# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 20, 2006 |
| v | No. 260317<br>Wayne Circuit Court |
| DONALD EDWARDS STEWART, JR.,<br><br>Defendant-Appellant. | LC No. 04-005837-01 |

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Defendant was convicted by the court of first-degree home invasion, MCL 750.110a(2), and originally sentenced as an habitual offender, MCL 769.10, to a prison term of 13 to 20 years. The judgment of sentence was later amended to reflect a sentence of 13 to 30 years commensurate with the statutory maximum resulting from defendant's status as a second habitual offender. We affirm defendant's conviction and sentence, but remand to the trial court for the correction of a clerical error made in the May 19, 2005, amendment to defendant's judgment of sentence.

Defendant first contends that the prosecution presented insufficient evidence to support his conviction for first-degree home invasion. In reviewing the sufficiency of the evidence in a bench trial, we view the evidence in the light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission, (2) that when the defendant did so, he *intended to commit* a felony, larceny, or assault, *or he actually committed* a felony, larceny, or assault while entering, being present in, or exiting the dwelling, and (3) the defendant was armed with a dangerous weapon or another person was lawfully present in the dwelling. The elements of the underlying breaking and entering offense are: "(1) breaking and entering or (2) entering the building (3) without the owner's permission." *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002). For purposes of the home invasion statute, "a dwelling" is specifically

defined as "a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." MCL 750.110a(1)(a).

Defendant clearly effectuated a breaking and entering on the day in question. Defendant broke the window on the front door of an occupied home. When the police arrived, defendant was standing with his entire left arm inside the shattered window. See *People v Gillman*, 66 Mich App 419, 429-430; 239 NW2d 396 (1976). Moreover, defendant is deemed to have committed a larceny while entering the dwelling as an aider and abettor. At the time of the breaking and entering, defendant's accomplice, Dean Hamilton, had already taken a box of personal checks belonging to the home's occupants from the inside of the screen door on the front porch. This larceny was committed on an appurtenant structure to the dwelling and, therefore, occurred during the commission of the breaking and entering. Given defendant's action the day of the incident, it is clear that defendant knew of Hamilton's intended larceny. See *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004).

Defendant also contends that the trial court improperly amended the felony information at the conclusion of trial. As defendant failed to challenge the "amendment" to the information below, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant's felony complaint and felony information both indicate that defendant was charged with first-degree home invasion under the theory that he "did break and enter without permission" into the dwelling of another "and, while entering . . . did commit a larceny." At the conclusion of defendant's trial, however, the trial court found that defendant "intended to commit the crime of larceny" once he had successfully entered the home as evinced by Hamilton's taking of the box of checks, which was "probably on the front porch."

Pursuant to MCL 767.67, "[t]he court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence." Such amendment will not be allowed, however, where the amendment would "unfairly surprise or prejudice the defendant," MCR 6.112(H), or where it charges a new crime, *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001). Pursuant to MCL 767.45(1), an indictment or information must contain "[t]he nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged," and the time and place of the offense. In determining whether an information is sufficient, this Court must consider the following factors:

> "Does it identify the charge against the defendant so that his conviction or acquittal will bar a subsequent charge for the same offense; does it notify him of the nature and character of the crime with which he is charged so as to enable him to prepare his defense and to permit the court to pronounce judgment according to the right of the case?" [*People v Weathersby*, 204 Mich App 98, 101; 514 NW2d 493 (1994), quoting *People v Adams*, 389 Mich 222, 243; 205 NW2d 415 (1973).]

In this case, the information charging defendant with actually committing a larceny while breaking and entering into William Ridella's home was sufficient to place defendant on notice. Defendant knew that the prosecution intended to use the taking of the box of checks against him and would be on notice that this larceny could also be evidence of his intent to commit further larceny inside the house itself under a theory of aiding and abetting. Moreover, as noted *supra*,

the prosecution actually did present sufficient evidence to establish that defendant actually committed a larceny in the course of breaking and entering into the dwelling of another under the theory of aiding and abetting. We may affirm a trial court's judgment where it reached the right result for the wrong reason. *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998).

Defendant also challenges the court's scoring of ten points for offense variable (OV) 14 based on its determination that defendant was the leader in a multiple offender situation. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Further, "scoring decisions for which there is any evidence in support will be upheld." *Id.* (citation omitted). *People v James*, 267 Mich App 675, 678; 705 NW2d 724 (2005).

MCL 777.44 provides for the scoring of OV 14 as follows:

> (1) Offense variable 14 is the offender's role. Score offense variable 14 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offender was a leader in a multiple offender situation..... 10 points
>
> (b) The offender was not a leader in a multiple offender situation.....0 points
>
> (2) All of the following apply to scoring offense variable 14:
>
> (a) The entire criminal transaction should be considered when scoring this variable.
>
> (b) If 3 or more offenders were involved, more than 1 offender may be determined to have been a leader.

With regard to OV 14, defendant was the individual who actually broke the front door window and attempted to enter into the house. Defendant was also the individual who continuously knocked on the door and searched the perimeter of the house. This evidence supports the trial court's determination that defendant was the leader and, therefore, we must affirm.

Defendant also raises several challenges to his conviction and sentence in a Standard 4 brief. Defendant first contends that he is entitled to resentencing where the trial court increased his maximum term of imprisonment by ten years without informing defendant of the amendment or holding a resentencing hearing. The Department of Corrections notified the trial court by letter dated December 22, 2004, that defendant's maximum sentence did not comport with the statutory maximum for a second habitual offender. Allegedly without notifying defendant, the trial court amended his judgment of sentence on January 11, 2005, to reflect a sentence of 13 to 30 years' imprisonment. Seven days later, defendant filed his claim of appeal, allegedly unaware that his sentence had been changed. On May 19, 2005, defendant's judgment of sentence was again amended. This amendment reflected that defendant's sentence was to be served

consecutive to a term of imprisonment for a parole violation. This amendment also incorrectly noted that defendant had pleaded guilty to the charged offense. Defendant asserts that he was not notified of these amendments until August 2005, seven months after his claim of appeal had been filed and in the same month that the lower court record was filed with this Court.

At the time of defendant's sentencing, and when both amendments were made to his judgment of sentence, MCR 6.429(A) provided that "[t]he court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law."

> A sentence is invalid when it is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of law, or when it conforms to local sentencing policy rather than individualized facts. . . . This Court has also repeatedly held that a sentence is invalid if it is based on inaccurate information. [*People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997), citing *People v Whalen*, 412 Mich 166, 169-170; 312 NW2d 638 (1981), *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980), and *People v Eason*, 435 Mich 228, 233; 458 NW2d 17 (1990).]

Generally, the determination of whether a defendant's sentence is valid or invalid and, therefore, whether it can be amended under MCR 6.429(A) are questions of law that we review de novo. See generally *Miles*, *supra*. As defendant failed to file a motion for resentencing below consistent with MCR 7.208(B)(1), our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

As noted in *Miles*, *supra* at 97-98, a trial court's ability to amend a judgment of sentence is not limited to corrections in a defendant's favor. Moreover, some sentence corrections are merely ministerial acts and do not require a resentencing hearing at which the defendant can challenge the amended information. However, other corrections implicate a defendant's right to due process and do require a resentencing hearing with the presence of counsel. *Id.* at 98-99.

In this case, defendant was not entitled to a resentencing hearing at which he could challenge the corrections to his sentence. In *Miles*, the Michigan Supreme Court cited with approval a prior opinion of this Court finding that the correction of the maximum term of imprisonment is ministerial in nature. *Id.* at 99 n 14, citing *People v Maxson*, 163 Mich App 467; 415 NW2d 247 (1987). In *Maxson*, *supra* at 471, this Court specifically found

> In all indeterminate sentences, the court sets the minimum term within its discretion and then must state the maximum term as set by statute. *People v Walton*, 17 Mich App 687, 691; 170 NW2d 315 (1969). Since the fixing of a maximum term in such a case is nondiscretional and is merely a ministerial act to comply with the statute, a misstatement at the time of sentencing by the trial court of the maximum sentence may be legally corrected by an order nunc pro tunc. *Id.*

The Court in *Miles* recognized that a correction to a defendant's sentence to comport with an enhancement statute presented "unique due process concerns." *Miles*, *supra* at 100.

> Due process protections afforded defendants subject to such sentence enhancement provisions are less than those afforded defendants for the substantive offense, because the enhancement is not a separate element that must be proved beyond a reasonable doubt. *People v Eason*, *supra* at 233. Applying *People v Eason*, the Court of Appeals in *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996), held that for enhancement of a felony-firearm sentence "due process is satisfied as long as the sentence is based on accurate information and the defendant has a reasonable opportunity at sentencing to challenge that information." [*Miles*, *supra* at 100.]

In this case, had defendant been convicted for his first offense, the proper maximum term of imprisonment would have been 20 years. MCL 750.110a(5). However, the maximum term of imprisonment when a defendant is sentenced as a second habitual offender is one and one-half times the otherwise applicable maximum term. MCL 769.10(1)(a). In this case, therefore, defendant's maximum term of imprisonment as a second habitual offender should have been 30 years. At his sentencing hearing, defendant knew he was being sentenced as a second habitual offender. Defendant was given a reasonable opportunity at the hearing to challenge his criminal record. In fact, defendant does not contend that he was sentenced upon otherwise inaccurate information. Accordingly, a resentencing hearing is not required to correct defendant's maximum sentence.

However, the amended judgment of sentence entered on May 19, 2005, must be corrected. The trial court found defendant guilty following a bench trial and the first two judgments of sentence accurately reflect that fact. However, on the seconded amended judgment of sentence, the trial court incorrectly marked the box indicating that defendant had pleaded guilty. Accordingly, we must remand to the trial court to allow this correction to be made pursuant to MCR 6.435(A).

Defendant also contends that he is entitled to a new trial because the trial judge had a preconceived opinion of defendant's guilt given the fact that she accepted the guilty plea of his codefendant, Hamilton. Defendant failed to preserve his challenge to the potential bias of the trial judge by raising a motion for disqualification below. MCR 2.003(C)(1); *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Accordingly, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

Pursuant to MCR 2.003(B)(1), a judge must be disqualified from hearing a case where that judge cannot impartially hear the case for reasons of actual personal bias or prejudice against a party or an attorney. See *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996).

> A party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality. *Cain*, *supra* at 497. Where a judge forms opinions during the course of the trial process on the basis of facts introduced or events that occur during the proceedings, such opinions do not constitute bias or partiality unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible. *Id.* at 496, citing *Liteky v United States*, 510 US 540, 555; 114 S Ct 1147; 127 L Ed 2d 474 (1994). [*People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).]

In this case, the trial judge took codefendant Hamilton's guilty plea in the course of these proceedings. Accordingly, that act cannot form the basis for disqualification due to bias. This Court has specifically decided this question in the past:

> Defendant claims that the trial court denied the defendant his right to an impartial trier of fact when it did not disqualify itself sua sponte from conducting a bench trial of the defendant after accepting a guilty plea of his codefendant . . . that implicated him in the offense.
>
> We disagree with the defendant. With a very similar fact situation in the case of *People v Chesbro*, 300 Mich 720; 2 NW2d 895 (1942), our Supreme Court ruled that where prejudice or bias is the reason alleged for disqualifying a judge, there must be prejudice or bias in fact, and it can never be based solely upon a decision in the due course of judicial proceedings. We find no prejudice or bias in fact has been shown by the defendant. [*People v Rider*, 93 Mich App 383, 388; 286 NW2d 881 (1979).]

Defendant has raised no allegations that the trial judge harbored actual bias against him besides the taking of Hamilton's guilty plea. As that fact alone cannot establish judicial bias worthy of disqualification, defendant's claim must fail.

Defendant also argues that the prosecution failed to provide proper notice of its intention to introduce prior bad acts evidence under MRE 404(b) and that the court improperly admitted this evidence. Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However when a trial court's decision regarding the admission of evidence involves a preliminary question of law, we review the issue de novo. *Id.* Defense counsel brought a motion in limine to exclude the challenged evidence arguing that it was irrelevant and that it was overly prejudicial because it implied that defendant had been on a crime spree. The trial court denied that motion and admitted the evidence. However, to the extent that defense counsel failed to challenge the lack of notice of the prosecution's intent to introduce this evidence, our review is limited to plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

Evidence of other bad acts is inadmissible to prove an individual's propensity to act in conformity therewith. MRE 404(b)(1); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). But such evidence may be admissible to show "proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material. . . ." MRE 404(b)(1). This Court evaluates the admission of other acts evidence by considering if: (1) it was offered for a proper purpose under MRE 404(b); (2) it was relevant; (3) its probative value was not substantially outweighed by unfair prejudice; and (4) a limiting instruction was requested and provided by the trial court. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994); see also *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Pursuant to MRE 404(b)(2), the prosecution must provide "reasonable notice" of its intent to introduce other bad acts evidence, including "the general nature" of the evidence and the rationale for its admittance.

First, although there is no written notice of the prosecution's intent to introduce this evidence at trial, defense counsel was clearly placed on notice. Defense counsel actually raised a

motion in limine in advance of trial to exclude this evidence prior to trial. Second, the trial court properly allowed the admission of this evidence. At the pretrial hearing, the prosecution indicated that it intended to introduce a long list of items that were found inside the van when defendant was arrested. At trial, Detroit police officer Kari Kammerzal testified that when she apprehended Hamilton inside the van, she "found several items of evidence inside the vehicle." It is undisputed that these items were not taken from the Ridella home. In fact, there is no evidence that these items were actually stolen. However, this evidence does tend to establish that defendant and Hamilton had a scheme, plan or system of committing larceny. As the trial court noted, these items appeared to be "loot." Further, given the fact that the prosecution presented no evidence that these items were actually stolen, the trial court was in the position to give these items limited weight. Accordingly, this evidence was not more prejudicial than probative.

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defendant must overcome the strong presumption that counsel's performance was sound trial strategy. *Id.* at 600.

First, we note that defense counsel was not ineffective for failing to call Hamilton at trial per defendant's request. Generally, questions regarding whether to call or question witnesses are presumed to be matters of trial strategy. *Rockey*, *supra* at 76. The failure to question witnesses can constitute ineffective assistance of counsel when it deprives a defendant of a substantial defense; i.e., one that might affect the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). When taking Hamilton's guilty plea, the court heard Hamilton's admission that he was the individual who actually took the box of checks from the front porch. However, the court also heard the damaging testimony that defendant was the individual who was going to break into the house, that the two men intended to commit a larceny inside the dwelling, and that Hamilton planned to act as look-out for defendant. Given this potential testimony, defense counsel wisely opted not to call Hamilton as a defense witness. Hamilton's testimony would only harm defendant's case, not create a substantial defense.

Second, counsel was not ineffective for failing to renew his objection to the admission of prior bad acts evidence at trial. As noted *supra*, defense counsel brought a motion in limine to exclude this evidence on the grounds that it was irrelevant and that it was more prejudicial than probative. The trial court denied defense counsel's motion. Given the trial court's disposition of this issue at the pretrial hearing, it is unlikely that the court would have ruled differently at trial. As further objection would have been futile, defense counsel was not ineffective for failing to do so at trial.

Defendant's convictions and sentences are affirmed, and the case is remanded for the ministerial task of correcting the judgment of sentence. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ Jessica R. Cooper