STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRADY JEROME JONES,

Defendant-Appellant.

UNPUBLISHED
May 30, 1997

No. 178900
Muskegon Circuit Court
LC No. 93-36390-FH

Before: Griffin, P.J., and Doctoroff and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of receiving or concealing stolen property, MCL 750.535(1); MSA 28.803(1) --a felony because it was his third offense-- and with being a fourth habitual offender. MCL 769.12; MSA 28.1084. Defendant was sentenced to two concurrent sentences of ten to twenty-five years in prison and appeals. We affirm.

Defendant first argues that he was denied effective assistance of counsel because his counsel failed to object to improper impeachment and questioning. Because defendant failed to raise the issue of ineffective assistance of counsel below, our review is limited to the facts contained on the record. *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993). Defendant contends that, under MRE 609, his counsel should have objected to his parole agent's testimony about his prior convictions because this testimony allowed the jury to improperly consider defendant's character instead of focusing on the elements of the charged offenses. The pertinent part of MRE 609 states:

> For the purposes of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited *from the witness* or established by public record during cross-examination. [Emphasis supplied.]

However, this argument is without merit because the prosecution was not attempting to impeach the credibility of the "witness," i.e. the parole agent, by bringing out defendant's convictions. Additionally, the prosecution could not have been attempting to impeach the credibility of

defendant because defendant had not yet testified. *People v Winhoven*, 65 Mich App 522, 529; 237 NW2d 540 (1975). Therefore, under MRE 609, defense counsel was not ineffective in failing to object to the testimony or in failing to request a curative instruction.[1]

Defendant contends that his counsel also should have objected, under MRE 401 and MRE 402 when the prosecutor questioned witnesses about his alleged drug habit.[2] However, we believe that such evidence was arguably relevant under MRE 401 and, therefore, that defense counsel did not have a fundamental duty to object. The evidence was relevant because it had some tendency to show defendant's financial motivation to conceal or possess stolen property. Equally importantly, because defense counsel may either have decided to rely on the contrary testimony of several witnesses that defendant no longer abused drugs or not to highlight the issue of defendant's alleged drug abuse by objecting, we cannot conclude that counsel fell short of satisfying the minimum threshold of his responsibilities. Defendant has not met his substantial burden of demonstrating that his counsel was not acting in conformity with a reasonable trial strategy and that he was ineffective in either of these instances. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).[3]

Next, defendant argues that he was denied a fair trial because the trial court erroneously admitted rebuttal testimony concerning evidence in his possession at the time of his arrest stemming from an uncharged and unrelated breaking and entering. Generally, a trial court's decision to admit rebuttal evidence will not be disturbed on appeal absent a clear abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). However, because defendant failed to object to the admission of the rebuttal evidence, we review this issue only to determine whether the error resulted in manifest injustice. *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985).

We assume, *arguendo*, that the rebuttal evidence in this case was improperly admitted because it related to a collateral, rather than a substantive issue, *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994), and because the prosecutor cannot create an issue for rebuttal merely by eliciting defendant's denial on cross-examination. *Figgures, supra* at 401. Even so, we do not find that any manifest injustice occurred requiring a new trial. Such error did not, in our judgment, affect the reliability of the jury's verdict in light of the substantial weight of the untainted evidence against defendant going to each element of the charged offenses MCR 2.613(A); *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

Next, defendant argues that his sentence is disproportionate and excessive in light of his background and the nature of the offenses. Our review of the proportionality of sentences is limited to whether the sentencing court abused its discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). The statutory maximum for defendant's crimes is five years' imprisonment, MCL 750.535(1); MSA 28.803(1), but the trial court was permitted to sentence defendant to a term of life or a lesser term under the habitual offender enhancement provision. MCL 769.12(1)(a); MSA 28.1084(1)(a). However, the sentencing court stated that it would not sentence defendant to a life term because it reserves higher sentences for violent offenders. Instead, defendant was sentenced to two concurrent terms of ten to twenty-five years' imprisonment. In light of defendant's lengthy history of

property offenses and the absence of any apparent rehabilitation, we do not find that the sentencing court abused its discretion in sentencing defendant.

In a separate brief, filed in propria persona, defendant raises several additional claims relating to the preliminary examination and arraignment.[4] Contrary to defendant's representations, our review of the record demonstrates the following: the November 9, 1993, preliminary examination involved two counts of receiving and concealing stolen property under one-hundred dollars - third offense; while the certified documents showing the previous offenses were received after the close of the prosecution's proofs at the preliminary examination, the judge noted this on the record, noted that there was no objection and received them as evidence; the information, as well as the complaint, warrant, and bind over/transfer, clearly included a supplemental charge of habitual offender-fourth felony; and the waiver of arraignment contains defendant's signature. Moreover, the record demonstrates that defendant raised no objections regarding his arraignment on the two counts of receiving and concealing stolen property or the habitual offender count at his trial. We have reviewed the preliminary examination transcript and find no abuse of discretion in the district court's determination that there was probable cause to bind defendant over for trial on the two counts of receiving and concealing stolen property. See *People v Johnson*, 206 Mich App 122, 126; 520 NW2d 672 (1994). Contrary to defendant's contention, a failure to file a preliminary examination transcript would not deprive the circuit court of jurisdiction. See *People v Zinn*, 63 Mich App 204, 211; 234 NW2d 452 (1975). Finally, defendant raises additional claims of ineffective assistance of counsel. In order to justify reversal of an otherwise valid conviction on the basis of ineffective assistance of counsel, "a defendant must show that a counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *Stanaway*, *supra*; *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant's claims do not meet this standard, in our judgment.

Affirmed.

/s/ Richard Allen Griffin
/s/ Martin M. Doctoroff
/s/ Stephen J. Markman

[1] Whatever greater merit this argument might have in the context of MRE 404(b), defendant has raised this issue only in the context of MRE 609. Even under MRE 404(b), however, there is no basis for reversing defendant's conviction. Defendant himself called the witness, Jess Doan, who was identified as defendant's parole officer, and then questioned about aspects of defendant's evolving personal appearance. On cross-examination, the prosecutor asked a single question concerning the matter for which defendant was on parole, without further inquiry. Whatever error may have occurred in this question being asked, the marginal prejudice done to defendant beyond what was already known about his need for a parole officer was certainly minimal. At most, the prosecutor's question constituted harmless error under MRE 404(b).

[2] Because of defendant's inapt reference to MRE 410 in his brief, we assume that MRE 401 is the proper provision cited here.

[3] Defendant also alleges ineffective assistance because of his counsel's failure to object to testimony regarding "defendant's possession of stolen identification." However, if this reference is to defendant's possession of Larabee's identification, then his argument is without merit because this is the charged offense. If defendant, however, is referring to his possession of Garnett's identification, see *infra*, then his argument is without merit because his counsel repeatedly objected to the introduction of this evidence.

[4] We hereby grant defendant's motion to file a supplemental brief on appeal.