STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VIRGIL DAVID WITHERSPOON,

Defendant-Appellant.

UNPUBLISHED
May 2, 1997

No. 187224
Kalamazoo Circuit Court
LC No. 94-001181-FH

Before: Neff, P.J., and Smolenski and D. A. Roberson*, JJ.

PER CURIAM.

Defendant was convicted by the trial court of larceny from a person, MCL 750.357; MSA 28.589, and fourth-offense habitual offender, MCL 769.12; MSA 28.1084. Defendant was sentenced to eight to twenty years' imprisonment, such sentence to be served consecutively to sentences defendant was serving in unrelated cases. Defendant appeals as of right. We affirm.

Defendant argues that insufficient evidence was presented to sustain his conviction for larceny from a person. We disagree. Viewing the victim's testimony in a light most favorable to the prosecution, we conclude that sufficient evidence was presented from which a rational trier of fact could have found that the essential elements of the crime of larceny from a person were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, modified 441 Mich 1201 (1992); *People v Ainsworth*, 197 Mich App 321, 323-324; 495 NW2d 177 (1992). The credibility of the witnesses was for the trier of fact. *Wolfe*, *supra* at 515.

We note that following the larceny it was the victim who observed defendant in the vicinity of the larceny, flagged down a patrol car and led the police to defendant. To the extent that defendant insinuates error with respect to the circumstances of this alleged on-the-scene identification, we deem the issue abandoned where defendant has failed to cite any authority in support of his insinuation. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Moreover, we reject

---

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

defendant's contention that counsel's failure to request a subsequent line-up denied him the effective assistance of counsel. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Next, defendant argues that the prosecutor failed to exercise due diligence in producing alleged res gestae witnesses. However, defendant does not claim that these witnesses witnessed some part of the continuum of the criminal transaction. Rather, defendant claims that these witnesses could have placed him elsewhere than at the scene of the crime. Thus, we conclude that the witnesses at issue were alibi witnesses, not res gestae witnesses. *People v McGinnis*, 402 Mich 343, 345; 262 NW2d 669 (1978); *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989). Further, the prosecutor's former duty to use due diligence to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses who might be called at trial and reasonable assistance to locate witnesses on a defendant's request. *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (citing MCL 767.40a; MSA 28.980[1]). Even assuming that the prosecutor knew about defendant's alibi witnesses, we find no failure to provide notice where defendant does not contend that the prosecutor intended to call these witnesses at trial. Moreover, defendant concedes that defense counsel did not request the prosecutor to provide reasonable assistance in locating these witnesses. Accordingly, we find no error on the part of the prosecutor.

Next, defendant argues that the police failed to obtain fingerprints from the victim's purse and car. However, the police are not required to seek and find exculpatory evidence. *People v Miller (After Remand)*, 211 Mich App 30, 43; 535 NW2d 518 (1995). Defendant also argues that the police failed to attempt to find his alibi witnesses. It is true that the police, like the prosecutor, must provide reasonable assistance to locate witnesses on a defendant's request. *Burwick, supra*. However, in this case there is no indication that either defendant or his counsel requested assistance from the police in locating these witnesses. Thus, we find no error on the part of the police.

Next, defendant argues that defense counsel's failure to demand that the prosecutor produce his alibi witnesses constituted ineffective assistance of counsel. Defendant contends that at least one alibi witness could have testified that at the time of the crime he was at the Polar Bear Market, which was approximately one or two blocks from the vicinity of the crime and defendant's apprehension. However, even defendant concedes that the victim lost sight of him for a period time after the crime. Moreover, evidence was presented at trial that at the time he was apprehended by the police defendant was walking in the wrong direction to be coming from the market. Finally, we note that at the sentencing hearing defendant admitted his guilt. Thus, even if we construe defendant's argument as one contending that counsel erred in failing to request assistance in locating these witnesses or to seek these witnesses himself, we nevertheless conclude that defendant cannot establish that he was deprived of a substantial defense or prejudiced by counsel's error. *Pickens, supra*.

Finally, defendant argues that his sentence violates the principle of proportionality. We disagree. As a fourth-offense habitual offender, the sentencing guidelines do not apply to defendant, and it is inappropriate to use them when reviewing defendant's sentence. *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995); *People v Gatewood (On Remand)*, 216 Mich App 559, 560;

550 NW2d 265 (1996). Nonetheless, the principle of proportionality applies when reviewing habitual offender sentences. *Gatewood, supra*.

The maximum sentence for a conviction of larceny from a person is ten years. MCL 750.357; MSA 28.589. However, as a fourth-offense habitual offender, defendant could have received a sentence of life imprisonment. MCL 769.12; MSA 28.1084. In light of defendant's criminal history, we find no abuse of discretion in the trial court's conclusion that there was little hope for defendant's rehabilitation and that a lengthy prison sentence was warranted in order to protect society. *People v Johnson*, 173 Mich App 706, 709; 434 NW2d 218 (1988).

Defendant insists that the trial court penalized him for exercising his right to trial. We disagree. The trial court did not express anger at defendant's decision to go to trial, but, rather, at defendant's admission that he lied at trial. Defendant's wilful, material and flagrant perjury was an appropriate sentencing consideration. *People v Houston*, 448 Mich 312, 324; 532 NW2d 508 (1995).

Defendant insists that his sentence is disproportionate in light of its consecutive nature. However, as long as each sentence is proportionate, the cumulative effect of consecutive sentences does not affect proportionality. *People v Clark*, 207 Mich App 500, 502; 526 NW2d 357 (1994).

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Dalton A. Roberson