

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

SHANE DAVID HENRY,

Defendant-Appellant.

UNPUBLISHED

October 16, 2003

No. 243327

Schoolcraft Circuit Court

LC No. 02-006309

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JAMES ARTHUR RENO,

Defendant-Appellant.

No. 243328

Schoolcraft Circuit Court

LC No. 02-006308-FH

Before: Meter, P.J., and Saad and Schuette, JJ.

PER CURIAM.

In these consolidated appeals, defendants Shane David Henry and James Arthur Reno appeal as of right their jury trial convictions of attempted breaking and entering with intent to commit larceny, MCL 750.110, and possession of burglar tools, MCL 750.116. The court sentenced defendants to terms of 18 months' to 5 years' imprisonment and 18 months' to 10 years' respectively for these convictions. We affirm.

Docket No. 243327 – Appeal of Defendant Henry

Defendant Henry admits there is sufficient evidence to support his conviction for attempted breaking and entering, but argues that the prosecution failed to prove he had the requisite intent to commit larceny at the time of the breaking and entering. A defendant does not need to take any special steps to preserve a challenge to the sufficiency of the evidence. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). Due process requires that a prosecutor present evidence sufficient to justify a trier of fact in concluding that the defendant is

guilty beyond a reasonable doubt. *People v Breck*, 230 Mich App 450, 456; 584 NW2d 602 (1998).

The prosecution has the burden of proving that defendant had the specific intent to commit larceny at the time of the breaking and entering and intent may be reasonably inferred from the nature, time, and place of defendant's acts. *People v Uhl*, 169 Mich App 217, 220-221; 425 NW2d 519 (1988). Testimony revealed the janitor secured the school at 9 p.m. every night. A witness admitted driving defendants to the school at 10 p.m. Defendant Reno testified that he believed the witness who drove them was waiting in the car for them. Two witnesses observed defendants' attempt to pry open a door to the school by using a long crow bar type instrument. The office across from the door defendants attempted to pry open contained prescription drugs, and the school also contained numerous computers, printers, projectors and televisions. Viewing the evidence in a light most favorable to the prosecution, there is sufficient evidence from which the jury could find that defendant had the intent to commit larceny.

Defendant Henry also says that the trial court erred by failing to define larceny for the jury when the trial court instructed the jury on breaking and entering with intent to commit larceny. To preserve this issue, defendant was required to object before the jury began its deliberations. *People v Gonzales*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Because defendant failed to object this issue is unpreserved. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Review of claims of unpreserved error is disfavored. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). Generally, issues not properly raised and preserved for review are waived. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). Because defendant failed to object to the claimed error regarding the jury instructions and the jury instructions, considered as a whole, fairly presented the issues to be tried¹ and sufficiently protected defendant's rights, appellate review of the issue is waived because relief is not necessary to avoid manifest injustice. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

Defendant Henry further contends on appeal that the trial court erred in considering charges in the presentencing report that had been dismissed, or resulted in acquittals, or where there was no indication of disposition. To preserve this issue defendant was required to object at sentencing. *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002). Because defendant failed to object, this issue is unpreserved and appellate review is forfeited.

Alternatively, defendant argues his counsel was ineffective for failing to object to the presentencing report. Because defendant failed to raise this issue as evidence of his counsel's ineffective assistance at any time before the instant appeal, this claim of error is not preserved. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). An unpreserved, nonconstitutional error is reviewed for plain error affecting defendant's substantial rights. *Carines, supra* at 761. Moreover, the evidence shows defense counsel did review the presentence report with defendant and that defendant did not advise counsel or the court of any

¹ The trial court instructed the jury that the prosecution had to prove that defendants' attempt to gain access was for the "purpose of stealing property from the school."

inaccuracies. Defendant failed to show an error affecting his substantial rights; thus, appellate review of this issue is also forfeited.

Docket No. 243328 – Appeal of Defendant Reno

Defendant Reno argues that introduction of testimony regarding the construction of the pharmacy cabinet permitted the jury to infer defendant was attempting to break into the school in search of drugs. Defendant objected to the witness' testimony but the trial court overruled defendant's objection and the witness was permitted to answer. The admission of evidence is reviewed for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). An abuse of discretion is found when an unprejudiced person considering the facts on which the trial court acted would find no reason or justification for the ruling made. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

Here, the jury had evidence of the computers, printers, projectors, and television sets contained within the school in addition to the drugs kept in a pharmaceutical cabinet in an office. Because the jury could have believed defendant attempted to break into the school for the electronic equipment alone, the admission of the testimony concerning the pharmaceutical cabinet was harmless. Where an evidentiary error is not outcome determinative, reversal is not required. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

Defendant also maintains that the prosecutor's question – asking the police officer if he arrested defendant based on reasonable cause to believe that a felony had occurred and defendant had committed it – implied police only arrest guilty people. The question does not imply guilt, but simply refers to reasonable cause for arrest. Further, any alleged prejudice could have been cured by a limiting instruction; yet, defendant failed to object and thus forfeited any error. When examining an unpreserved evidentiary issue in a criminal case, a defendant is required to demonstrate plain error affecting a substantial right. *Gonzales, supra* at 222. Reversal is only warranted if the error resulted in the conviction of an innocent defendant or the error seriously affected the integrity, fairness, or public reputation of the proceedings. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002). Defendant failed to demonstrate plain error affecting his substantial rights. (Deleted text)

Also, defendant Reno asserts that the trial court erred in allowing a witness' testimony on rebuttal because the prosecutor could have elicited the witness' testimony concerning defendant's statements during the prosecutor's case in chief. The "test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). "Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *Id.* Having failed to make this argument at trial, defendant forfeited this issue. Moreover, the testimony directly contradicted defendant's testimony and therefore was proper rebuttal.²

² Defendant Reno contends, without citing to the record, that during closing argument the
(continued...)

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Bill Schuette

(...continued)

prosecutor told the jury that defendant lied on the stand and attempted to manipulate a witness into not testifying. Where, as here, defendant failed to object to the prosecutor's remarks during closing argument, and where there is no support offered for the conclusory argument, appellate review is precluded. *Stanaway, supra* at 687.