# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY ROWELL,

Defendant-Appellant.

UNPUBLISHED
August 20, 1996

No. 168474
LC No. 93-001028

Before: Griffin, P.J., and Bandstra and M. Warshawsky,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering an occupied dwelling with the intent to commit larceny, MCL 750.110; MSA 28.305. Defendant subsequently pleaded guilty to being an habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant was sentenced to five to fifteen years' imprisonment for his breaking and entering conviction. Thereafter, the trial court vacated the sentence and sentenced defendant to five to thirty years' imprisonment for the habitual offense. We affirm.

Defendant was originally charged with three separate break-ins that occurred in the City of Grosse Pointe Park. The jury found defendant not guilty of the first two break-ins. However, defendant was found guilty of breaking into the Bender residence at 1229 Three Mile Drive with the intent to commit larceny.

I

Defendant first claims that the trial court improperly joined the three separate breaking and entering offenses into a single trial. An information or indictment may charge a single defendant with two or more related or unrelated offenses, and two or more informations or indictments may be consolidated into a single trial. MCR 6.120(A). However, a defendant is entitled to severance of unrelated offenses upon a motion to the court. MCR 6.120(B). The court rule defines offenses as "related" if they are based upon the same conduct or a series of connected acts or acts constituting part of a single scheme or plan. MCR 6.120(B). Although defendant did not move to sever the breaking and entering offenses, defendant's objection to the prosecutor's motion to consolidate the offenses was sufficient to

* Circuit judge, sitting on the Court of Appeals by assignment.

invoke defendant's right to sever the offenses under the

court rule. See *People v Daughenbaugh*, 193 Mich App 506, 508-509; 484 NW2d 690 (1992), modified in part on other grounds 441 Mich 867; 490 NW2d 886 (1992).

We conclude that the trial court properly consolidated the charges against defendant into a single trial because the charged offenses were a series of connected acts or acts constituting a part of a single scheme or plan. Although the offenses in this case occurred two and three nights apart, the break-ins all occurred in Grosse Pointe Park in the early morning hours with similar items taken only from the first floors of the victims' homes. The close proximity of the break-ins in place and time permitted the trial court to conclude that the break-ins were parts of a single scheme. See *People v Miller*, 165 Mich App 32, 45; 418 NW2d 668 (1987). Furthermore, consolidation of defendant's offenses into a single trial did not confuse defendant in his defense by requiring different proofs or deny him any substantial rights. *Id*.

Defendant also contends that the consolidation of the offenses permitted the prosecutor to improperly use a "guilt by pattern of behavior" theory that portrayed defendant as a "bad person" with the propensity to commit break-ins contrary to MRE 404(b). We find this argument without merit because the consolidation of the offenses was proper. Furthermore, even if consolidation was improper, reversal is not warranted because the error was harmless beyond a reasonable doubt. *People v Lucas*, 188 Mich App 554, 580; 470 NW2d 460 (1991). The prosecution presented overwhelming evidence that defendant was guilty of breaking and entering into 1229 Three Mile Drive in the form of defendant's statement to police and his possession of the property stolen from that address.

II

Defendant next contends that the statement he made to police implicating himself in the robberies was inadmissible at trial because the statement was induced by his drug withdrawal and an offer of leniency by the police and was the product of an illegal pretrial detention. Prior to trial, defendant challenged the admissibility of his statement to police on the grounds that the statement was involuntary. The trial court determined that the statement was given voluntarily.

When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination on the issue. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992). The findings of the trial court will not be reversed unless they are clearly erroneous. *Id.; People v DeLisle*, 183 Mich App 713, 719; 455 NW2d 401 (1990) However, deference is given to the trial court's assessment of the credibility of the witnesses and the weight of the evidence. *People v Young*, 212 Mich App 630, 634; 538 NW2d 456 (1995); *Brannon, supra*. When determining whether a statement made by a defendant is voluntary, the circumstances to be considered include the length and conditions of the detention, the physical and mental state of the defendant, his age, mentality, and prior criminal experience, the conduct of the police, the nature of any inducements offered to the defendant, and the adequacy and frequency of the advisement of rights to the defendant. *DeLisle, supra*.

Defendant first alleges that his statement was induced by a deal offered by police to drop

charges against him if defendant confessed to the break-ins. A confession caused by a promise of leniency from the police is involuntary and inadmissible at trial. *People v Conte*, 421 Mich 704, 729; 365 NW2d 648 (1984). A confession will be considered the product of a promise of leniency if the defendant is likely to have reasonably understood the statements as a promise of leniency and if the defendant relied upon the promise in making the confession. *People v Butler*, 193 Mich App 63, 69; 483 NW2d 430 (1992).

Defendant testified that he was in pain from drug withdrawal and frightened when Grosse Pointe Police questioned him on January 4, 1993, and was persuaded into writing out a statement by the police who promised that no charges would be brought against him by the homeowners who only wanted their property returned. Detective Smith testified that he did not make a promise of leniency to defendant and informed defendant that only the prosecutor was authorized to make a deal with him. At trial, Detective Heller testified that defendant volunteered the confession after being told that a footprint in the snow was found that was similar to defendant's shoe. The question of whether a promise of leniency was made to defendant was ultimately a question of credibility between defendant and the testifying police officers. Because deference should be given to the trial judge's credibility determinations, we will not set aside the trial court's conclusion that defendant's statement was not induced by a promise of leniency. *Young, supra*.

The determination whether defendant's statement was induced by illness or drug withdrawal caused by drug withdrawal was also a question of credibility of the witnesses. When the trial judge determined that defendant's confession was given voluntarily, she discounted the testimony of defendant that his physical condition caused his statements to be involuntary. We give deference to that assessment. Furthermore, there was no indication in the record that defendant was suffering from withdrawal symptoms to a degree that would make his statements involuntary. *People v Mann*, 49 Mich App 454, 462-463; 212 NW2d 282 (1973).

Defendant also contends that his statement was the product of his unreasonable detention prior to arraignment. An arrestee must be arraigned without unnecessary delay. *People v Feldmann*, 181 Mich App 523, 531; 449 NW2d 692 (1989). However, a delay in the arraignment is but one factor in the determination of voluntariness, and an otherwise competent confession should not be excluded solely because of a delayed arraignment. *Id*. A delay in arraignment is viewed in light of the totality of the circumstances surrounding a defendant's confession. *Id*. A confession or other incriminating evidence should be suppressed only where the delay was used as a tool to extract the confession or evidence. *People v Lumsden*, 168 Mich App 286, 294; 423 NW2d 645 (1988). We find that the delay in holding defendant prior to his arraignment was not used as a tool to extract defendant's statement. Although defendant was held from December 31, 1992 until January 5, 1993 when he was arraigned, defendant was only briefly questioned during that time by Grosse Pointe Park police concerning defendant's connection to three break-ins in that city. The delay in transferring defendant from the Ninth Precinct to Grosse Pointe was apparently caused by the Detroit Police Department's investigation of charges against defendant that were unrelated to the breaking and entering charges. After Detroit Police concluded their investigation on January 5, 1993, they notified the Grosse Pointe police who promptly transferred defendant to Grosse Pointe Park where defendant was questioned

later from 11:30 to 1:15 in the afternoon. Additionally, the questioning conducted by Grosse Pointe Park police did not occur at a time when defendant would have been most vulnerable to coercion. See *id.*

III

Next, defendant contends that the prosecution presented insufficient evidence to support the jury's verdict and that the verdict was based on an impermissible compromise. When reviewing the sufficiency of the evidence, this Court must review the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Questions of credibility should be left for the trier of fact to resolve. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

When viewed in a light most favorable to the prosecution, we find that the jury verdict was supported by sufficient evidence. The elements of breaking and entering into a dwelling house with intent to commit a larceny are: (1) breaking and (2) entering (3) an occupied dwelling (4) with felonious intent. *People v Ferguson*, 208 Mich App 508, 510-511; 528 NW2d 825 (1995). Larceny is defined as the taking and carrying away of the property of another without the owner's consent and with a felonious intent. *People v Malach*, 202 Mich App 266, 270; 507 NW2d 834 (1993). Defendant was found in possession of property recently stolen from 1229 Three Mile Drive when he was pulled over by the Detroit Police. In his statement to police, defendant admitted to breaking into houses in Grosse Pointe and admitted taking the very items that were reported missing from 1229 Three Mile Road. Therefore, sufficient evidence supports the jury verdict.

Defendant's argument that the jury verdict was an impermissible compromise is without merit. A jury is not held to any rules of logic and has the power to be lenient and render an inconsistent verdict in a criminal case with multiple counts. *People v Garcia*, 448 Mich 442, 461; 531 NW2d 683 (1995); *People v Vaughn*, 409 Mich 463; 295 NW2d 354 (1980). Moreover, there is no indication in the record that the jury was confused in reaching its verdict.

IV

Defendant next contends that he was provided ineffective assistance of counsel at trial. A claim of ineffective assistance of counsel must be preceded by an evidentiary hearing or a motion for new trial before the trial court; otherwise the claim will be considered by this Court only to the extent that the alleged mistakes by counsel are apparent on the record. *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993). Because defendant did not request an evidentiary hearing or a motion for a new trial, this Court's review is limited to the record provided. *Id.* This Court reviews claims of ineffective assistance of counsel to determine whether counsel's performance was below an objective standard of reasonableness under prevailing professional norms and whether there is a reasonable probability that, but for counsel's error, the result of the proceedings would be different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Effective assistance of counsel is

presumed and the defendant bears the burden of proving otherwise. *Id*. at 687.

Defendant first alleges that defense counsel should have objected to police testimony that, when pulled over by police, defendant was in possession of a stolen automobile and license plates even though the Detroit Police did not charge defendant in relation to the car or the license plate. We believe that this testimony was not hearsay because it was offered to prove why the police officers were suspicious of defendant's story and items in the back seat of the car, and not offered to prove the truth of the matter asserted. MRE 801(c). We also conclude that the testimony was relevant to explaining why defendant had been detained by the Detroit Police from December 31, 1992 to January 4, 1993. Defense counsel's failure to object to this testimony, therefore, did not deny defendant the effective assistance of counsel.

Next, defendant claims that defense counsel was ineffective for failing to prohibit impeachment of defendant with his 1987 conviction for unlawfully driving away in an automobile (UDAA), MCL 750.413; MSA 28.645, and a 1986 arrest for two counts of receiving and concealing stolen property. Defendant admitted to the 1987 conviction but denied the arrest allegations. Defense counsel did not object to the questions. A witness may not be impeached with prior arrests or charges that did not result in a conviction. *People v Yarbrough*, 183 Mich App 163, 164-165; 454 NW2d 419 (1990). Consequently, it was improper for the prosecutor to question defendant about his prior arrests, and it was error for defense counsel not to object to the question. It was also error for defense counsel to fail to object to the prosecution's impeachment of defendant with his prior UDAA conviction. Although UDAA is an offense against property that lies in the hierarchy with larceny, it is a less serious offense because it does not require a larcenous intent and is not intended to deter theft, but is aimed at preventing the "joyriding" of automobiles. *People v Hendricks*, 446 Mich 435, 448-451; 521 NW2d 546 (1994). Therefore, defendant's prior conviction for UDAA did not involve an element of dishonesty or theft and did not satisfy the criteria of MRE 609. See *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993). However, despite these mistakes, we find the error to be harmless beyond a reasonable doubt given the strength of the prosecution's case. *People v Coleman*, 210 Mich App 1, 7; 532 NW2d 885 (1995).

Defendant also contends that defense counsel "worked hard" at establishing that defendant picked up stolen automobiles from drug houses in exchange for drugs. However, this contention is without merit because the central theme to defendant's theory of the case was that he was a drug user whose confession to police occurred while he was experiencing withdrawal from his drug addiction. Furthermore, defendant testified that he was delivering "merchandise" for a friend who "take[s] merchandise from people in pawn for 50 percent insurance profit" and stores the merchandise so that "if the police ever come in[,] the people wouldn't lose their valuables." This type of testimony established that defendant was engaged in activity that was most likely illegal, yet elicitation of this testimony was sound trial strategy because it also established defendant's defense of only possessing the stolen property.

V

Defendant next contends that he was denied a fair trial because the prosecutor engaged in misconduct throughout the trial. Defendant failed to preserve this issue for appellate review because defendant failed to object to the prosecutor's conduct during the trial. *Stanaway, supra* at 687. Therefore, this Court reviews the alleged misconduct by the prosecutor only if a curative instruction could not have cured its prejudicial effect or if our failure to review the issue would result in the miscarriage of justice. *Id*. Upon reviewing the alleged instances of misconduct, we conclude that defendant was not denied a fair and impartial trial.

VI

Next, defendant alleges that defense counsel should have requested and the trial court should have instructed the jury on the lesser offense of receiving and concealing stolen property and the standard instructions for flight and impeachment by a prior conviction. Defendant failed to object to the jury instructions. Absent objection, this Court will not review the alleged error unless relief is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052; *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We find that the alleged errors did not result in manifest injustice.

Receiving and concealing stolen property is a cognate lesser included offense of breaking and entering. *People v Adams*, 202 Mich App 385, 387; 509 NW2d 530 (1993). We note that the evidence presented at trial would have supported a conviction of the lesser offense of receiving and concealing stolen property. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991). Therefore, if defendant would have requested such an instruction, the trial would have been obligated to give the instruction. *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993). However, we believe that defense counsel's failure to request the instruction constituted trial strategy. An instruction on receiving and concealing stolen property might have reduced defendant's chance of acquittal because the instruction would not have been consistent with defendant's theory of the case. See *People v Robinson*, 154 Mich App 92, 94; 397 NW2d 229 (1986); *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982).

We also find that the standard jury instruction on flight, concealment, and escape, CJI2d 4.4, was not warranted by the evidence presented at trial. Furthermore, counsel's failure to request the standard instruction for impeachment by a prior conviction, CJI2d 5.1, did not result in manifest injustice because this instruction was not significantly different than the trial court's general instruction that the jury could consider numerous factors when deciding whether a witness was credible.

VII

Finally, defendant contends that the cumulative effect of the errors denied him a fair and impartial trial. However, after a review of the record, we conclude that defendant was not denied a fair and impartial trial.

We affirm.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Meyer Warshawsky