

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK MCCALLUM,

Defendant-Appellant.

UNPUBLISHED

February 25, 1997

No. 182642

Kent Circuit Court

LC No. 93-064263-FH

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Before: Sawyer, P.J., and Neff and A.L. Garbrecht,\* JJ.

PER CURIAM.

Defendant was convicted by a jury of entry without breaking, MCL 750.111; MSA 28.306, and was sentenced to 2-1/2 to 5 years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in reinstructing the jury on the various elements of the charged offense and the lesser included offenses without also instructing the jury that it could find defendant not guilty. However, defendant failed to object to the trial court's supplemental instructions and, therefore, did not preserve this issue for appellate review. *People v Van Dorsten*, 441 Mich 540; 494 NW2d 737 (1993).

Defendant next argues that the trial court erred in failing to strike certain evidence that he claimed should have been produced by the prosecutor during discovery. Where a prosecutor fails to comply with a discovery order, a trial court has the discretion to fashion an appropriate remedy. The trial court's exercise of its discretion involves a balancing of the interests of the courts, the public and the parties. *People v Loy-Rafuls*, 198 Mich App 594, 597; 500 NW2d 480 (1993), rev'd in part on other grounds 442 Mich 915 (1993).

Defendant's trial counsel was provided with a copy of defendant's taped statement and a police report on a related matter in Ottawa County on the first day of trial. In the Ottawa County case, defendant confessed to committing the instant offense. Counsel informed the court that his cross-examination of the police officer who took defendant's statement would not be effective unless counsel had more time to prepare.

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

The trial court granted defense counsel time to listen to the taped statement and time to compare it to the transcript made of the statement. The court ordered that the officer involved in taking defendant's statement was not to be called until defense counsel had time to hear the tape. The trial court believed that this procedure was adequate to allow defense counsel time to prepare his cross-examination.

A defendant is entitled to have produced at trial all evidence bearing on guilt or innocence that is within the prosecutor's control. *People v David Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). Where the prosecution suppresses evidence, the court must consider whether (1) the suppression was deliberate, (2) the evidence was requested, and (3) in retrospect, the defense could have significantly used the evidence. *Id.*

In the case at bar, there was not a deliberate effort to suppress the evidence. Defendant's previous counsel was presumably provided with this information and it was simply overlooked when defendant had new counsel take over this matter. It appears that the prosecution voluntarily agreed to provide defendant with all requested discovery materials, including this report and statement.

At trial, defense counsel was able to effectively cross-examine the police officer involved to show that defendant, in his statement, admitted going into the warehouse, but not having to open the door to enter because it was already open. Defendant's taped statement varied from the police officer's version of defendant's statement. The police officer explained that defendant admitted to jiggling or moving the door to get into the warehouse. The jury found defendant guilty of the lesser offense of entry without breaking, which was consistent with defendant's own statement. Thus, defense counsel was able to effectively cross-examine the police officer on defendant's statement and defendant was not prejudiced by the fact that his counsel only received this evidence on the first day of trial. See *People v Gary Johnson*, 206 Mich App 122, 126; 520 NW2d 672 (1994).

Finally, defendant argues that the trial court erred in not striking his three prior misdemeanor convictions from the presentence investigation report. Defendant argued at his motion for resentencing that all three of the convictions were obtained without counsel or without a valid waiver thereof. The trial court ruled that it did not take defendant's prior misdemeanor record into account in its sentencing decision. Therefore, resentencing was not required. Defendant now argues that he was entitled to have the three convictions stricken from the presentence investigation report. We disagree.

Although the trial court ruled that resentencing was not required because it did not consider defendant's misdemeanor record at sentencing, it also ruled that defendant failed to meet his burden of establishing that the prior misdemeanor convictions were invalid. Defendant's appellate counsel wrote to circuit courts only to request verification of defendant's records. As the trial court properly held, this did not satisfy defendant's initial burden. *People v Zinn*, 217 Mich App 340, 342; 551 NW2d 704 (1996). Defendant should have written to district courts, not circuit courts. Therefore, the trial court also found there was no merit to defendant's challenge to the constitutional validity of his prior convictions in light of his failure to meet his initial burden on this issue. Accordingly, defendant is not entitled to have these convictions deleted from the presentence investigation report where the trial court

addressed the merits of his challenge to the constitutional validity of the misdemeanor conviction and found that he had not met his burden. *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991).

Affirmed.

/s/ David H. Sawyer

/s/ Janet T. Neff

/s/ Allen L. Garbrecht