

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM EARL HENDERSON,

Defendant-Appellant.

UNPUBLISHED
February 14, 1997

No. 185873
Recorder's Court
LC No. 94-005816

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIM FOX,

Defendant-Appellant.

No. 185875
Recorder's Court
LC No. 94-005816

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

PER CURIAM.

At a joint jury trial, defendant Henderson was convicted of armed robbery, MCL 750.529; MSA 28.797, breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305, and assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, while defendant Fox was convicted of armed robbery, MCL 750.529; MSA 28.797, and breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305. Defendant Henderson was sentenced as a fourth felony offender, MCL 769.12; MSA 28.1084, to a single term of life imprisonment; defendant Fox was

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

sentenced as a fourth felony offender, MCL 769.12; MSA 28.1084, to a single term of twenty to fifty years' imprisonment. Defendants filed separate appeals as of right that were consolidated for our review. We affirm.

I

Defendant Henderson knocked on the victim's door and asked if she wanted her lawn cut. When the victim declined, Henderson asked her to come outside to see what he was doing by the side of her house. The victim said that she did not want him doing anything around her house and asked him to leave. A few minutes later, the victim could not see her dog in the yard and opened her door approximately twelve inches to check on him. Henderson then reached over and grabbed her arm. Henderson dragged her inside the house, put a rope around her neck, and demanded money. She then saw defendant Fox opening drawers in her bedroom and looking through them. Henderson subsequently went through the victim's purse while Fox held the rope around the victim's neck. Defendants left when someone started banging on the victim's door.

II

Defendant Henderson first argues that the trial court clearly erred in admitting the victim's identification of him at a lineup because only two other persons in the lineup resembled him. *People v McElhaney*, 215 Mich App 269, 286; 546 NW2d 18 (1996). Although there were apparently only two other men similar in height to defendant Henderson, we are unable to say that there was a substantial likelihood that the differences among the lineup participants, rather than complainant's recognition of defendant Henderson, was the basis of her identification. *People v James*, 184 Mich App 457, 466; 458 NW2d 911 (1990), vacated on other grounds 437 Mich 988; 469 NW2d 294 (1991); *People v Kurylczyk*, 443 Mich 289, 311-312; 505 NW2d 528 (1993). Moreover, even if the lineup identification was unduly suggestive, an independent basis existed for the victim's in-court identification of defendant Henderson where the incident lasted from fifteen to twenty minutes, the victim was twelve inches from defendant's face and the victim never failed to identify defendant as one of the perpetrators. *People v Kachar*, 400 Mich 78, 96; 252 NW2d 807 (1977). Finally, any error in admitting the identification testimony was harmless where there was no reasonable probability that the testimony contributed to defendant Henderson's conviction. *People v Hampton*, 138 Mich App 235, 239; 361 NW2d 3 (1984). Several neighbors testified to seeing two black men running from the victim's yard to a yellow car that had a lawnmower sticking out of the trunk and backing down the street at a high rate of speed. Within minutes, officers pulled over defendants who were backing up a yellow car at a high rate of speed one quarter mile from the victim's house. The car had a lawnmower and rope in the trunk. Accordingly, reversal is not warranted on this issue.

Defendant Henderson next claims that he was denied the effective assistance of counsel because his attorney failed to object to the in-court identification of him by the complainant. However, as noted, there was no need to establish an independent basis for the in-court identification because the lineup identification was not impermissibly suggestive. Moreover, there was an independent basis for the in-court identification of Henderson and any error in the admission of the identification testimony was

harmless. Therefore, defendant suffered no prejudice. Accordingly, defendant was not denied the effective assistance of counsel. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Defendant Henderson argues that he was also denied effective assistance of counsel when his attorney failed to object to a comment made by the prosecutor indicating that the victim was lucky because the incident did not result in her death but certainly could have. Defendant argues that this comment requires reversal because it contradicted the facts at trial and was designed to elicit jury sympathy. See *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988). We find that the comment was not an appeal to the jury's sympathy and related to facts later put into evidence. The complainant testified that she thought she was being killed when defendants put a heavy rope around her neck and tightened it so that she had difficulty breathing. Therefore, defense counsel was not ineffective in failing to object. *Nantelle, supra*, p 87. Moreover, we are convinced that defendant Henderson would have been convicted despite this remark and so defense counsel's failure to object to the allegedly improper remark did not prejudice defendant. *Id.*

Defendant Henderson also complains that the trial court abused its discretion by allowing the complainant's testimony about the resemblance between defendant Henderson and Satan to stand over defense objection. However, any error in the admission of the evidence did not prejudice defendant Henderson because, even if the comment had not been made, defendant still would have been convicted in light of the overwhelming evidence against him. *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996).

Defendant Henderson next argues that his right to due process was violated when his sentence was enhanced despite the fact that the habitual offender notice was defective in that the convictions listed on the notice were not his, as required by MCL 769.13; MSA 28.1085. Due process requires that a sentence be based on accurate information and that a defendant have a reasonable opportunity at sentencing to challenge the information. *People v Zinn*, 217 Mich App 340, 347-348; 551 NW2d 704 (1996). Defendant had notice that the prosecutor was seeking sentence enhancement and knew that he had four prior convictions. Although the convictions listed on the notice of enhancement were not his, this was brought to the attention of the court which confirmed, by way of defendant's acknowledgment and the presentence report, that defendant had four prior convictions. Defendant had an opportunity to challenge the sentencing information and was sentenced based upon accurate information. Accordingly, defendant was not denied due process.

Defendant Henderson also argues that resentencing is required because the trial court improperly calculated the sentencing guidelines. Defendant's asserted scoring errors would make no difference in the sentencing guidelines' range and, therefore, relief is not warranted. *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996). Moreover, defendant was sentenced as an habitual offender and the trial court is not to consider the guidelines in sentencing habitual offenders. *People v Dixon*, 217 Mich App 400, 411; 552 NW2d 663 (1996).

Lastly, defendant Henderson contends that his convictions for armed robbery, assault with intent to do great bodily harm less than murder, and breaking and entering violated his state and federal rights to be free from double jeopardy where all of the crimes arose out of the same events which occurred at

the same time. US Const, Am V; Const 1963, art 1, § 15. We hold that the convictions of these crimes do not violate the double jeopardy clauses where the social norms protected by each statute are distinct, the amount of punishment authorized by statute is different for each offense, the statutes are not hierarchical, and the crimes involve different elements. *People v Rivera*, 216 Mich App 648; 550 NW2d 593 (1996).

III

Defendant Fox argues that his convictions for breaking and entering and armed robbery constitute double jeopardy. For the reasons stated above in regard to defendant Henderson's claim, we disagree. *Rivera, supra*.

Defendant Fox next argues that there was insufficient evidence to find him guilty beyond a reasonable doubt of breaking and entering an occupied building where there was no evidence that he "broke" into the victim's house. See *People v Ferguson*, 208 Mich App 508, 511; 528 NW2d 825 (1995). The victim testified that when she cracked open the door to check on her dog, defendant Henderson grabbed her wrist, she was pushed outside, and then Henderson dragged her back in. She did not testify that defendant Henderson left the door wide open. The victim testified that she then saw defendant Fox inside her home going through her drawers. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could find that defendant Fox, if not directly, at least aided and abetted in breaking and entering the victim's house with intent to commit larceny. *People v Medlyn*, 215 Mich App 338, 341; 544 NW2d 759 (1996); *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

Defendant Fox also contends that there was insufficient evidence to find him guilty beyond a reasonable doubt of armed robbery since there was no evidence of a weapon. Fox asserts that the rope used in the crime was not used as a weapon but rather was merely used to immobilize the victim. Contrary to defendant's claim, the rope in question was not merely used to tie up and immobilize the victim. Rather, the rope was used as a garrote to obtain the property from the victim. The testimony showed that Fox held the noose around the victim's neck while defendant Henderson looked through her purse. Viewing this evidence in a light most favorable to the prosecution, we find that a rational trier of fact could have found beyond a reasonable doubt that defendant Fox was armed with a weapon. *Turner, supra*, p 569; *State v Berain*, 360 So2d 822 (La, 1978).

Defendant Fox next claims that the court should have granted his motion for a directed verdict where there was no evidence of a breaking to support the breaking and entering charge and no evidence of a dangerous weapon to support the armed robbery charge. For the reasons discussed above, a rational trier of fact could have found the essential elements of armed robbery and breaking and entering were proven beyond a reasonable doubt. Therefore, the court did not err in denying defendant's motion for a directed verdict. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

Defendant Fox argues that the trial court's instruction on mere presence did not adequately instruct the jury regarding his theory of the case which varied slightly from being merely present. A trial

court must instruct the jury on the applicable law. However, a trial court is not required to present an instruction on the defendant's theory unless the defendant requests it. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995). Defendant did not request the court to instruct the jury on his theory of the case and in fact indicated that he was satisfied with the instructions. Therefore, the court was not required to give such an instruction. Moreover, the court instructed the jury on aiding and abetting as well as the defense of mere presence. Accordingly, the jury was properly instructed regarding the applicable law, which included defendant's defense of mere presence. Reversal is not warranted.

Defendant Fox argues that his sentence should not have been enhanced where the notice of his sentence enhancement was untimely and failed to set forth the convictions upon which the prosecutor was relying. Contrary to defendant's claim, the notice of sentence enhancement was filed within the twenty-one day time period provided by MCL 769.13; MSA 28.1085. Moreover, defendant had notice that the prosecutor was seeking sentence enhancement and knew that he had at least three prior convictions. Although the convictions listed on the notice of enhancement were not correct, this matter was brought before the court which confirmed by way of defendant's acknowledgment and the presentence report that defendant had at least three prior convictions. Defendant had an opportunity to challenge the sentencing information and was sentenced based upon accurate information. Accordingly, defendant was not denied due process. *Zinn, supra*.

Finally, defendant Fox contends that his background and the circumstances of the offenses do not present the worst possible case, and therefore, he should not have been sentenced at the highest end of the guidelines. Aside from the fact that defendant was not sentenced at the highest end of the guidelines, the guidelines are not to be considered on appellate review. *Gatewood (On Remand), supra*, p 560. Moreover, defendant's involvement was more than he claims it to be and his "circumstances" indicate that he has not been rehabilitated despite past probation, incarceration, and parole. Accordingly, defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offenses and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995).

Affirmed.

/s/ Marilyn Kelly
/s/ Kathleen Jansen
/s/ Meyer Warshawsky