STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PETER ZIROVICH,

Defendant-Appellant.

UNPUBLISHED
February 28, 1997

No. 191176
LC No. 94-000771

Before: Cavanagh, P.J., and Gage and D.A. Burress,* JJ.

PER CURIAM.

Defendant appeals as of right from a jury trial conviction of larceny in a building, MCL 750.360; MSA 28.592. Defendant was sentenced to a term of six months' imprisonment, three years' probation, and in addition was ordered to pay $2,740 in fines, restitution, court costs, and supervision fees. We affirm.

Defendant first asserts that the trial court abused its discretion by admitting evidence of defendant's gambling that was both irrelevant and impermissible character evidence. Because defendant's objection at trial was based on relevance, only that claim is preserved for appellate review. See *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992).

The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). We conclude that the challenged evidence was relevant, and therefore the trial court did not abuse its discretion in admitting it. Evidence was presented that defendant had recently borrowed a modest sum for gas and cigarettes and, shortly thereafter, had spent a considerable sum on entertainment, including gambling. As there was no evidence that defendant had other resources, the fact that he had excess cash for gambling and other entertainment made it more probable that defendant had taken the money missing from the store where he worked. See MRE 401.

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

Defendant also raises two claims of prosecutorial misconduct during the closing argument, only one of which has been preserved for appellate review. Defendant made a timely objection to the prosecutor's definition of reasonable doubt. Therefore, we review this claim to determine whether defendant was denied a fair and impartial trial. See *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995). Although the prosecutor did improperly emphasize that a reasonable doubt is a substantial doubt, we find that this comment did not deny defendant a fair and impartial trial because the trial court read the correct instruction before opening statements and closing argument began, and during jury instructions.

Defendant also asserts that the prosecutor acted improperly by suggesting that defense counsel was trying to mislead the jury. Defendant did not object at trial to the comments of which he now complains. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). Because we find that the prosecutor made no suggestion that the evidence presented by the defense was intended to mislead the jury, we conclude that failure to consider the issue more fully would not result in a miscarriage of justice.

Finally, defendant argues that the trial court's instruction on larceny in a building as a cognate lesser included offense of embezzlement was in error. We disagree. An offense is a cognate lesser included offense of a greater charge if it is of the same class or category as the principal charge. The trial court should only give a requested instruction on a cognate offense where the evidence adduced at trial would support a conviction of the cognate offense. *People v Bailey*, 451 Mich 657, 668; 549 NW2d 325 (1996).

Both embezzlement and larceny in a building share the elements of intentional taking or converting to one's own use the personal property of another without the owner's consent. See *People v Artman*, 218 Mich App 236, 241; 553 NW2d 673 (1996); *People v Mumford*, 171 Mich App 514, 517-518; 430 NW2d 770 (1988). However, larceny in a building has the additional element that the larceny occur within a building. *Id*. Thus, if the facts of the case involve embezzlement within a building, larceny in a building is a cognate lesser included offense of embezzlement.

In the instant case, the trial court did not err in instructing the jury on larceny in a building because the evidence presented at trial was sufficient for a reasonable jury to find defendant guilty of that offense. See *Bailey, supra*. Defendant's claim that he did not receive fair notice that the jury might be instructed on larceny in a building is belied by the record.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Daniel A. Burress