STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN D. PREE,

Defendant-Appellant.

UNPUBLISHED
July 5, 1996

No. 160522
LC No. 92-115464

Before: Bandstra, P.J., and Young and M.D. Schwartz,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529; MSA 28.797, one count of conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1), MCL 750.529; MSA 28.797, one count of safe breaking, MCL 750.531; MSA 28.799, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). In addition, defendant was subsequently convicted of being a fourth habitual offender, MCL 769.12; MSA 28.1084. Defendant was initially sentenced to twenty-five to seventy-five years' imprisonment for the armed robbery and conspiracy convictions and twelve to twenty years' imprisonment for the safe breaking conviction, to be served concurrently to one another and consecutively to two years' imprisonment for each of defendant's felony-firearm convictions. With the exception of the felony-firearm sentences, defendant's other sentences were vacated and defendant was sentenced to life imprisonment on the fourth habitual offender conviction. We affirm the armed robbery, conspiracy, safe breaking, and felony-firearm convictions, but reverse defendant's fourth habitual offender conviction and remand.

Defendant argues that he was denied a fair trial because the prosecutor introduced inadmissible and irrelevant testimony from Hitchcock and Detective Newlin that alleged defendant's involvement in an unrelated crime. We disagree. It was not misconduct for the prosecutor to offer the testimony from Hitchcock and Newlin because the testimony was presented for identification purposes and was offered to show how it was that the police came to include defendant's photograph in a lineup at which

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

defendant was identified by the victims who had been robbed. The testimony in question was offered for a purpose other than its truth and was presented to show why the police proceeded to investigate defendant. See *People v Wilkins*, 408 Mich 69, 72-73; 288 NW2d 583 (1980).

Although defendant argues that the testimony was irrelevant because codefendant Bommarito's alleged action in pawning the diamonds did not make any fact at issue in defendant's trial more or less probable, we conclude that this testimony linking defendant to Bommarito was relevant to the conspiracy charge against defendant. MRE 401. The testimony presented made it more likely that defendant and Bommarito were in a position to conspire than would have been the case without the testimony. In addition, the testimony tended to establish how defendant's picture came to be used in the photographic lineup. Thus, the testimony of both Hitchcock and Newlin was relevant to material issues in dispute in this matter.

Furthermore, there is no indication in the record that the testimony was offered for the purpose of showing defendant's propensity toward criminal action nor does the record support defendant's contention that the prosecutor improperly argued that the testimony was evidence of defendant's guilt. The record shows that the prosecutor argued that the testimony was relevant to show how the police came to identify Bommarito and connect him to defendant, causing the police to include defendant's picture in a photographic lineup.

Moreover, even if the prosecutor's conduct was improper, defendant was not prejudiced and any error was harmless in light of the overwhelming evidence against defendant. *People v Robinson*, 386 Mich 551, 563; 194 NW2d 709 (1972); *People v Mooney*, ___ Mich App ___; ___ NW2d ___ (Docket No. 144270, issued 4/23/96), slip op p 4. It is unlikely that, in the absence of the error, defendant would have been acquitted. *Mooney*, *supra*.

Defendant next contends that he is entitled to a new trial because the prosecutor failed to reveal the existence of criminal charges pending against prosecution witness Roger Kalisz at the time of defendant's trial. We disagree. Although Kalisz signed an information and waiver of indictment on October 23, 1992, there is no indication in the record that the prosecutor knew of the charges pending against Kalisz at or before the time of defendant's trial held on November 2-5, 1992. Further, defendant offers no explanation or suggestion as to how the fact that federal charges (unrelated to defendant's case) were pending against Kalisz could possibly have been used to show bias or self-interest in the outcome of defendant's trial, *People v Hall*, 174 Mich App 686, 690-691; 436 NW2d 446 (1989); *People v Torrez*, 90 Mich App 120, 124; 282 NW2d 252 (1979). In any event, there was overwhelming evidence against defendant to convict him of the offenses, making the failure to disclose the information about Roger Kalisz insufficient to justify a new trial. *People v Canter*, 197 Mich App 550, 569; 496 NW2d 336 (1992).

Defendant also asserts that he is entitled to resentencing because the prosecutor did not present sufficient evidence to find him guilty of being a fourth habitual offender. Specifically, defendant claims that, although the prosecutor submitted certified copies of previous records of conviction that purported

to establish that defendant had been convicted of the prior crimes, there was no evidence presented to establish that defendant and the person previously convicted were one in the same. In viewing the evidence in a light most favorable to the prosecution, we conclude that insufficient evidence was presented to establish defendant's guilt beyond a reasonable doubt on the fourth habitual offender charge. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

To convict defendant as a fourth habitual offender, the prosecutor was required to prove beyond a reasonable doubt defendant's prior convictions and the identity of defendant as the person who had committed those prior offenses. MCL 769.13; MSA 28.1085; *People v Covington*, 70 Mich App 188, 191; 245 NW2d 558 (1976).[1] There is no doubt that the evidence presented by the prosecutor proved that a defendant named "John Pree" had been convicted of three felonies as indicated by the records. However, the prosecutor failed to establish that the "John Pree" who was convicted on the previous charges was the same defendant who had been convicted on the fourth and underlying charge of armed robbery. At trial, defendant refused to provide his fingerprints, and, although the trial court had authority to compel defendant to provide fingerprints, *Nuriel v YWCA*, 186 Mich App 141, 146; 463 NW2d 206 (1990), the trial court did not do so. Nor did the prosecutor ask the fingerprint expert to review fingerprints already taken in the case or offer any further evidence to establish defendant's identity as the previously convicted felon. The prosecutor instead requested the trial court to take judicial notice that the fingerprints on the arrest cards belonged to defendant. However, the trial court may not take judicial notice of a necessary element of an offense because the prosecution is required to prove each and every element of a charged offense beyond a reasonable doubt. *People v Taylor*, 176 Mich App 374, 376; 439 NW2d 370 (1989). The prosecution's failure to establish the element of defendant's identity requires us to reverse defendant's fourth habitual offender conviction and vacate defendant's life sentence.[2]

Although defendant asserts that he should appear before a different judge on remand, our review of the record reveals no actual bias or prejudice on the part of the trial court, and defendant has failed to overcome the presumption of impartiality. *Jackhill Oil Co v Powell Production Co*, 210 Mich App 114, 120; 532 NW2d 866 (1995). Because we are reversing defendant's habitual offender conviction and vacating his life sentence, we need not address defendant's assertion that his life sentence is disproportionate.

We affirm the armed robbery, conspiracy, safe breaking, and felony-firearm convictions and remand. Upon remand, the trial court shall reinstate the sentences for the armed robbery, conspiracy, and safe breaking convictions that were previously vacated. We reverse defendant's fourth habitual offender conviction. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Robert P. Young, Jr.
/s/ Michael D. Schwartz

[1] We note that MCL 769.13; MSA 28.1085 was amended by P.A. 1994, No. 110, § 1, effective May 1, 1994, to establish a preponderance of the evidence standard rather than beyond a reasonable doubt standard.

[2] Although the prosecution asserts that double jeopardy does not bar a retrial on a habitual offender offense, we do not comment at this time regarding this assertion. "This argument should be raised in the trial court if and when [defendant] is retried on this charge." *Taylor*, *supra* at 378.