must be able to articulate specific facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Terry v Ohio,* 392 US 1, 21; 88 S Ct 1868, 1879; 20 L Ed 2d 889, 906 (1968).

The officer who stopped defendant's van testified that she ran several license plate numbers through the course of her shift, "checking for stolen vehicles, expired plates, improper plates." Defendant complains that the officer lacked reasonable suspicion to run the plate. However, the Fourth Amendment covers only searches and seizures and protects only those areas in which an individual has a reasonable expectation of privacy. It is not reasonable to expect that a license plate number is private. *People v Taormina*, 130 Mich App 73, 80; 343 NW2d 236 (1983). The officer did not stop the vehicle until the computer report indicated that the van was wanted by the Southfield police department for failure to return a rented vehicle. We find that the officer articulated specific facts that warranted her stop of the van.

Moreover, the search conducted by the Birmingham police was not constitutionally defective because it was a valid inventory search. Searches and seizures conducted without a warrant are considered unreasonable per se, subject to several specifically established and well-delineated exceptions. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). The performance of an inventory search by the police in accordance with departmental regulations is one of the established exceptions to the warrant requirement. *People v Toohey*, 438 Mich 265, 271; 475 NW2d 16 (1991). It was departmental policy for Birmingham police to inventory every vehicle that they impounded. The officers did not begin searching the van until they received confirmation of the vehicle's status. Their failure to complete an inventory sheet, despite departmental policy, was adequately explained.

Defendant's argument that the evidence should have been suppressed because the prosecution did not articulate which exception to the warrant requirement it relied on at trial is without merit. Although defense counsel argued in his opening and closing statement against the admission of this evidence, he did not move to suppress the evidence. The prosecution's burden to demonstrate a recognized exception to the warrant requirement is triggered by a defendant's motion to suppress evidence as illegally obtained. *People v Wade*, 157 Mich App 481, 485; 403 NW2d 578 (1987). The trial court properly considered the testimony of Birmingham officers and evidence from their search in the prosecution's case against defendant.

Defendant Riggen next argues that he must be resentenced because he was improperly assessed ten points under Offense Variable 9 for being the leader in a multiple offender situation and ten points under Offense Variable 24 for "wanton or malicious damage incurred above and beyond that necessary to commit the crime, and not formally charged." Defendant did not object to the scoring variables at his sentencing hearing, and this issue is therefore not preserved for our review. *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992). Moreover, because the sentencing guidelines were inapplicable to defendant because he was an habitual offender, *People v Cervantes*, 448 Mich 620, 625; 532 NW2d 831 (1995), any error committed is harmless.

Defendant Riggen next contends that he must be resentenced because the trial court intended to sentence him in the middle of the guidelines range but miscalculated in converting the upper figure of the range from months to years. This argument has no merit. First, defendant did not object to the trial court's mathematical error and has therefore not preserved this issue for review. Second, defendant has cited no authority for his contention that this error requires that he be resentenced and has therefore effectively abandoned the issue. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293

(1995). Finally, the sentencing guidelines do not apply to habitual offenders. *Cervantes, supra* at 448 Mich 625. Moreover, even if the guidelines did apply, the trial court's minimum sentence of five years would be within the guidelines' range of 36 to 80 months and thus presumptively proportionate. *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995).

Defendant Riggen's final argument is that he was denied effective assistance of counsel because his attorney did not object to the sentencing errors. Because defendant did not request a *Ginther* hearing, this Court must confine its review of defendant's claim to the facts apparent in the lower court record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In order to succeed on an ineffective assistance of counsel claim, a defendant must first show that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den ___ US ___; 115 S Ct 923; 130 L Ed 2d 802 (1995). Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 687-688. Defendant has failed to demonstrate that he was prejudiced by counsel's failure to object at the sentencing hearing. His sentence was not governed by the sentencing guidelines, because he pled guilty to being an habitual offender. Therefore, his counsel's failure to object to the scoring of offense variables did not prejudice him because the trial court was not bound to sentence him within the sentencing guidelines. Moreover, even though the guidelines do not apply to habitual offenders, the trial court's mathematical computation error did not prejudice him because his resulting sentence was within the guidelines range.

IV

Defendant Jackson argues that there was insufficient evidence to convict him of breaking and entering business property with intent to commit larceny and burning real property even if defendant Hough's statement is admissible. We disagree.

When reviewing a claim of insufficient evidence following a bench trial, 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 (1993). The elements necessary to prove breaking and entering an unoccupied building with the intent to commit larceny are: "(1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny or felony therein." *People v Adams*, 202 Mich App 385, 390; 509 NW2d 530 (1993).

Evidence of a breaking and entering presented at trial included: the testimony of a store employee that he had locked the business's doors and secured the burglary and fire alarms before leaving at 10:30 p.m.; testimony from the first firefighter on the scene that the rear door to the business had been pried open with some sort of tool and was slightly ajar and that the power lines had been cut; the interior of the store had been "trashed"; and a large amount of property was missing from the store. Some of this property was discovered in the roadway outside of the store; other property was discovered in the van in which defendant was a passenger. In his contested custodial statement, Hough indicated that Jackson and Riggen were inside of the building. He assisted them in carrying boxes from

the business and out to the van. When the van was stopped, it contained property taken from the business, a crowbar, which a state police forensics expert identified "to the exclusion of all others" as having produced the toolmarks on the business's rear steel door, three pairs of gloves, a telephone book that was earmarked to the business's listing, and blank checks from the business. Viewed in a light most favorable to the prosecution, there was sufficient evidence to convict defendant of breaking and entering business property with the intent to commit larceny.

Defendant also contends that the prosecution did not prove that he started a fire. The statute proscribing the burning of real property, MCL 750.73; MSA 28.268, provides:

> Any person who wilfully or maliciously burns any building or other real property, or the contents thereof, other than those specified in the next proceeding section of this chapter [dwelling houses], the property of himself or another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 10 years.

Evidence of arson presented at trial included the testimony of a detective, who was qualified as an expert in arson, that he had eliminated all possible sources of an accidental fire, the fire had at least three separate areas of origin, and that in his professional determination and without any doubt, the fire was intentionally set. A forensic test revealed no traces of accelerant, but the business contained combustible products such as stacks of T-shirts, boxes of records, and paper products. The firefighters found piles of partially burned clothing on the floor when they entered, which the owner indicated was not present prior to the fire. Hough's custodial statement indicated that defendant and Riggen were in the establishment. When they left the establishment and Hough was driving away, he noticed smoke in the building that he presumed to be a fire. Viewing the evidence in a light most favorable to the prosecution, there was also sufficient evidence to convict defendant Jackson of malicious or wilful burning of real property.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Thomas G. Power

[1] The two defendants were tried with a third individual, Eddie Shedrick-Christopher Hough, who was also convicted of the two charged offenses. This Court dismissed Hough's appeal on June 9, 1995, pursuant to stipulation (Docket No. 176493).

[2] Defendant Hough is considered unavailable because he was also being prosecuted for the underlying offenses, and, thus, could not be compelled to testify. See *People v Poole*, 444 Mich 151, 163; 506 NW2d 505 (1993).