STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK D. JACKSON,

Defendant-Appellant.

UNPUBLISHED
May 5, 1998

No. 196320
Detroit Recorder's Court
LC No. 95-010500

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

A jury convicted defendant of breaking and entering a building with intent to commit larceny, MCL 750.110; MSA 28.305. The trial court sentenced defendant to ten to twenty years in prison as a third felony offender, MCL 769.11; MSA 28.1083. Defendant appeals as of right. We affirm.

This case involves a burglary of an ABC Warehouse store. Police responded after the store's silent alarm was triggered at approximately 5:00 a.m. on September 6, 1995. They found a U-Haul truck backed up to the loading dock and filled with a large amount of merchandise, including camcorders, cellular phones, pagers, and forty to sixty VCRs. The locks on the loading dock door had been cut; bolt cutters were found nearby. A side entrance door had been pried open. The police observed defendant and another individual inside the store, near that door. The police eventually apprehended four men, including defendant. All were wearing brown jersey work gloves. Defendant claimed that he came to the store one or two minutes before the police arrived and that he neither broke in nor took any merchandise. He stated that he came to help one of the other men, who had been enlisted by the store manager to take the merchandise as part of a scheme to defraud the store's insurer. Consistent with his theory, his request for a jury instruction on mere presence was granted.

I

Defendant contends that the trial court abused its discretion in allowing the prosecution to impeach defendant with evidence of his prior attempted receiving and concealing stolen property conviction and his prior breaking and entering conviction. The claim is without merit; the evidence was admissible under MRE 609. *People v Livery Clark*, 172 Mich App 407, 419; 432 NW2d 726 (1988), *People v Robinson*, 172 Mich App 650, 655; 432 NW2d 390 (1988).

II

Defendant argues that the trial court deprived him of the right to receive a transcript of the jury voir dire. We disagree. Under MCR 6.425(F)(2)(a)(i), an indigent defendant is entitled to:

> [T]he trial or plea proceeding transcript, excluding the transcript of the jury voir dire, unless the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to a term of life imprisonment without the possibility of parole, or shows good cause. [See also MCR 6.433(D).]

Here, defendant was not provided a copy of the voir dire transcript. However, defendant has failed to raise any issue on appeal that requires review of the voir dire transcript nor has he alleged any other basis for being entitled to the transcript under MCR 6.425(F)(2)(a)(i) or MCR 6.433(D). Thus, we find no error.[1]

III

Defendant claims that the trial court erred in refusing to instruct the jury on the lesser included offenses of larceny in a building and attempted larceny in a building. We disagree. Larceny in a building is a cognate lesser included offense of breaking and entering. *People v Brager*, 406 Mich 1004; 280 NW2d 826 (1979), *People v Goliday*, 153 Mich App 29, 35; 394 NW2d 476 (1986). Attempt is also a cognate lesser offense. See *People v Adams*, 416 Mich 53; 330 NW2d 634 (1982), *People v Shelton*, 138 Mich App 510, 516; 360 NW2d 234 (1984). But see *People v Cavanaugh*, 127 Mich App 632; 339 NW2d 509 (1983). A trial court must give a requested instruction on a cognate lesser included offense when the evidence would support a conviction of the cognate offense. *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997), quoting *People v Bailey*, 451 Mich 657, 668; 549 NW2d 325 (1996). Here, the evidence does not support giving the lesser included offense instruction. Rather, the evidence established that defendant either (1) broke into the store or aided and abetted in the burglary, or (2) just arrived and did nothing wrong. We also reject defendant's claim that the trial court had a sua sponte obligation to instruct the jury on the necessarily included lesser offenses of entering without owner's permission, and entering without breaking. A verdict rendered will not be set aside because of the failure to instruct the jury on any point of law unless the defendant requests such an instruction. MCL 768.29; MSA 28.1052; *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994).

IV

Defendant's final argument is that the trial court improperly calculated his score for Offense Variable 8 under the sentencing guidelines. This claim is not subject to appellate review. *People Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997), *People v Raby*, 456 Mich 487, 499; ___ NW2d ___ (1998).

Affirmed.

/s/ William C. Whitbeck
/s/ Barbara B. MacKenzie
/s/ William B. Murphy

[1] We note that the Michigan Supreme Court is currently reviewing the constitutionality of MCR 6.425(F)(2)(a)(i). In *People v Bass*, 223 Mich App 241, 255; 565 NW2d 897 (1997), lv gtd, 456

Mich 851; 564 NW2d 902 (1997), this Court held that the court rules governing the production of the voir dire transcript did not violate the defendant's right to equal protection because the defendant did not raise any issue on appeal that required review of the voir dire transcript. *Id.*, 258. The Court also held, however, that under the "Due Process Clause of the Fourteenth Amendment, a criminal defendant is entitled to the effective assistance of counsel in his first appeal of right." *Id.* This Court therefore concluded that a jury voir dire transcript must be provided in all cases where the appointed appellate counsel was not the defendant's trial counsel. *Id.*, 260. The Michigan Supreme Court has granted leave to appeal in *Bass* and ordered that its precedential effect be stayed insofar as it held that indigent criminal defendants are entitled to a transcript of the jury voir dire without satisfying the requirements of MCR 6.425(F)(2)(a)(i). *People v Bass*, 456 Mich 851; 564 NW2d 902 (1997).