# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
January 21, 1997

No. 182593

Recorder's Court
LC No. 94-000126

Before: Griffin, P.J., and T.G. Kavanagh* and D.B. Leiber,** JJ.

PER CURIAM.

Defendant was convicted by a jury of breaking and entering an occupied dwelling with intent to commit larceny, MCL 750.110; MSA 28.305, and subsequently pleaded guilty to being a fourth habitual offender, MCL 769.12; MSA 28.1084. He was sentenced to ten to twenty years' imprisonment as a fourth habitual offender. We affirm.

Defendant first argues that the trial court's decision to uphold a prosecution objection to the admission of evidence constituted an abuse of discretion. Specifically, during the direct examination of Vasquez, defense counsel asked her if defendant indicated what he intended to do after his call to Kory. The prosecutor objected on hearsay grounds. Defense counsel argued that defendant's statement to Vasquez was admissible under MRE 803(3), but the court sustained the objection.

We agree with defendant that this ruling was erroneous. Under MRE 803(3), a statement of the declarant's then existing state of mind is admissible when the state of mind of the declarant is at issue. *McCallum v Dep't of Corrections*, 197 Mich App 589, 604-605; 496 NW2d 361 (1992). In this case, defendant did not dispute that he entered Shuh's house, but argued that he did not have larcenous

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.
** Circuit judge, sitting on the Court of Appeals by assignment.

intent at the time because he believed he was entering Kory's house. Therefore, his state of mind was at issue and Vasquez's testimony was relevant to that issue.

Reversal on the basis of nonconstitutional preserved error is only required if the error was prejudicial. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). In the present case, Vasquez was allowed to testify that, after defendant's phone call, "Brian was going to go to Kevin [Kory]'s and I didn't want him driving." In addition, Kory testified that he told defendant to "[c]ome on by and get paid." Finally, in his statement to police defendant said that he went to Shuh's neighborhood to collect money he was owed. In other words, there was evidence of defendant's plan to go to Kory's before the jury, and Vasquez's testimony on that issue would have been cumulative. Under these circumstances, we conclude that the exclusion of this statement was harmless error.

Defendant next argues that he was denied a fair trial and due process where the trial court instructed the jury that the charged offense was a felony while the lesser offense was a misdemeanor. A reviewing court examines jury instructions in their entirety to determine if error requiring reversal occurred. *People v Harris*, 190 Mich App 652, 664; 476 NW2d 767 (1991). Even though the instructions may be somewhat imperfect, there is no error if they fairly presented to the jury the issues to be tried and sufficiently protected the defendant's rights. *Id.*

The general rule is that neither counsel nor the court should address the question of disposition upon conviction. *People v Goad*, 421 Mich 20, 25; 364 NW2d 584 (1984). However, it is permissible for a trial court to inform the jury that a greater offense is a felony while a lesser offense is a misdemeanor where such language is contained in the relevant statutes. *People v Turner*, 99 Mich App 733, 742; 298 NW2d 848 (1980), rev'd on other grounds 411 Mich 897 (1981); *People v Nichols*, 391 Mich 813; 387 NW2d 923 (1974). The statutes at issue contain such language. See MCL 750.110; MSA 28.305; MCL 750.115; MSA 28.310. Further, defendant has not cited authority in which a defendant's conviction was reversed on this basis. Therefore, defendant is not entitled to relief on this issue.

Defendant next argues that the prosecutor improperly appealed to the emotions of the jury during voir dire and summation. As defendant neither objected or requested a curative instruction, he is entitled to relief only if any prejudice could not have been cured by a timely instruction. *People v Biggs*, 202 Mich App 450, 460; 509 NW2d 803 (1993). We have examined the comments at issue and find that any prejudice therefrom was no more serious than that from the prosecutor's comments in *People v Swartz*, 171 Mich App 364, 372-373; 429 NW2d 905 (1988), which this Court found to be curable with a timely cautionary instruction. Therefore, we conclude that defendant is not entitled to relief on this issue.

Next, defendant argues that he is entitled to resentencing because he was scored ten points on offense variable (OV) 8 (continuing pattern of criminal behavior) when the prosecution presented no evidence that defendant derived a substantial portion of his income as a result of a continuing pattern of criminal activity. Ten points are scored where:

> The offense is a 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 and/or the offense is directly related to membership in an organized criminal group.

Without these points defendant's offense severity score would have placed him in level II instead of level III, with a corresponding lower minimum sentence range, and defendant argues that his sentence on the habitual offender conviction might have been lower.

We agree that the prosecution presented no evidence that defendant derived a substantial portion of his income, or, for that matter, any income as a result of criminal activities. Defendant was paroled in April 1991 and the pre-sentence report stated that he was discharged from parole in April 1993 and reported as required, with no new convictions. The pre-sentence report states that defendant had been employed for the past six months as a carpet layer, and that prior to that he was employed as a subcontractor laying carpet on a cash basis. Defendant's most recent previous offense involving burglary or theft was in March 1986, for attempted burglary, and his other burglary or theft offenses occurred in 1982 and 1978.

Nonetheless, the Supreme Court held in *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995), that the sentencing guidelines do not apply to the sentencing of habitual offenders and that review of a trial court's sentence for a habitual offender conviction is for abuse of discretion. During the pendency of this appeal, this Court in *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996), held that appellate review of habitual offender sentences using the sentencing guidelines in any fashion is inappropriate. Our review of a habitual offender sentence is thus limited to considering whether the sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *Id.*

We note that defendant does not argue that his sentence was disproportionate. In any event, we conclude that given the circumstances surrounding the offense and offender here, defendant's sentence is not disproportionate.

Finally, defendant argues that the trial court justified its sentence based on an independent finding of his guilt on offenses for which he was not tried or convicted.

A trial court may not make an independent finding of a defendant's guilt on another charge and use it as a basis for justifying a sentence. *People v Tyler*, 188 Mich App 83, 85-86; 468 NW2d 537 (1991). See also *People v Fortson*, 202 Mich App 13, 21; 507 NW2d 763 (1993); *People v Glover*, 154 Mich App 22, 44-45; 397 NW2d 199 (1986). This case, however, is unlike *Tyler*, *Glover*, and *Fortson* in that the trial court did not identify a specific criminal act which it believed defendant committed. Rather, the court remarked, during a long colloquy addressed to defendant in which it noted defendant's multiple felony convictions,[1] that it did not believe that defendant was caught every time he had broken and entered and that "you should have learned from all the numbers and especially the ones that you were convicted of that you don't get enough out of there to make a difference in your life."

We conclude that the court's comments are more accurately characterized as a belief that defendant is a threat to society, which is a permissible sentencing consideration. See *People v Derbeck*, 202 Mich App 443, 447; 509 NW2d 534 (1993). Defendant is not entitled to relief.

Affirmed.

/s/ Richard Allen Griffin
/s/ Thomas G. Kavanagh
/s/ Dennis B. Leiber

[1] The pre-sentence report states defendant had six felony convictions and three misdemeanor convictions prior to the instant conviction.