

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 15, 2013

v

JEROME LAMONT MILLER,

Defendant-Appellant.

No. 309417
Wayne Circuit Court
LC No. 11-007105-FH

Before: M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Defendant Jerome Lamont Miller appeals of right his jury conviction of larceny from a motor vehicle. MCL 750.356a(1). The trial court sentenced him as a fourth habitual offender, MCL 769.12, to serve 46 months to 15 years in prison. Because we conclude that there were no errors warranting relief, we affirm.

I. PROSECUTORIAL DISCRETION

Miller first argues that the prosecutor overcharged him in order to subject him to a potential felony conviction; specifically, he contends that the prosecution was obligated to charge him with breaking and entering a motor vehicle under MCL 750.356a(2) rather than larceny from a motor vehicle under MCL 750.356a(1). Prior to trial, Miller moved to quash the charge against him on the grounds that it was improper to try him for a felony instead of a misdemeanor. This Court reviews a trial court's decision on a motion to quash for an abuse of discretion. *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001).

The evidence showed that Miller took a GPS device worth between \$10 and \$20 from a parked semi. The prosecution charged Miller with violating MCL 750.356a(1), which makes it a felony to commit a larceny "by stealing or unlawfully removing or taking any wheel, tire, air bag, catalytic converter, radio, stereo, clock, telephone, computer, or other electronic device in or on any motor vehicle, house trailer, trailer, or semitrailer . . ." On appeal, Miller argues that the prosecution should have charged him with violating MCL 750.356a(2), which makes it a misdemeanor to enter or break into a motor vehicle and "steal or unlawfully remove property" with a value that is "less than \$200.00."

“[T]he prosecutor is the chief law enforcement officer of the county and has the right to exercise broad discretion in determining under which of two applicable statutes a prosecution will be instituted.” *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972). Courts generally lack the authority to interfere with the exercise of that discretion because the determination is committed to the executive branch. *Id.* at 683-684; *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995) (“[A] trial court does not have authority to review the prosecuting attorney’s decisions outside this narrow scope of judicial function.”). Courts may review the prosecutor’s decision to determine whether it was unconstitutional, illegal, or ultra vires. *People v Ford*, 417 Mich 66, 91; 331 NW2d 878 (1982). But the court “may not substitute [its] discretion for that of the prosecuting attorney’s merely because the [court] believes an alternate charge is more appropriate or would better serve the administrative complexities of the court.” *People v Williams*, 186 Mich App 606, 612; 465 NW2d 376 (1990).

Relying on *People v LaRose*, 87 Mich App 298, 303-304; 274 NW2d 45 (1978), Miller argues that the prosecution must charge under a more specific and recent statute when the conduct at issue is covered by both a general and specific statute. The Court in *LaRose* explained that this is a rule of statutory construction: when the Legislature enacts a statute “specific in language and . . . subsequent to a general statute covering the same subject matter”, the recent and more specific statute “constitutes an exception to the general statute if there appears to be a conflict between the two statutes.” *Id.* at 303. It does not, however, apply to statutes that prohibit different conduct. *Id.* at 302.

Here, the prohibited conduct is not criminalized under separate statutes, but is part of a single, unified scheme. Moreover, the different subsections do not conflict and proscribe different conduct. As this Court has explained, the Legislature expressed a clear intent within this statutory scheme to punish specific thefts more severely than others “[a] person who violates subsection (1) is guilty of a felony with a specific punishment, regardless of the value of the property stolen, unlawfully removed, or taken.” *People v Miller*, 288 Mich App 207, 211; 795 NW2d 156 (2010). Conversely, “a person who violates subsection (2) is guilty of a misdemeanor or felony, with a range of possible punishments, depending on the value of the stolen or unlawfully removed property and the person’s prior convictions.” *Id.* The Legislature plainly “intended to penalize the stealing, unlawful removal, or taking of specific items commonly associated with vehicles in subsection (1) differently than the stealing or unlawful removal of other unspecified property in subsection (2).” *Id.* at 212. As such, if the evidence supports the more specific charge under MCL 750.356a(1), the prosecutor has every right to proceed under that subsection.

The evidence showed that Miller stole an electronic device—a GPS device—from a qualifying vehicle as specifically prohibited by MCL 750.356a(1). Accordingly, the prosecution’s decision to proceed under that subsection was not unconstitutional, illegal, or ultra vires. The trial court did not err when it denied Miller’s motion to quash.

II. EVIDENCE OF WARRANTS

Miller next argues that the trial court erred when it allowed officers to mention that he had had outstanding warrants at the time of his arrest. Because Miller did not object, our review is limited to plain error affecting Miller's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

At trial, the prosecution asked an officer about his attempt to apprehend Miller and he responded that his "partners ran [Miller's] name and found out that he had two felony warrants and one traffic warrant for his arrest, also." Similarly, another officer noted that he ran a background check and found that Miller was wanted on two felony warrants and a traffic warrant. After this testimony, the trial court invited Miller to request a curative instruction, which he did. The trial court later instructed the jurors to disregard the mention of the warrants and to determine Miller's guilt on the proper evidence.

Although it is generally improper to admit evidence that a defendant committed other crimes, see *People v Holly*, 129 Mich App 405, 416; 341 NW2d 823 (1983), there is nothing to suggest that the prosecutor intended to elicit testimony about the warrants. Moreover, the officers' references did not mention specific crimes and were not particularly inflammatory. As such, the trial court's curative instruction alleviated whatever minimal prejudice there may have been. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, Miller has not established grounds for relief.

III. STANDARD 4 BRIEF

Miller raises additional issues in his supplemental brief. We shall briefly address three of those issues. However, we decline to address his claims of false imprisonment and malicious prosecution because he failed to include them in his statement of the questions presented. *People v Fonville*, 291 Mich App 363, 383; 804 NW2d 878 (2011).

A. INSTRUCTIONAL ERROR

First, Miller claims that the trial court abused its discretion by refusing to instruct the jury on the lesser included offense of breaking and entering a motor vehicle. "This Court reviews de novo claims of instructional error." *People v Dupree*, 284 Mich App 89, 97; 771 NW2d 470 (2009). "But a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (quotation marks and citation omitted).

A trial court must generally instruct the jury on a necessarily included lesser offense if a rational view of the evidence would support it. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). A necessarily included lesser offense is an offense in which all its elements are included in the elements of the greater offense such that it would be impossible to commit the greater offense without first having committed the lesser offense. *People v Mendoza*, 468 Mich 527, 532-533; 664 NW2d 685 (2003).

The prosecution charged Miller with violating MCL 750.356a(1) by stealing an electronic device from a truck. Miller asked the trial court to instruct the jury that it could find him guilty

of the lesser offense of breaking and entering of a vehicle with the intent to steal property under MCL 750.356a(2).

MCL 750.356a(1) prohibits a “larceny” involving the “stealing”, “removing”, or “taking” of a specified set of property from a motor vehicle. In contrast, MCL 750.356a(2) prohibits a person from entering or breaking into a motor vehicle to steal any property. Thus, while prohibiting similar conduct, these subsections each have distinct elements. Because both subsections have an element that is not contained in the other, MCL 750.356a(2) is not a lesser included offense of MCL 750.356a(1). The trial court, therefore, did not err when it refused to instruct the jury on MCL 750.356a(2).

B. DISCOVERY VIOLATION

Miller next contends that the trial court should have excluded a police report from admission as a discovery sanction. This Court also reviews a trial court’s decision regarding a discovery violation for an abuse of discretion. MCR 6.201(J).

At trial it was revealed that Miller did not have the first page of a four-page incident report and the prosecution promptly provided Miller with the missing page. The trial court then ordered a recess to give Miller and his standby defense counsel an opportunity to review the omitted page. After reviewing the page, Miller was able to cross-examine the officer utilizing the full report. Given that there was no evidence that the prosecution deliberately withheld the missing page or that Miller suffered prejudice as a result, we conclude that the trial court did not abuse its discretion in handling the matter as it did. See *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997).

C. SENTENCING DEPARTURE

Finally, Miller argues that the trial court abused its discretion by imposing a minimum sentence beyond the recommended minimum sentence range. This Court reviews the trial court’s factual finding that a particular factor in support of departure exists for clear error. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). “However, whether the factor is objective and verifiable is a question of law that this Court reviews de novo.” *Id.* This Court reviews “the trial court’s determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence” for an abuse of discretion. *Id.* “A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes.” *Id.*

A court may depart from the recommended sentencing range if it articulates “a substantial and compelling reason for that departure” on the record. MCL 769.34(3). Reasons for departure are substantial and compelling if they are “objective and verifiable” and “of considerable worth in determining the length of the sentence and . . . keenly or irresistibly grab the court’s attention.” *People v Smith*, 482 Mich 292, 299; 754 NW2d 284 (2008). A reason is objective and verifiable where “the facts to be considered by the court [are] actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and [are] capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74;

665 NW2d 501 (2003). A departure may not be based on “an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” *People v Harper*, 479 Mich 599, 617; 739 NW2d 523 (2007), quoting MCL 769.34(3)(b).

Miller’s recommended minimum sentence range was from two to 34 months. The trial court recognized the range, but elected to sentence him to serve a minimum of 46 months in prison. The trial court noted that Miller had 12 felony convictions since 1986. These convictions resulted in a prior record variable (PRV) score of 117, which was substantially higher than the guidelines “top out” at 75 points. The court further noted that the PRVs did not “adequately take into account someone who has been convicted of as many crimes as” Miller had and which were uninterrupted over “ten years.” The trial court found that Miller’s “criminal history and his repeated violations while on probation and parole irresistibly grab the attention of the Court” and provide “substantial and compelling reasons” to go beyond the recommended guidelines range. The trial court “look[ed] to the grid for guidance” and “note[d] that the next highest grid would be five to forty-six months.” The trial court then sentenced Miller to serve a minimum that was at the top end of the next higher grid.

Miller argues that the trial court could not use his prior record to enhance his minimum sentence because the guidelines already took into consideration those factors. The trial court reasoned that the guidelines did not adequately reflect Miller’s history of 12 felonies, which included many that he committed while on probation or parole. Because the court referenced actions that are external and able to be confirmed, the factors were objective and verifiable. *Abramski*, 257 Mich App at 74. In addition, the trial court did not err in concluding that the guidelines did not adequately account for defendant’s lengthy record and the repetitive nature of his crimes. *Harper*, 479 Mich at 617. Therefore, the trial court articulated sufficient facts on the record to justify the upward departure from the sentencing guidelines.

Furthermore, the trial court’s reasons justified the particular departure. *Smith*, 482 Mich at 303-304. The trial court found that the guidelines did not account for the elevated PRV points, so it utilized the sentence range in the next highest grid. The departure to the next grid was not a substantial leap. Rather, the upper range went from 34 months to 46 months, a difference of one year. Moreover, by utilizing the sentencing guidelines to determine the extent of departure, the trial court amply explained why the sentence it imposed was more proportionate than a sentence within the original range. *Id.* at 303-304, 309. Accordingly, the trial court did not abuse its discretion.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood