STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

L.C. FOWLER,

Defendant-Appellant.

UNPUBLISHED
May 1, 1998

No. 196131
Eaton Circuit Court
LC No. 95-000230 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN FREDRICK WEAVER,

Defendant-Appellant.

No. 196132
Eaton Circuit Court
LC No. 95-000233 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH GREER,

Defendant-Appellant.

No. 196155
Eaton Circuit Court
LC No. 95-000232 FC

Before: Griffin, P.J., and McDonald and O'Connell, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right their convictions stemming from the safe-breaking of a night depository at a First of America Bank in Charlotte. Following a joint trial before the same jury, defendants Fowler, Weaver, and Greer were all convicted of the three charged offenses: (1) safe-breaking, MCL 750.531; MSA 28.799; (2) conspiracy to commit safe-breaking, MCL 750.531; MSA 28.799; MCL 750.157(a); MSA 28.354(1); and (3) possession of burglar's tools, MCL 750.116; MSA 28.311. Supplemental informations also charged defendants Fowler and Greer as habitual offenders. Defendant Fowler received concurrent sentences of twelve to twenty years' imprisonment for each offense and was ordered to pay restitution in the amount of $6200. Defendant Weaver was sentenced to serve concurrent prison terms of fifty-two months to ten years' imprisonment for the offenses, with restitution ordered in the amount of $6200. Defendant Greer was sentenced to concurrent terms of ten to twenty years' imprisonment. We affirm the convictions of each defendant but remand Docket No. 196132 to the trial court for correction of the presentence report and judgment of sentence in accordance with this opinion.

In March of 1995, the three defendants and James Reed traveled to Michigan from Kentucky in an automobile leased to defendant Weaver. Arriving in Charlotte in the morning, the four men drove around town looking for a particular type of night depository to burglarize. After one was located, the men left and returned later that evening. They broke into the depository and several money bags were removed and placed in the car, along with the tools that were used to break the safe. The four men then drove to a nearby freeway but returned to the bank when it was decided that more money could be obtained. Soon after they returned, the police, alerted by suspicious citizens, arrived on the scene. All four men fled and were later arrested by the police in Charlotte. Defendant Greer was arrested in the vehicle, Reed and defendant Fowler were arrested at a service station, and defendant Weaver was apprehended hitchhiking by the freeway.

Defendants raise a plethora of issues for appellate consideration. We will first review those issues which are unique to each defendant, followed by consideration of questions common to more than one defendant.

Docket No. 196131

Defendant Fowler first argues on appeal that he was denied his right to be tried solely on the evidence against him when evidence was presented that an accomplice, James Reed, had entered into a plea agreement in exchange for his testimony for the prosecution. [1]

The issue of accomplice testimony was initially raised during the opening statements of both the prosecution and defense. Subsequently, on direct examination, the prosecution questioned Reed about the plea agreement that he entered into in exchange for his testimony. Defendant did not object at any time to the introduction of this evidence. On the contrary, defense counsel for both the present defendant and defendant Greer cross-examined Reed about the plea agreement, with the obvious strategy of portraying the accomplice as a "snitch" and impeaching his credibility. Under these circumstances, this Court "will not allow a defendant to use the plea information to undermine the accomplice's credibility at trial, and then allow him to argue on appeal that introduction of the evidence of the plea was prejudicial." *People v Dowdy*, 211 Mich App 562, 572; 536 NW2d 794 (1995).

In a related matter, we conclude that defendant's ineffective assistance of counsel claim regarding his attorney's failure to move for a mistrial following the admission of evidence of Reed's plea agreement is without merit. Defendant has not overcome the presumption that trial counsel's actions might be considered sound trial strategy. *People v Hurst*, 205 Mich App 634, 641-642; 517 NW2d 858 (1994). Defendant's contention that he has been denied the effective assistance of trial counsel in numerous other respects is similarly unfounded. Because defendant did not move for a new trial or request an evidentiary hearing on his claim of ineffective assistance of counsel, we review the existing record to the extent that it contains sufficient detail to support defendant's position. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Our review indicates that defendant has not shown that his counsel committed errors so serious that he was not functioning as "counsel" guaranteed by the Sixth Amendment or that any such errors resulted in prejudice to the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Reed*, 453 Mich 685, 694-695; 556 NW2d 858 (1996); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Defendant next argues that his Sixth Amendment right to counsel was abridged when, subsequent to his arrest and prior to the preliminary examination, the prosecutor showed photographs of defendants to a witness without the presence of counsel. We disagree. The right-to-counsel guarantee of the Sixth Amendment does not extend to photographic displays. *United States v Ash*, 413 US 300; 93 S Ct 2568; 37 L Ed 2d 619 (1973); *People v Kurylczyk*, 443 Mich 289, 297; 505 NW2d 528 (1993) (opinion by Griffin, J.). The Michigan courts, however, have held that identification by photograph should not be used "when a suspect is in custody or when he can be compelled by the state to appear at a corporeal lineup." *Kurylczyk*, *supra* at 298, n 8; *People v Jackson*, 391 Mich 323; 217 NW2d 22 (1974); *People v Franklin Anderson*, 389 Mich 155; 205 NW2d 461 (1973). Since the unpreserved error alleged here is not an error of constitutional magnitude, *People v Roberson*, 55 Mich App 413, 418; 222 NW2d 761 (1974), it may not be considered for the first time on appeal unless the error could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Under the facts of this case, we are persuaded that the error, if any, in the photographic identification, was not decisive of the outcome. Although the witness placed defendant at a gas station near the scene of the crime on the night in question, he could not positively identify defendant Fowler or, for that matter, any of the other defendants as the perpetrators of the offense. Substantial evidence of defendant's involvement in the offense, independent of and unrelated to the witness' testimony, was introduced at trial. Defendant's argument is therefore without merit.

Defendant next contends that his due process rights were violated when the trial court ordered restitution without first considering his ability to pay. We disagree. The restitution statute, MCL 780.767(1); MSA 28.1287(767)(1), in effect at the time of defendant's sentencing,[2] requires consideration of payment factors but does not require an express determination on the record regarding a defendant's ability to pay, absent a timely objection, at the time restitution is imposed. *People v Grant*, 455 Mich 221, 224-225, n 4, 237-238; 565 NW2d 389 (1997); *People v Griffis*, 218 Mich App 95, 103; 553 NW2d 642 (1996).

In the instant case, based on the testimony of a bank representative, the trial court determined that the amount of restitution to be paid by defendant should be $6200. While the trial court did not make an express determination on the record regarding defendant's ability to pay, the court clearly

indicated that it had read the presentence report and recommendation as to restitution contained therein. Defendant neither objected at the time of sentencing to the amount of restitution nor requested an evidentiary hearing on the issue of his ability, or inability, to pay the $6200. Having failed to raise the issue below, meaningful appellate review is precluded. *Grant, supra*; *Griffis, supra*.

Defendant further argues that the trial court improperly scored OV-1 (aggravated use of a weapon). However, our review of defendant's habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *People v Edgett*, 220 Mich App 686, 694-695; 560 NW2d 360 (1996); *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). In light of the circumstances surrounding the offense and offender in this case, including the significant fact established by the evidence of record and recognized by the trial court that defendant took a "clear leadership role" in the crime that "caused this event to happen," we conclude that defendant's sentence of twelve to twenty years does not violate the principle of proportionality, *Milbourn, supra*, and the trial court did not abuse its discretion in sentencing defendant. *Edgett, supra*.

Defendant next complains that the trial court erroneously precluded impeachment of the accomplice, James Reed, with evidence of his prior misdemeanor conviction. At different times during Reed's testimony, defense counsel sought to raise the issue of Reed's termination from his job as a corrections officer and the misdemeanor conviction for theft by unlawful taking under $300 which led to that termination. Pursuant to MRE 609(a)(2)(A),[3] the trial court granted the prosecution's motion to suppress reference to Reed's prior conviction. We find no abuse of discretion in the trial court's ruling. The court properly held that the prior conviction could not be used for impeachment purposes. *People v Parcha*, 227 Mich App 236, 246-247; ___ NW2d ___ (1997).

Regarding the next issue of severance, defense counsel stipulated to consolidation of defendant's trial before the same jury as his codefendants. No subsequent motion to sever the trials was made. Defendant may not assign error on appeal to something that his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). In any event, severance is mandated only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). Severance is required where the defenses are mutually exclusive or irreconcilable, not simply where they are inconsistent. *Id*. at 349; *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). Defendant not only failed to move for severance but also failed to make the requisite showing pursuant to *Hana, supra*. The defenses proffered by all of the defendants were consistent theories of noninvolvement. Accordingly, reversal is not warranted.

Defendant further maintains that his due process rights were violated when a lay witness, James Reed, was allowed to give his opinion on an ultimate issue to be decided by the jury. Reed answered affirmatively in response to a question posed by the prosecutor on redirect examination as to whether Reed had "conspired" with the three defendants to break into the bank. This testimony was not objected to by counsel for defendant Fowler and hence not preserved for appellate review. *Grant, supra* at 445 Mich 553. At any rate, the topic of conspiracy was first raised during cross-examination

of Reed and falls within the parameters of MRE 701 and MRE 704, the latter rule providing that testimony in the form of an opinion or inference otherwise admissible "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." MRE 704; *McCalla v Ellis*, 180 Mich App 372, 384; 446 NW2d 904 (1989); *Sells v Monroe Co*, 158 Mich App 637, 644-645; 405 NW2d 387 (1987).

Defendant finally contends that error requiring reversal occurred when the trial court held an in-camera hearing, out of the presence of defendant, to ascertain possible juror bias. After the jury had been selected, but not yet sworn, a juror indicated to the bailiff that she knew one of the witnesses. The attorneys for all three defendants and the prosecutor gathered in the library to question the juror. It was established that the juror was acquainted with the witness through a bowling league, knew the witness only on a first name basis, and did not realize that she was going to be called as a witness. The juror further indicated that she and the witness were not personal friends and had never discussed the case. The trial court ascertained that the juror would weigh the witness' testimony with impartiality. Defense counsel had no questions for the juror, did not challenge her continued presence on the jury, and did not request that defendant be present. Our review of the record convinces us that defendant's absence from this proceeding "made no difference in the result reached" and does not require reversal of his conviction because there is no "reasonable possibility of prejudice." *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977). See also *People v Carroll*, 396 Mich 408, 413; 240 NW2d 722 (1976) ("there are no rights held by the defendant which his presence would have afforded him that his counsel cannot exercise in his absence."); *People v Marsh*, 108 Mich App 659, 665; 311 NW2d 130 (1981).

Docket No. 196155

Defendant Greer contends that he was denied due process and a fair trial because the prosecution concealed the identity of a police informant who, to protect his status as an informant, attended pretrial meetings between defendant and his attorney at their request and later testified as a witness for the prosecution.

James Reed's involvement as a police informant began approximately two months after the offense occurred. Reed audio-taped the other defendants while they were out on bond, but the information gathered at that time was not related to or introduced in the instant case. Reed did attend pretrial meetings between defendant and his attorney, but a week before trial, Reed was endorsed late as a prosecution witness. At trial, Reed admitted being privy to certain information gleaned from his participation in the defense meetings. Although Reed's testimony was damaging to all of the defendants, there is no indication in the record that Reed testified regarding what he had learned in those meetings or that his testimony was prompted by those meetings. There is likewise no evidence that Reed conveyed defendant's privileged communications or trial strategy to the prosecution. Reed's testimony consisted of his first-hand account, as an accomplice, of the events which transpired on the evening in question. Under these circumstances, "there being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion" by Reed, defendant was not denied a fair trial. *Weatherford v Bursey*, 429 US 545, 558; 97 S Ct 837; 51 L Ed 2d 30 (1977).

Defendant also alleges sentencing errors, arguing that the trial court improperly relied on a scoring of the armed robbery guidelines in sentencing him for safe-breaking, and also erroneously scored the guidelines under OV-1 (aggravated use of a weapon). However, due to his status as an habitual offender, our review of defendant's sentence is limited to the *Milbourn* principle of proportionality. *Edgett, supra; Gatewood, supra.* The facts in the instant case establish a well-organized, carefully planned criminal endeavor. The night depository had been pried open and the wall broken out using either a hydraulic jack or drill. Investigating officers found a long wooden stick with three hooks taped to the end, which apparently was used to fish bags out of the night depository area. A total of sixteen bank bags were taken from the night depository. The bags' contents totaled $51,919.86. Considering the seriousness of the circumstances surrounding the offense and the offender, defendant's sentence of ten to twenty years' imprisonment embodies the principle of proportionality. *Milbourn, supra.*

Docket No. 196132

Defendant Weaver contends that the trial court erred when it entered a written judgment of sentence that did not comport with the sentence given on the record. At the time of sentencing, defendant successfully moved to quash the supplemental information for habitual offender, third offense. One alleged felony had been dismissed and the other had been reduced to a misdemeanor. The prosecution could not use the third conviction because proper notice was not given to defendant. Thus, defendant was not convicted as an habitual offender, although the cover page of the presentence investigation report incorrectly lists the final charges as "3rd Felony Supp." under the section for "Current Conviction(s)." The judgment of sentence also inaccurately lists a conviction for "Habitual Offender, 2nd Con." On appeal, the prosecution acknowledges these inaccuracies and the fact that correction is warranted. The appropriate remedy is to remand to the trial court so that the inaccuracies on defendant's presentence report and the judgment of sentence can be corrected and the corrected copy of the presentence report transmitted to the Department of Corrections. *People v Swartz*, 171 Mich App 364, 380-381; 429 NW2d 905 (1988); *People v Taylor*, 146 Mich App 203, 205-206; 380 NW2d 47 (1985).

Common Issues

Defendants Fowler and Greer contend that they were denied a fair trial when a police witness interjected other acts evidence into the trial by testifying that an FBI agent was "very familiar with the activities of these subjects" and "was reviewing with us their MO and what to expect." No objection or request for a curative instruction was lodged by either defendant. The failure to register an objection at trial results in the forfeiture of that claim on appeal unless the error could have been decisive of the outcome of the case. *Grant, supra* at 445 Mich 553.

Generally, a volunteered and unresponsive answer to a proper question is not error requiring reversal. *People v Holly*, 129 Mich App 405, 415; 341 NW2d 823 (1983). However, when an unresponsive remark is made by a police officer, this Court will scrutinize that statement to make sure the officer has not ventured into forbidden areas which may prejudice the defense. *Id.* The detective's remark in the instant case was not intentionally unresponsive, compare *Holly, supra*, but rather was an inadvertent reference made in response to the prosecutor's question concerning the initial investigative

process. In light of the overwhelming evidence introduced at trial as to defendants' involvement in the offense, this solitary reference to defendants' "other activity" was not decisive of the outcome of the case. *Grant, supra*; *People v Stewart*, 199 Mich App 199, 200; 500 NW2d 756 (1993); *People v Von Everett*, 156 Mich App 615, 622; 402 NW2d 773 (1986).

Defendants Fowler and Weaver next argue that the trial court abused its discretion in qualifying a detective as an expert in tool-mark identification. Defendants' argument is without merit. It is well established that the qualification of an expert to render an opinion is a matter which rests in the discretion of the trial court. *People v Peebles*, 216 Mich App 661, 667; 550 NW2d 589 (1996); *Osner v Boughner*, 180 Mich App 248, 257; 446 NW2d 873 (1989). A witness may be qualified as an expert if he or she has acquired specialized knowledge through experience, training, or education. MRE 702; *Mulholland v DEC Int'l Corp*, 432 Mich 395, 404-405; 443 NW2d 340 (1989); *Osner*, *supra* at 261.

In the instant case, although the detective lacked a formal education in tool-mark identification, he had acquired special knowledge of this subject during his fifteen-year employment with the Michigan State Police. He supervised the unit specializing in tool-mark identification at the Michigan State Police forensic science lab. Trained on the subject by a supervisor for 2 1/2 years, the detective read numerous books on tool-mark identification and toured tool-making factories as part of his training. He testified that he is a member of the AFTE (Association of Firearms and Toolmark Examiners), which publishes a bimonthly journal containing articles on tool-mark identification. The detective also taught classes on tool-mark identification to police officers from the Detroit metropolitan area. In qualifying the detective as an expert witness, the trial court in the present case took note of the fact that other courts had previously recognized the detective's qualifications as an expert on this subject. We find no abuse of discretion in the trial court's determination. Once qualified as an expert because of his knowledge, skill, and experience, the detective properly testified in the form of an opinion regarding the tools used in the safe-breaking.

Defendants Greer and Fowler also maintain that the trial court erred in denying their request to instruct the jury on the cognate lesser included offense of receiving and concealing stolen property over $100, MCL 750.535; MSA 28.803.[4] We disagree. A trial court must instruct the jury on necessarily included lesser offenses, regardless of the evidence in a given case. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997); *People v Bailey*, 451 Mich 657, 667-668; 549 NW2d 325 (1996). However, in the case of cognate offenses, the evidence must be reviewed to determine if it would support a conviction of the cognate offense. *Id*. The requested instruction on the cognate offense must be consistent with the evidence and defendant's theory of the case. *Id.* If no reasonable jury could find a cognate offense because of the absence of evidence, then the requested instruction should not be given. *Id*.

Applying these principles to defendants Greer and Fowler, we conclude that the requested instruction was not only inconsistent with the evidence introduced at trial but defendants' theories of the case as well. From the time of his arrest through the closing argument at trial, defendant Greer denied any knowledge of the bank bags or their contents, or that he had taken any money out of the bags. For that matter, defendant Greer denied any involvement in the alleged offenses. Defendant Fowler pursued a similar theory of noninvolvement unrelated in any manner to the requested charge of receiving and

concealing stolen property. Moreover, there was no dispute in the evidence adduced at trial that would warrant instruction on the lesser offense; on the contrary, the evidence clearly demonstrated defendants' active participation in the charged offenses. The trial court therefore properly rejected the requested instruction on the lesser included offense.

Defendants Fowler and Greer next allege that on two occasions during the trial, the prosecutor improperly commented regarding defendants' failure to testify and shifted the burden of proof, thereby depriving them of a fair trial. We disagree. Prosecutorial misconduct issues are reviewed case by case *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). This Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.* The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id*.

In the instant case, the first challenged prosecutorial remark was a response to the defense attacks on the competency and credibility of the prosecution's expert witness. Reviewed in this context, the prosecutor's remarks did not constitute prosecutorial misconduct which denied defendants a fair trial. *People v Jansson*, 116 Mich App 674; 323 NW2d 508 (1982).

The second challenged prosecutorial remark, which occurred in the context of an objection to defense counsel's inference that defendant Greer had a twin who could have committed the offense, did not improperly shift the burden of proof or infringe on defendants' right not to testify. Where a defendant explicitly or implicitly advances an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternative theory cannot be said to shift the burden of proving innocence to the defendant. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). The nature and type of comment allowed is dictated by the defense asserted, and the defendant's decision regarding whether to testify. *Id*. When the defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence. *Id.*

Defendants Weaver and Fowler further claim that they were denied their right to equal protection of the law and an impartial jury drawn from a representative cross section of the community. Defendants are African-American males, and only one of the twelve selected jurors was African-American. However, we agree with the trial court that defendants' challenge in this regard was not made in a timely fashion. MCL 600.1354(1); MSA 27A.1354(1), which encompasses the selection and impaneling of jurors, provides in pertinent part:

> Failure to comply with the provisions of this chapter shall not . . .affect the validity of a jury verdict unless the party . . .claiming invalidity has made a timely objection and unless the party demonstrates actual prejudice to his cause and unless the noncompliance is substantial. An objection made at the day of a scheduled trial shall not be considered timely unless the objection, with the exercise of reasonable diligence, could not have been made at an earlier time.

In the instant case, only after the jury was impaneled but not yet sworn did defense counsel object to the racial composition of the jury array. Shortly after defendants' objection and motion for mistrial in this regard were denied by the trial court, the jury was sworn and the trial commenced.

Unlike *People v Hubbard (After Remand)*, 217 Mich App 459, 465-466; 552 NW2d 493 (1996), there is no evidence of record in the instant case that defendants' challenge could not have been made at an earlier time. Moreover, after defendants raised their untimely challenge, they failed to create a factual record to support their claim. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Under these circumstances, appellate review is foreclosed.

Defendants Greer and Fowler finally allege that the trial court erred in admitting crucial evidence that was purportedly seized in violation of the Fourth Amendment. We disagree.

The Fourth Amendment and Const 1963, art 1, § 11 grant individuals the right to be secure against unreasonable searches and seizures. *Peebles*, *supra*. Investigative stops short of arrest are permitted where police officers have a reasonable suspicion of ongoing criminal activity. *People v Christie (On Remand)*, 206 Mich App 304, 308; 520 NW2d 647 (1994). In order to make a constitutionally valid investigative stop, the police must have a particularized suspicion, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing. *Peebles, supra* at 665. The totality of the circumstances are to be considered to assess the police officer's suspicion that criminal activity is afoot, and reasonableness is the test that is to be applied for both the stop of, and the search of moving motor vehicles. *Id.; Christie, supra*. This Court will review a trial court's decision regarding a motion to suppress evidence under the clearly erroneous standard. *Peebles, supra* at 664. We will reverse a trial court's ruling on a suppression issue only if we are left with a definite and firm conviction that a mistake was made. *People v Carter*, 194 Mich App 58, 63; 486 NW2d 93 (1992).

In the instant case, the facts adduced at trial indicate that Reed and defendant Fowler broke into the depository and removed a number of bags of cash, while Weaver acted as a lookout. Defendant Greer was arrested several blocks from the bank after he was stopped while driving in a rented car by himself. The car was later searched after a search warrant was obtained on the basis of observations made at the time of his arrest. The search turned up crucial evidence, including money, tools, fingerprints, and documents linking the vehicle to defendants and the crime.

The detective who made the investigative stop in the instant case testified that he knew, prior to making the stop, that an ATM machine had been broken and entered, that an eyewitness had observed two suspects wearing ski masks and dark clothing standing near the bank with one holding a large pipe or crowbar in his hands, and that three to four African-American males were fleeing the scene and attempting to get into a full-sized car which was traveling southbound with its lights off. The detective also knew from monitoring radio traffic after the initial call went out, that a maroon full-sized car had left the Burger King parking lot driving slowly with its lights off. While driving in an attempt to locate this vehicle, the detective noticed a vehicle traveling at a high rate of speed. When he followed and caught up with the car, he noted that it was a maroon four-door with Kentucky plates. The African-American driver was wearing dark clothing and a black stocking cap. Given that the automobile matched the description of the car that had just left the area of the bank, the detective had a "particularized suspicion that the driver [and the car] being stopped was engaged in wrongdoing." *People v Faucett*, 442 Mich 153, 161; 499 NW2d 764 (1993). The circumstances supported a reasonable suspicion of criminal activity and the investigative stop was appropriate. *Peebles, supra; Christie, supra.*

Contrary to defendants' contention, the ensuing warrantless search of the automobile was conducted well within the parameters of the "automobile exception" to the warrant requirement. *Carter*, *supra* at 60-61; *People v Cruz*, 161 Mich App 238, 241-244; 409 NW2d 797 (1987). The search warrant obtained after the vehicle was towed to the police station was firmly founded on probable cause, *People v Darwich*, 226 Mich App 635, 637; ___ NW2d ___ (1997), and a valid affidavit. *People v Williams*, 212 Mich App 607, 610; 538 NW2d 89 (1995). We consequently find no clear error in the trial court's decision denying defendants' motion to suppress the evidence obtained as a result of the search of the vehicle.

The convictions of defendants Fowler, Weaver, and Greer are affirmed, and Docket No. 196132 is remanded to the trial court for correction of the presentence report and judgment of sentence in accordance with this opinion.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald
/s/ Peter D. O'Connell

[1] In exchange for James Reed's plea of guilty to a federal charge stemming from the criminal activity set forth above, and his cooperation in the present cases, state charges against Reed were dismissed.

[2] MCL 780.767; MSA 28.1287(767) was amended, effective June 1, 1997, deleting all previous references to a defendant's ability to pay restitution. See discussion in *Grant*, *supra* at 455 Mich 240, n 24.

[3] MRE 609(a)(2)(A) provides in pertinent part:

> For the purpose 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, and
>
> * * *
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted. . .

[4] Receiving and concealing stolen property is a cognate lesser included offense of breaking and entering with intent to commit larceny, *People v Kamin*, 405 Mich 482, 496; 275 NW2d 777 (1979), overruled in part on other grounds, *People v Beach*, 429 Mich 450, 484; 418 NW2d 861 (1988); *People v Quinn*, 136 Mich App 145, 147; 356 NW2d 10 (1984), an offense which is comprised of elements analogous to the offense of safe-breaking, i.e., in this case the attempt (whether successful or not) to break into a night depository with the intent to commit larceny. CJI2d 18.5.