STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE J. MURPHY,

Defendant-Appellant.

UNPUBLISHED
March 7, 1997

No. 181128
Oakland Circuit Court
LC No. 94-131561-FH

Before: McDonald, P.J., and Bandstra and C.L. Bosman,* JJ.

PER CURIAM.

Defendant appeals as of right his conviction of breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305, and his conviction and sentence as a fourth habitual offender, MCL 769.12; MSA 28.1084. Defendant was sentenced to five to twenty years' imprisonment. We affirm.

Defendant first contends that the evidence was insufficient to support his conviction. We disagree. In reviewing a claim of insufficient evidence, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

Here, the prosecution proved, by circumstantial evidence, that defendant aided and abetted in the breaking and entering of the Broadway store on February 25, 1994. Circumstantial evidence and the reasonable inferences therefrom can constitute satisfactory proof of the elements of a crime. *People v Fisher*, 193 Mich App 284, 289; 483 NW2d 452 (1992). Defendant was arrested after the Southfield police tracked a set of distinctive footprints that matched defendant's boots from the crime scene to the Embassy Suites Hotel. Consistent with the prosecution's theory that defendant acted as a lookout during the commission of the crime, defendant was found with a pair of binoculars. We have held that an aider and abettor's state of mind may be inferred from all of the facts and circumstances of

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

the case, including evidence of flight after the crime. *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995). Therefore, a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.

Defendant next contends that the lower court erred by abdicating its obligation to pass on the admissibility of evidence to the jury. We find this contention erroneous. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989). Here, although the lower court stated that the relevance of the evidence would be a matter for the jury, it also stated that defendant's objection to admissibility would be overruled and the evidence admitted as there was no dispute as to authenticity and it had something to do with the alleged crime. Therefore, the court did not abdicate its role to the jury. Further, in order to convict defendant of aiding and abetting, the prosecution must prove that the defendant or another committed the crime. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993). The proposed evidence was relevant as to this proof, and its admission did not constitute an abuse of discretion.

Defendant next asserts that the prosecution committed several instances of prosecutorial misconduct, which denied defendant a fair and impartial trial. We disagree. In making the determination of whether defendant was denied a fair and impartial trial, this Court reviews the prosecutor's remarks in the context of all of the facts of the case. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

First, defendant contends that the prosecution improperly bolstered the testimony of Officer Stanley Mrocka by allowing him to testify that he had also testified in the same way at the preliminary examination. This Court has held that generally neither a prosecutor nor anyone else is permitted to bolster a witness' testimony by referring to prior consistent statements of that witness. *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987). Therefore, the prosecutor did improperly bolster Mrocka's testimony. However, in reviewing Mrocka's statement, it cannot be said that it was so prejudicial as to deny defendant a fair trial, as it is important to note that the statement came in the context of Mrocka's relaying that defendant had stated not only that he did not have any involvement "whatsoever" in the Broadway store break-in, but that he also stated that he had not been in the area and had been at a Seven-Eleven at the time of the commission of the crime. Much of Mrocka's testimony benefited defendant.

Defendant also alleges that the prosecution improperly elicited testimony from Mrocka surrounding defendant's identification through the use of running his fingerprints through the Automatic Computerized Identification System. We conclude that this questioning was not prosecutorial misconduct as it was necessary to demonstrate defendant's intent for the crime of aiding and abetting. MRE 404(b)(1). Evidence of a defendant's flight, particularly in light of further evidence that the defendant attempted to conceal his identity, is admissible to show evidence of consciousness of guilt. *People v Cutchall*, 200 Mich App 396, 399-401; 504 NW2d 666 (1993). Therefore, the questioning did not violate the Michigan Rules of Evidence and was not prosecutorial misconduct.

Defendant finally alleges that prosecutorial misconduct occurred during closing argument when the prosecutor asked the jury to draw improper inferences from defendant's alleged running away from the crime scene and mischaracterized the Southfield Police Department's tracking of the footprints they found as a "chase." We disagree. Evidence of flight is admissible if it is relevant and material. *Id*. at 398-399. Further, it is permissible for a prosecutor to comment about and suggest reasonable inferences from the evidence. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). Here, it was not unreasonable to characterize the police officers' efforts to follow the footprints through a ravine, over a fence and a brick wall, while constantly running, as a "chase." Therefore, the prosecution's closing remarks did not constitute misconduct.

Defendant next contends that the Oakland County Prosecutor's policy of charging every defendant passing through the Oakland County criminal justice system who has a prior felony conviction as an habitual offender is an abuse of discretion and unconstitutional. We disagree. A prosecutor's decision on which charges should be brought is reviewed to determine whether it is illegal, ultra vires, or unconstitutional. *People v Barksdale*, 219 Mich App 484; ___ NW2d ___ (1996). This Court has repeatedly reviewed the Oakland County Prosecutor's policy and found that it does not deny fundamental fairness, due process, or equal protection of the law. *People v Newcomb*, 190 Mich App 424, 431-432; 476 NW2d 749 (1991); *People v Sunday*, 183 Mich App 504, 506; 455 NW2d 321 (1990).

Defendant contends that the trial court violated MCR 6.302 in its acceptance of defendant's guilty plea as to the fourth habitual offender charge. However, because defendant did not file a motion to withdraw his plea within the time for filing an application for leave to appeal, this issue is not preserved on appeal. MCR 6.311(C); *People v Gaines*, 198 Mich App 130, 131-132; 497 NW2d 210 (1993). Defendant has provided no argument that MCR 6.311(C) should not apply here, and we consider that argument to be waived. In any event, a defendant may be adjudged an habitual offender without being granted the right to a jury trial, and Michigan's habitual offender statutes are merely sentence enhancement mechanisms rather than substantive crimes. *People v Zinn*, 217 Mich App 340, 344-347; 551 NW2d 704 (1996).

Finally, defendant argues that the sentence imposed was based on miscalculated sentencing guidelines and violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). "[R]eview of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality…without reference to the guidelines." *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). We have considered the circumstances surrounding the offense and the offender and conclude that defendant's sentence is not disproportionate. *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995).

We affirm.

/s/ Gary R. McDonald
/s/ Richard A. Bandstra
/s/ Calvin L. Bosman