STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 2, 1999
v	No. 205854 Tuscola Circuit Court
DANIEL THOMAS ELLESIN, Defendant-Appellant.	LC No. 96-006899 FH

Before: Markman, P.J., and Hoekstra and Zahra, JJ.

PER CURIAM.

A jury convicted defendant and his codefendant of larceny of livestock, MCL 750.357a; MSA 28.589(1), conspiracy to commit larceny of livestock, MCL 750.157a; MSA 28.354(1), and receiving stolen property in excess of $100, MCL 750.535; MSA 28.803. Specifically, defendant and his partner were convicted of stealing two cows and trying to sell them through an auction house. The trial court sentenced him to one year of jail for each count, to be served concurrently, and ordered him to pay restitution of $2,000 and costs of $2,106.75. We granted defendant leave to bring this appeal. We vacate the conviction for receiving and concealing stolen property over $100 and affirm the convictions for larceny of livestock and conspiracy.

I. Sufficiency of evidence

Defendant argues that the prosecutor failed to present evidence of intent sufficient to sustain his convictions of larceny, conspiracy, and receiving stolen property. Larceny of livestock, MCL 750.357a; MSA 28.589(1) and receiving and concealing stolen goods over $100, MCL 750.535(1); MSA 28.803(1) require the prosecutor to prove intent or knowledge. *People v Ainsworth*, 197 Mich App 321, 324; 495 NW2d 177 (1992). Intent may be inferred from the facts and circumstances presented at trial. *People v Daniels*, 163 Mich App 703, 708; 415 NW2d 282 (1987). Moreover, "[c]ircumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), quoting *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

The prosecutor presented evidence that defendant and Bills delayed the trip to the Michigan Livestock Exchange (MLE) until later in the evening, arguably to avoid detection. They left the cows in an unusual location after 11:00 p.m. without water, when normally the night guard would put the animals in pens, and the manner in which they left the note on the gate was also unusual. Although both defendant and Bills claimed that Marion Jennings had given them permission to move the cows, their stories differed in several respects. Further, although Bills and defendant claimed that Jennings led them to believe that they had permission to move the cows, Bills stated that he had never seen Jennings working with the cows, and defendant indicated only that he was aware that Jennings was "living" or "staying" at the farm. Defendant wrote only his own name on the note, though he claimed an intention to request two checks, one in Jennings' name and one in his own. It was the jury's role, however, to assess the credibility of defendant's testimony. Moreover, both defendants testified to the formation of an agreement and to their collaboration in obtaining the truck and trailer, installing the trailer hitch, and loading the cows, which established a conspiracy. *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). Considering this testimony in a light most favorable to the prosecution, we find that the jury could conclude that intent to commit larceny of livestock, knowledge that the cows were stolen, and the existence of an agreement to advance the unlawful purpose of stealing the cows were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

II. Effective Assistance of Counsel

Defendant first argues that his trial counsel's failure to request the prosecutor's assistance in having Jennings appear at trial pursuant to MCL 767.40a(5); MSA 28.980(1)(5) or pursuant to MCL 767.91 *et seq*; MSA 28.1023(191) *et seq* amounted to ineffective assistance of counsel. It is well established, however, that we will not second-guess trial counsel in matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). "Counsel's failure to call witnesses is presumed to be trial strategy." *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Although counsel could have requested help in producing Jennings, defendant has not demonstrated that defense counsel's decision was anything other than trial strategy, nor has he demonstrated prejudice.

Defendant next argues that his counsel's failure to object to Detective Woidan's second-hand reference to defendant's experience with stolen pigs was ineffective assistance of counsel. Assuming arguendo that defense counsel erred in failing to object, we find that the error was harmless. When considering non-preserved, nonconstitutional error, our Supreme Court has recently stated:

> The defendant must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).]

Here, we do not find that this rigorous standard has been met. The testimony of Elroy Gilmore established that his cows were valued in excess of $100 and were moved without his consent. Further testimony regarding the note defendant left with the cows, the unusual manner in which the cows were left, and defendant's later attempt to receive compensation for the cows formed a sufficient basis upon

which a reasonable jury could conclude that defendant committed the crimes with which he was charged. In light of this testimony, any error concerning Woidan's testimony was harmless.

Defendant also argues that his defense counsel erred when she failed to object to the prosecutor's effort to impeach defendant with evidence of his prior conviction for receiving and concealing stolen property. Again, assuming arguendo that defense counsel did err, we find the error harmless under the standard articulated in *Carines, supra*. The same argument applies to defendant's claim that his defense counsel failed to request certain cautionary jury instructions. When the properly admitted evidence is viewed through the standard set forth in *Carines*, we must find that the error was harmless.

Further, we find no error in counsel's failure to move for separate trials. To show ineffective assistance of counsel, defendant would have to demonstrate that severance was required. There is no absolute right to a separate trial, *People v Harris*, 201 Mich App 147, 152; 505 NW2d 889 (1993), and the decision to sever is committed to the discretion of the trial court. *People v Stanley Jackson*, 158 Mich App 544, 555; 405 NW2d 192 (1987). In order to succeed in a motion for separate trials, a defendant must demonstrate that his substantial rights will be prejudiced and that severance is necessary to avoid potential prejudice. MCR 6.121(C). If defenses are "antagonistic" to each other, severance should be granted. *Stanley Jackson, supra* at 555. "A confession is not antagonistic for the purposes of determining whether to sever a trial where the confession of a codefendant incriminates both the codefendant and the defendant." *Harris, supra* at 153. According to Woidan, Bills incriminated himself and defendant in his original statement. The two defendants testified similarly at trial, and neither attempted to incriminate the other. Both indicated that it was Jennings who led them to believe that he had authority to arrange for the cow hauling. Therefore, the testimony of the two defendants was not antagonistic. Defendant has not shown that his substantial rights were prejudiced and that severance would have eliminated that prejudice. Defense counsel's failure to request severance was not error.

III. Prosecutorial Misconduct

Defendant argues that he was denied his right to a fair trial by the prosecutor's intentional misconduct. Because defense counsel did not object to the prosecutor's argument or request a curative instruction, our review is precluded unless the prejudicial effect was so great that it could not have been cured by an appropriate instruction and failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first maintains that the prosecutor's references to the stolen pigs testimony amounted to intentional misrepresentation of the facts, and that his argument to the jury regarding this testimony amounted to a misstatement of the law. A prosecutor may not make a statement to the jury that is not supported by the evidence. *Stanaway, supra* at 686. Although the prosecutor's later statements regarding defendant's alleged prior bad acts were somewhat exaggerated, they were inferences that arose from the evidence presented as it related to the prosecution's theory of the case. See *People v Roberson*, 167 Mich App 501, 509; 423 NW2d 245 (1988).

Defendant also alleges that the prosecutor improperly referred to the defendants as "liars." "It is well-established that the prosecutor may comment upon the testimony and draw inferences from it and may argue that a witness, including the defendant, is not worthy of belief." *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985); *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Bills testified that he had been lying in his first discussion with Woidan in order to protect his sister and her boyfriend. Where the evidence supports the inference that a defendant may have fabricated testimony, the prosecutor's argument is a proper comment on defendant's credibility. *Buckey, supra* at 16; see also *People v Calloway*, 169 Mich App 810, 821; 427 NW2d 194 (1988).

Next, defendant argues that the prosecutor vouched for the credibility of his witnesses, particularly Woidan. The prosecutor did not "convey a message to the jury that the prosecutor had some special knowledge or facts indicating the witness' truthfulness." *People v Bahoda*, 448 Mich 261, 277; 531 NW2d 659 (1995). He merely argued that some witnesses were not worthy of belief. Defendant argues that the prosecutor denigrated the defendant, his defense, and his witnesses when he stated, "I submit to you that what these two individuals told you is deserving of no respect. It's not evidence, it's garbage is what came in during this trial." Again, it is permissible for the prosecutor to comment upon the testimony, argue that a witness is not believable, and even to state that the defendant is lying. *Buckey, supra* at 16; *Launsburry, supra* at 361; *Calloway supra* at 821.

Defendant next argues that the prosecutor impermissibly asserted that defense counsel conspired with defendant to fabricate a defense and mislead the jury. The prosecutor stated: "Don't be mislead [sic] by the arguments made by defense counsel, trying to point to this mysterious Mike." There was no implication by the prosecutor that defense counsel conspired with the defendant to fabricate testimony. He was merely questioning the credibility of the defendants' theory of the case. Finally, defendant argues that in the prosecutor's rebuttal argument he "placed the prestige of his office behind the police work and investigation" when he stated:

> Finally, I ask you to rely upon your common sense and every day [sic] experience. Take into account all of the evidence, the investigation that was completed by Detective Woidan, which I would submit to you was detailed.

A prosecutor is not permitted to argue that "what he says is under the sanction of his official oath" or to express "a personal opinion to the jury upon disputed facts." *People v Ignofo*, 315 Mich 626, 632; 24 NW2d 514 (1946), quoting *People v Quick*, 58 Mich 321; 25 NW 302 (1885). The prosecutor's statement regarding Woidan's investigation was made as part of his main argument, that Bills' initial statement to police was the truth, and that the other evidence presented substantiated that version of events. He did not invoke the prestige of his office or of the police. Moreover, the degree of detail in Woidan's investigation was not a disputed fact.

In sum, we find no merit in defendant's allegations of prosecutorial misconduct.

IV. Jury Instructions

Defendant next argues that the trial court's failure to properly instruct the jury requires reversal of his convictions. By statute, "the failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29; MSA 28.1052. Although CJI2d 4.11 was an appropriate jury instruction in this case and should have been given, defense counsel expressed satisfaction with the offered instructions. "Failure to object to jury instructions waives appellate review absent manifest injustice," and "[m]anifest injustice occurs where the erroneous or omitted instructions pertain to a basic and controlling issue in the case." *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991). Intent was a controlling issue in this case. However, there was circumstantial evidence, other than the impermissible bad acts testimony, from which the jury could have inferred the requisite intent. When the additional evidence of intent is coupled with the fact that the jury received some instruction limiting its consideration of the prior conviction, we find no manifest injustice in the trial judge's failure to sua sponte read CJI2d 4.11 to the jury.

V. Double Jeopardy

Defendant also argues that convictions for both larceny of livestock and receiving and concealing stolen property over $100, where both convictions are for the same theft, violate the prohibitions contained in both the United States Constitution and the Michigan Constitution against placing a person twice in jeopardy. US Const, Am V; Const 1963, art 1, § 15. We agree.

Here, we are concerned with that category of double jeopardy protection that prevents an individual from being punished more than once for the same offense. *People v Walker*, 234 Mich App 299, 305; 593 NW2d 673 (1999). The double jeopardy protections contained in both our state and federal constitutions act as a restraint on the prosecutor and the courts, not the Legislature. *Walker*, *supra* (citing *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984)). Specifically, the Legislature can impose multiple punishments for a single offense, but prosecutors and courts cannot impose multiple punishment where the Legislature has made no such provision. *People v Robideau*, 419 Mich 458, 485-486; 355 NW2d 592 (1984).

In *People v Johnson*, 176 Mich App 312, 315; 439 NW2d 345 (1989), this Court held that the Legislature did not intend to authorize multiple convictions for larceny over $100, MCL 750.356; MSA 28.588, and possession of stolen property over $100, MCL 750.535; MSA 28.803. Absent legislative intent to authorize multiple convictions, and in light of the fact that both statutes punish the violation of the same societal norm (theft), we found that a court's entry of such multiple convictions violates the constitutional prohibitions against double jeopardy. *Id*. at 315. Because we find no meaningful difference between the larceny statute at issue in *Johnson* and the larceny of livestock statute at issue here, we conclude that *Johnson* is controlling precedent.[1] Therefore, on remand the trial court must vacate one of the convictions. *Johnson*, *supra* at 315.

VI. Cumulative Error

Defendant's final argument is that even if the enumerated errors taken individually do not amount to errors requiring reversal, the cumulative effect of the errors, considered in combination, denied

defendant his constitutionally guaranteed rights to due process and a fair and impartial trial. Where a defendant alleges denial of due process because of cumulative error, we will review the record to determine whether defendant has received a fair and impartial trial. *People v Duff*, 165 Mich App 530, 539; 419 NW2d 600 (1987); *People v Taylor*, 185 Mich App 1, 10; 460 NW2d 582 (1990).

Assuming that defense counsel erred in failing to object to the improper prior bad acts testimony, and to the prior conviction testimony, and in failing to request a cautionary instruction regarding that testimony, these errors do not support a finding of ineffective assistance of counsel. Likewise, their cumulative effect does not amount to error requiring reversal. There was sufficient evidence to enable a rational trier of fact to conclude that defendant was guilty beyond a reasonable doubt without considering the prior bad acts testimony. Regarding the prior conviction, the trial judge alluded to its limited use as evidence in his instruction to the jury, and thus, its prejudicial effect was discounted. MCL 769.26; MSA 28.1096 provides that no judgment shall be reversed solely because the jury was misdirected, unless the error complained of yielded a miscarriage of justice. Based on the foregoing analyses, we cannot conclude that the errors committed resulted in denial of a fair trial or a miscarriage of justice.

Remanded for vacation of defendant's conviction for receiving and concealing property over $100, but otherwise affirmed. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Brian K. Zahra

Judge Markman did not participate.

[1] Although the facts in the instant case differ slightly from those in *Johnson*, in the instant case, defendant apparently tried to sell the cattle, whereas in *Johnson* the defendant simply retained the stolen clothes, we find this factual distinction to be insignificant. Plaintiff would have us hold that MCL 750.535; MSA 28.803 creates a separate offense of placing stolen goods into the stream of commerce, but cites no authority for this interpretation of the statute.