

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BASHIR ABRO,

Defendant-Appellant.

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UNPUBLISHED

August 19, 1997

No. 193478

Genesee Circuit Court

LC No. 95-052887-FH

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELROY R. ROSBOROUGH,

Defendant-Appellant.

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No. 193479

Genesee Circuit Court

LC No. 95-052905-FH

Before: Corrigan, C.J., and Markey and Markman, JJ.

PER CURIAM.

A jury convicted both defendant Abro and defendant Rosborough of receiving and concealing stolen property over \$100, MCL 750.535; MSA 28.803. The court sentenced defendant Abro to a term of five to seven and one-half years' imprisonment as an habitual offender, second offense, MCL 769.10; MSA 28.1082.<sup>1</sup> The court sentenced defendant Rosborough to serve eighteen to thirty years' imprisonment as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendants appeal as of right. As to defendant Abro, we affirm. As to defendant Rosborough, we affirm in part, reverse in part and remand.

Defendants' convictions arose from an investigation that the United States Secret Service Agency conducted regarding the King Party Store in Flint, which was owned by defendant Abro. The

investigation was focused on food stamp fraud. When Secret Service agents raided the store, they recovered a stolen camera. As a result of the raid, Nadim Alkader, an employee of the party store, became a cooperating witness for the Secret Service. Alkader informed the Secret Service that defendant Rosborough had sold the stolen camera to defendant Abro, and other testimony established that the camera was valued at more than \$100. Each defendant raises a number of issues on appeal. The prosecution has not filed an appellate brief.

## I

Defendant Abro first argues that the trial court abused its discretion by admitting into evidence a picture of defendant Abro that was on the roll of film in the camera because the prosecution did not disclose the evidence prior to trial. Because defendant Abro did not seek discovery, this argument is without merit. See *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994). Moreover, this evidence had no prejudicial effect on defendant because it was undisputed that defendant Abro was in possession of the camera when it was recovered, and the record established that the defense was provided sufficient time to respond to the evidence.

Next, defendant Abro argues that the trial court prevented him from cross-examining the Secret Service agent as to why a witness usually cooperates. We disagree.

We review for an abuse of discretion the question whether a trial court has properly limited cross-examination. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995). A limitation on cross-examination that prevents a defendant from placing before the jury facts from which to infer that a witness is biased, prejudiced or incredible amounts to an abuse of discretion and can constitute a denial of the right of confrontation. *People v Holliday*, 144 Mich App 560, 566; 376 NW2d 154 (1985). If cross-examination of a prosecution witness has been unreasonably limited, a conviction based upon the testimony of that witness should not be sustained. *Id.* at 566-567. Failure to permit adequate cross-examination constitutes error, but reversal is not always required where the error is harmless or no prejudice results. *Id.* at 567.

In the case at bar, no prejudice resulted from the trial court's actions. Pursuant to MRE 401, relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The question as to why witnesses cooperate was irrelevant with respect to why Alkader agreed to become a cooperating witness in this instance. Furthermore, Alkader was questioned about whether his testimony was the result of a plea agreement on the federal food stamp fraud investigation. Both the Secret Service agent and Alkader testified that he did not receive any plea bargain agreement, and, in fact, was still a suspect. Thus, we find that the trial court did not abuse its discretion in limiting this question.

Defendant Abro also argues that the trial court relied upon material that was not part of his presentence investigation report (PSIR) to make its sentencing determination. The material was a newspaper article that apparently discussed the federal charges against defendant Abro. Defendant contends that the article is the equivalent of a supplement to the PSIR, that he should be resentenced, or

that his sentence should be reconsidered because he was not given an opportunity to review it. We disagree.

The PSIR presented to the court contained a reference to the newspaper article. Initially, we note that at the time of sentencing, defendant's only comment in respect to the newspaper article was that it "gave him a bad name." Because defendant did not dispute the accuracy of the article, he has not properly reserved this issue. *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). Moreover, while the court did refer to the article, the court clearly and succinctly stated that it was making its sentencing determination based on its observations throughout the trial. Therefore, we believe that the trial court did not consider the newspaper article as supplemental material. Thus, defendant is not entitled to resentencing. See *People v Newcomb*, 190 Mich App 424, 427-428; 476 NW2d 749 (1991).

Finally, defendant Abro contends that his sentence violated the principle of proportionality. We disagree.

We review a trial court's sentencing determination for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion when it is not proportionate to the circumstances of the offense and the background of the offender. *Id.* The trial court acknowledged that defendant Abro's role as a fence was as harmful to society as if he were a thief because he provided a place for socially unacceptable and illegal activity to take place. Given the continuous criminal activity in defendant's store, we believe that the sentence was proportionate to the circumstances of the offense and defendant's background.

## II

Defendant Rosborough first argues that his sentence is not proportionate because it is nine times greater than the guidelines. We disagree. A sentence must be proportionate to the seriousness of the crime and defendant's prior record. *Milbourn, supra* at 635-636, 654. The sentencing guidelines do not apply to habitual offender convictions, however. *People v Cervantes*, 448 Mich 620, 622, 625-630; 532 NW2d 831 (1995). Thus, when reviewing the sentences of habitual offenders, this Court should determine whether the trial court abused its discretion in imposing the sentence. *Id.* at 626-630, 636-637. Here, we find no abuse of discretion. See *People v Broden*, 428 Mich 343, 350; 408 NW2d 789 (1987). As an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, defendant Rosborough could have been sentenced to a maximum of life imprisonment for his conviction. The trial court sentenced defendant to eighteen to thirty years' imprisonment. In light of defendant's repetitive pattern of criminal behavior spanning many years, the sentence was proportionate. See *People v Yeoman*, 218 Mich App 406, 422; 554 NW2d 577 (1996).

Defendant Rosborough also argues that the trial court made inappropriate comments during sentencing. In light of defendant's past criminal history, we disagree. When the comments are read in the context in which they were presented, they accurately reflected defendant Rosborough's criminal behavior and were not inappropriate.

Defendant Rosborough contends that his habitual offender conviction and sentence must be vacated because he was denied the right to a jury trial on that charge. Although defendant did not object at the end of his jury trial or at his sentencing, we will review this issue de novo because he raises a question of law. See *People v Slocum (On Remand)*, 219 Mich App 695, 697; 558 NW2d 4 (1996).

When defendant Rosborough was charged for receiving and concealing stolen property, the habitual offender statute in effect required that, in pertinent part:

The court in which the conviction was had shall cause the person to be brought before it and shall inform him of the allegations contained in the information, and of right to be tried on the allegations, and require the offender to say whether he is the same person as charged in the information or not. If the offender is not the same person, or remains silent, the court shall enter a plea of not guilty, and a jury of 12 jurors shall be impaneled from the petit jurors serving at the then or a following term of court to determine the issues raised by the information and plea. [MCL 769.13; MSA 28.1085.]<sup>2</sup>

According to case law, the habitual offender proceeding is like any ordinary criminal trial and is a critical stage of prosecution. Therefore, the defendant has a right to a jury trial and the prosecution must prove the charges by proof beyond a reasonable doubt. See *People v Brownridge*, 414 Mich 393, 397; 325 NW2d 125 (1982); *People v Wilkins*, 184 Mich App 443, 452; 459 NW2d 57 (1990); *People v Taylor*, 176 Mich App 374, 377-378; 439 NW2d 370 (1989). “A defendant’s waiver of a jury trial must conform to the requirements of MCL 763.3; MSA 28.856: it must be made in writing, signed by the defendant, and filed in the case and made part of the record” (footnotes omitted). *Wilkins, supra*. The record reflects that the trial court failed to inform defendant Rosborough of his right to a jury trial on the habitual offender charge, nor is defendant’s waiver of that right in writing and signed by defendant, and made part of the record. Therefore, we must reverse and remand for a trial on the habitual offender charge.

Next, defendant Rosborough alleges that the trial court abused its discretion by denying his motion for severance from defendant Abro’s case. We disagree.

We review for an abuse of discretion a trial court’s decision to sever. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). Severance of a case is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *Id.* Inconsistency of defenses is not enough to mandate severance. Rather, the defenses must be “mutually exclusive” or “irreconcilable.” *Id.* at 349. Defenses are mutually exclusive within the meaning of this rule if the jury must disbelieve the core of the evidence offered on behalf of a codefendant in order to believe the core of the evidence offered on behalf of another defendant. *Id.* at 349-350.

Defendants’ defenses were not mutually exclusive or irreconcilable. Defendant Abro’s defense was that he did not know the camera was stolen. He never argued that he bought the camera from defendant Rosborough. The jury could have believed him and found him not guilty of the crime,

regardless of how or from whom he received the camera. Similarly, defendant Rosborough's defense was that he did not steal the camera. Again, the jury could have believed him and still believed that defendant Abro not only obtained the camera from someone other than defendant Rosborough but also had no knowledge that it was stolen. Defendant Rosborough contends that he is implicated by the mere fact that the camera was in defendant Abro's possession. We disagree because the jury could have found that defendant Abro did not obtain the camera from defendant Rosborough. Accordingly, the trial court did not abuse its discretion in denying the motion to sever the cases and conduct separate trials.

Defendant Rosborough further contends that the motion to sever should have been granted because he was prejudiced by the testimony regarding the federal food stamp fraud investigation. Notably, defendant Rosborough's counsel elicited approximately one-half of this testimony. Defendant may not assign error on appeal to something his counsel deemed appropriate and defendant acquiesced to at trial. See *People v Barclay*, 208 Mich App 670, 672-673; 528 NW2d 842 (1995). As to other trial testimony cited by defendant Rosborough, defendant Abro's counsel objected, and the court sustained the objection. Finally, the testimony regarding the federal investigation did not implicate defendant Rosborough in the scheme, and his name was not connected in any way to the investigation. Accordingly, defendant Rosborough's argument is without merit.

Next, defendant Rosborough alleges that the trial court improperly admitted evidence of his prior convictions that were more than ten years old. We disagree.

We review for an abuse of discretion a trial court's decision to allow impeachment by evidence of a prior conviction. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). Although MRE 609(c) prohibits introduction of convictions if more than ten years have elapsed since the date of conviction, defendant Rosborough testified that when he had committed crimes in the past, he had pleaded guilty to them; consequently, his testimony denying his culpability in the instant case should be believed. He also testified that in the two years previous to the current charge, he had received numerous trespassing tickets. With this testimony, defendant Rosborough himself opened the door on direct examination questions about his prior convictions. Moreover, he was not prejudiced by the admissions because the questions regarding the prior convictions were asked on direct examination by his counsel, were brief, and reflected the fact that the convictions were old. The prosecution did not ask any questions on cross-examination regarding the prior convictions and did not raise them in his closing arguments. Moreover, the trial court instructed the jury as to the proper use of the evidence. Accordingly, admitting the convictions into evidence was proper and does not warrant reversal.

Next, defendant Rosborough argues that Alkader, the cooperating witness, and the prosecution misled the jury on the issue of a plea bargain. He contends that Alkader "perjured himself in denying the extent of the sentence bargain, his expectations of leniency, and his having to testify to fulfill the bargain." Although defendant did not object to Alkader's testimony at trial, we review this issue de novo because defendant Rosborough alleges that his due process rights were violated. See *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

Where an accomplice or coconspirator has been granted immunity or other leniency to secure his testimony, it is incumbent upon the prosecutor and the trial judge, if the fact comes to the court's attention, to disclose such fact to the jury upon request of defense counsel. The same requirement of disclosure should also be applicable if reasonable expectations, as opposed to promises, of leniency or other rewards for testifying resulted from contact with the prosecutor. It has been held to be a denial of due process for a prosecutor not to correct the testimony of such a witness against the defendant, where the witness testifies that he has been promised no consideration for his testimony and the prosecutor knows this statement to be false. [*People v Atkins*, 397 Mich 163, 173-174; 243 NW2d 292 (1976).]

In *Atkins*, the Michigan Supreme Court explained that the prosecution and the trial judge had a duty to disclose to the jury the existence of a plea bargain agreement with a witness upon the request of defense counsel. *Id.* at 173. This same requirement exists where the witness received reasonable expectations of leniency in exchange for the testimony, or where the prosecution knew that the witness testified falsely as to an offer of leniency. *Id.* at 173-174. Our Supreme Court also distinguished between disclosure of facts and disclosure of future possibilities and explained that disclosure of the latter was not required because it would lead to jury speculation and the prosecution's vouching for that witness' credibility. *Id.* at 174.

In the instant case, defendant Rosborough offers no evidence that a plea agreement existed or that Alkader received a reasonable expectation of leniency in exchange for his testimony. Alkader's statement that he was testifying because "it was the right thing to do" did not mislead the jury because Alkader never denied he was a suspect and, in fact, admitted throughout his testimony that he had been and remained a suspect. Although Alkader may have an expectation of consideration from the federal government, this does not equate to an offer of leniency in exchange for his testimony. Finally, defendant Rosborough's counsel extensively cross-examined Alkader and was not prohibited from eliciting any facts that were relevant to Alkader's credibility. Thus, it was for the jury to weigh Alkader's credibility. *People v Goss*, 200 Mich App 9, 18-19; 503 NW2d 682 (1993), *aff'd* 446 Mich 587; 521 NW2d 312 (1994).

Furthermore, defendant Rosborough has failed to produce any evidence that the prosecution knew that the federal authorities had offered Alkader an agreement or that Alkader's testimony was incorrect. Therefore, defendant's argument that the prosecution misled the jury is unsubstantiated.

Defendant Rosborough finally contends that the prosecution failed to assist him in serving a subpoena on a Secret Service agent. The agent was on the prosecution's witness list and had been served. Defense counsel was not able to get to Saginaw to serve the agent again with a second subpoena requiring the agent to bring records with him to court. Thus, he wanted the prosecutor to serve the agent. Pursuant to MCL 767.40a(5); MSA 28.980(1), the prosecuting attorney must provide reasonable assistance in locating and serving a witness. Because defendant Rosborough knew the agent was in the Saginaw office, he did not need the prosecutor's assistance in locating him. Therefore, this argument is without merit.

We affirm defendant Abro's conviction and sentence. Regarding defendant Rosborough, we affirm in part and reverse in part and remand for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Maura D. Corrigan

/s/ Jane E. Markey

/s/ Stephen J. Markman

<sup>1</sup> Immediately following the completion of his state sentence, defendant Abro will begin serving a federal sentence.

<sup>2</sup> The statute, as amended, was effective May 1, 1994, and now provides that the defendant no longer has a right to a jury trial on the habitual offender charge.