STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADRIAN GATSON,

Defendant-Appellant.

UNPUBLISHED
December 28, 2001

No. 225561
Macomb Circuit Court
LC No. 99-002222-FC

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of armed robbery, MCL 750.529. The trial court sentenced defendant to a term of 225 to 360 months' imprisonment. We affirm.

Defendant first asserts that the trial court erred when it denied his motion for mistrial after a police officer inadvertently testified that defendant was previously convicted of first-degree criminal sexual conduct (CSC I) arising out of another armed robbery. We review a trial court's ruling on a motion for mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). An abuse of discretion exists if, based on a thorough review of the facts before the trial court, an unprejudiced person would conclude that no justification or excuse could support the court's ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

We recognize that a police officer's unresponsive or volunteered remarks are subject to intense scrutiny to determine whether the officer violated the special obligation of law enforcement not to venture into forbidden areas that could prejudice the defendant. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). However, it is clear that the police officer's mention of defendant's previous conviction was not unresponsive to the prosecutor's inquires. Moreover, it was not volunteered, but was merely an inadvertent error. The officer simply referred to the wrong one of two separate convictions arising from the trial about which the officer was asked. The prosecutor immediately recognized the witness' error and followed the answer with a statement that offered the jury a plausible explanation for what the prosecutor impliedly characterized as the witness' mistaken memory of the previous trial without repeating the offending conviction or drawing further attention to it. On this record, we are not persuaded that the trial court abused its discretion in denying defendant's motion for a mistrial.

Defendant also contends that he was denied a fair trial because the prosecutor improperly invited him to comment on the credibility of prosecution witnesses. Alternatively, defendant asserts that his counsel's failure to object to the prosecutor's questions denied defendant the effective assistance of counsel. We disagree with both contentions.

We review a defendant's unpreserved claim of prosecutorial misconduct for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Reversal is warranted only when a plain error resulted in the conviction of an innocent defendant or seriously affected the fairness or integrity of the trial. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Although a prosecutor should not ask a defendant to assess the credibility of prosecution witnesses, this impropriety does not necessarily warrant reversal. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

Here, the prosecutor's request that defendant assess the prosecution witnesses' credibility was contained in a very short exchange, did not affect defendant's composure, and addressed the content of defendant's own direct testimony, which was directly opposed to the prosecution witnesses' account of the incident. Further, reversal is not warranted where any prejudicial effect could have been cured had counsel raised a timely objection. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Here, had counsel objected, any prejudice could have been cured by an instruction from the court. *Id.* Thus, we are not persuaded that reversal is warranted.

In a related argument, defendant contends that his counsel's failure to object to the prosecutor's improper questions denied him the effective assistance of counsel. We disagree.

Because defendant did not move for a new trial or a *Ginther*[1] hearing in the trial court, our review is limited to errors apparent from the existing record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). To establish a claim of ineffective assistance of counsel, a defendant must make an affirmative showing that counsel's performance fell below an objective standard of reasonableness and that errors in counsel's performance resulted in actual prejudice – that is, had counsel not erred, there existed a reasonable probability that the outcome of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). Here, defendant has not overcome the well-settled presumption that counsel's decision to not object during the course of the prosecutor's cross-examination of defendant was the product of sound trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Finally, defendant asserts that the trial court erred in refusing to instruct the jury on the misdemeanor offense of larceny by conversion, MCL 750.362.[2] We disagree. Claims of

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] The plain language of MCL 750.362 does not specify under what circumstances larceny by conversion constitutes a misdemeanor offense. However, MCL 750.362 does provide that one who commits larceny by conversion "shall be punished as provided in the first section of this chapter," which is MCL 750.356. At the time defendant committed the instant offense, MCL 750.356(5) provided that larceny of property under $200 was a misdemeanor offense.

instructional error are reviewed de novo by considering the instructions as a whole to determine whether a defendant's rights were sufficiently protected. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998). However, a trial court's decision to not instruct the jury on a lesser included misdemeanor offense will not be disturbed on appeal absent an abuse of discretion. *People v Stephens*, 416 Mich 252, 265; 330 NW2d 675 (1982); *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987).

In *Stephens, supra*, at 261-264, our Supreme Court articulated five requirements that must be met for an instruction on a lesser misdemeanor offense to be warranted. The party seeking such an instruction must make a proper request, there must be "an appropriate relationship between the charged offense and the requested misdemeanor," the requested instruction must be supported by a rational view of the evidence set forth at trial, and, if the prosecutor requests the instruction, the defendant must have adequate notice of it as a charge he is expected to defend against. Finally, the requested instruction may not result in undue confusion or some other injustice. *Id.* at 264. With regard to the requirement that the requested instruction be supported by a rational view of the evidence at trial, the Supreme Court observed:

> This means that *not only must there be some evidence which would justify conviction of the lesser offense*, but that "proof on the elements or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense." [*Id.* at 262-263 (emphasis supplied), quoting *United States v Whitaker*, 144 US App DC 344, 347; 447 F2d 314 (1971).]

Thus, the pertinent inquiry here is whether the record contains "some evidence which would justify conviction of the lesser offense" of larceny by conversion. *Stephens, supra* at 262. Quoting the holding of an earlier panel in *People v Scott*, 72 Mich App 16, 19; 248 NW2d 693 (1976), this Court recently articulated the elements of the offense of larceny by conversion in *People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001).

> (1) [T]he property at issue must have "'some value,'" (2) the property belonged to someone other than the defendant, (3) someone delivered the property to the defendant, irrespective of whether that delivery was by legal or illegal means, (4) the defendant embezzled, converted to his own use, or hid the property "'with the intent to embezzle or fraudulently use'" it and (5) at the time the property was embezzled, converted or hidden, the defendant "'intended to defraud or cheat the owner permanently of that property.'" Stated more simply, larceny by conversion occurs "where a person obtains possession of another's property with lawful intent, but subsequently converts the other's property to his own use." [*Id.* at 72, quoting *People v Christenson*, 412 Mich 81, 86; 312 NW2d 618 (1981) (footnote omitted).]

We are not convinced that a rational view of the evidence could have supported a conviction of larceny by conversion. *Stephens, supra* at 262. At trial, defendant testified on his own behalf. Specifically, he indicated that he met with the victim, who was driving a taxicab, at approximately 2:30 to 3:00 a.m. on June 11, 1999. When the victim picked defendant up at the corner of Eight Mile Road and Gratiot, defendant directed the victim to take him to a crack house in the area of Linhurt and Chalmers. According to defendant, the victim asked defendant to

obtain two "stones" of crack cocaine for the victim when he went into the crack house. Defendant agreed to do so, and accepted a total of $45 from the victim, $40 for the crack cocaine, and an extra $5 for his services. Defendant further testified that he entered the crack house, purchased the items for the victim, but then instead of returning to the taxicab to give the victim the crack cocaine, he walked away through a vacant parking lot.

Consequently, a review of the record does not yield evidence indicating that at the time of the conversion of the victim's funds, defendant specifically intended to permanently defraud or cheat the victim of the money given in exchange for his promise to obtain crack cocaine. *Mason, supra* at 72. Consequently, we are not persuaded that the trial court abused its substantial discretion in declining to instruct the jury regarding the offense of larceny by conversion. *Stephens, supra* at 264-265.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Peter D. O'Connell