

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY JENNINGS,

Defendant-Appellant.

UNPUBLISHED
February 26, 2002

No. 226317
Wayne Circuit Court
LC No. 99-001665

Before: Neff, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of larceny in a building, MCL 750.360. Defendant was sentenced to one to four years for the conviction. We affirm.

I

On appeal, defendant first argues that he was denied a fair trial because the trial court did not sua sponte object to two instances in which 404(b) evidence was admitted. We disagree. Defendant failed to preserve this issue for appeal by objecting at trial; therefore, our review is limited to plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 377; 624 NW2d 227 (2001).

First, defendant argues that testimony regarding his having a drug problem was improperly admitted 404(b) evidence. See *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). However, review of the record evidence, including defendant's cross-examination of the complainant, reveals that his defense theory was that defendant had several problems with the complainant and his fiancée, Yolanda Simmons, which led to their pursuit of the charge against defendant. Therefore, on redirect examination, the prosecutor questioned the complainant about the reason for the problems he had with his brother, defendant, to which the complainant replied, "[m]y brother has a drug problem." This statement did not constitute impermissible 404(b) evidence. Defendant placed at issue the nature of the problems that existed between the parties and the testimony was merely an explanation of the nature of the problems. A party waives review of the admission of evidence which he introduced, or which was made relevant by his own placement of a matter in issue. *Knapp*, *supra* at 378; *People v Bates*, 91 Mich App 506, 510; 283 NW2d 785 (1979). Therefore, defendant failed to establish plain error that affected his substantial rights.

Defendant also argues that the trial court erroneously admitted irrelevant 404(b) evidence in the form of testimony that one of the witnesses obtained a personal protection order against defendant. Although we disagree that it was 404(b) evidence, we conclude that the testimony was irrelevant. See *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). However, error in the admission of evidence is not grounds for reversal where the error was harmless. *Id.* at 676. Further, errors which might merit reversal if committed before a jury can be harmless if committed at a bench trial. See *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988).

Here, review of the record shows that the trial court made no reference to the disputed evidence when it found defendant guilty on the basis of other, properly admitted evidence. Because the trial court's decision was not affected by the disputed testimony, defendant has failed to establish that any error substantially affected his rights and, therefore, his claim must fail. Similarly, for the reasons discussed above, defendant's ineffective assistance of counsel claim premised on the admission of the testimony regarding his alleged drug problem and the personal protection order is without merit.

II

Defendant next argues that he could not be found guilty of larceny in a building under MCL 750.360 because he resided on the premises. We disagree. Questions of statutory construction are reviewed de novo. *People v Vasquez*, 465 Mich 83, 87; 631 NW2d 711 (2001). When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction. *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999).

MCL 750.360 provides:

Any person who shall commit the crime of larceny by stealing in any dwelling house, house trailer, office, store, gasoline service station, shop, warehouse, mill, factory, hotel, school, barn, granary, ship, boat, vessel, church, house of worship, locker room or any building used by the public shall be guilty of a felony.

Defendant claims that he could not be convicted of larceny in a building, MCL 750.360, because he was lawfully on the premises and did not invade a protected property right. However, the plain language of the statute clearly prohibits the commission of larceny in "any" dwelling house. To construe this statute as excluding a defendant's own dwelling, or any building in which a defendant has a right to enter, would grant him the right to steal the personal property of others who are also on the premises. Defendant's proposed construction would produce an absurd and unjust result inconsistent with the purpose of the statute, which is to protect persons' property rights in their dwellings. See *People v Thompson*, 114 Mich App 302, 304-305; 319 NW2d 568 (1982). Therefore, defendant was properly convicted of larceny in a building for taking his brother's and Simmons' personal property from their flat without their consent.

III

Defendant next argues that the evidence was insufficient to sustain his conviction because the evidence did not establish that he took the property with the intent to permanently deprive the owner of that property. We disagree.

The elements of larceny in a building are: (1) the actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the goods or property must be the personal property of another, (5) the taking must be without the consent and against the will of the owner, and (6) the taking must occur within the confines of the building. *People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1998). Here, the testimony included that (1) defendant was seen with the complainant's black and turquoise gym bag at a neighborhood store, (2) the bag was later found on the complainant's porch, (3) the bag contained the complainant's leather motorcycle jacket and Simmons' leather boots, (4) neither the complainant or Simmons gave defendant permission to enter their flat or take their personal property, (5) there was a hole in the wall between the flat where defendant lived and the flat where the complainant and Simmons lived that was large enough for a person to pass through, and (6) defendant admitted to Simmons that he went into her flat, took her camera, and sold it. Viewing the evidence in a light most favorable to the prosecution, we conclude that the evidence was sufficient to justify a rational trier of fact in finding guilt beyond a reasonable doubt. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), quoting *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

IV

In his supplemental brief in propria persona, defendant asserts that he was deprived of his right to effective assistance of counsel because defendant's former counsel, who withdrew from the representation, and the trial counsel who was appointed as his replacement were law firm partners. We disagree. Because defendant did not move for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent on the record. See *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's representation prejudiced him so as to deprive him of a fair trial. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). When claiming ineffective assistance due to defense counsel's conflict of interest, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). In this case, after carefully and thoroughly reviewing each of defendant's allegations, we conclude that defendant was not denied the effective assistance of counsel. Furthermore, it appears that defendant discovered that his attorneys were allegedly partners before trial; therefore, defendant's failure to raise the issue in the trial court constitutes an acquiescence. See *People v Gierke*, 437 Mich 969; 467 NW2d 597 (1991); *People v Suiter*, 82 Mich App 214, 219; 266 NW2d 762 (1978).

V

Next, defendant argues that several instances of trial court misconduct denied him a fair trial. Specifically, defendant contends that the trial court repeatedly demonstrated that it was personally biased against defendant. We disagree. Defendant failed to preserve this issue for review by moving for disqualification of the trial judge. See MCR 2.003(A); *Cain v Dep't of Corrections*, 451 Mich 470, 503-504; 548 NW2d 210 (1996); *People v Gomez*, 229 Mich App 329, 331; 581 NW2d 289 (1998). Therefore, this Court's review is limited to determining

whether defendant established plain error that affected his substantial rights. See *Carines, supra* at 763-764.

First, defendant contends that judicial bias was demonstrated when the trial court found Simmons' testimony to be credible. However, after reviewing the record as a whole and reading the trial court's comments in context, we conclude that the trial court properly discharged its duties as finder of fact, including making credibility determinations. See *People v Thenghkam*, 240 Mich App 29, 46; 610 NW2d 571 (2000); *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Second, defendant asserts that the trial court improperly convicted him of a crime with which he was not originally charged. Here, defendant was charged with second-degree home invasion, MCL 750.110a, but during defendant's motion for a directed verdict, the trial court granted the prosecutor's request to charge defendant with larceny in a building, MCL 750.360, a cognate offense. However, defendant does not assert that the two offenses are so dissimilar as to require different defenses; therefore, defendant's claim is without merit. See *People v Adams*, 202 Mich App 385, 391-392; 509 NW2d 530 (1993).

Third, defendant claims that the trial court lacked subject matter jurisdiction. We disagree and conclude that the court had subject matter jurisdiction.

Fourth, defendant claims that, at sentencing, the trial court demonstrated its bias against defendant when it treated him differently than it would treat a similarly situated white man. Beyond this accusation, defendant fails to explain or support the basis for his claim, and the record does not support defendant's contention. Therefore, defendant fails to show plain error. See *Carines, supra*.

VI

Defendant's next argument consists entirely of numerous incoherent, conclusory statements alleging instances of prosecutorial misconduct. Defendant failed to support these accusations with any facts or law. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment of an issue with little or no citation of supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant's failure to cite any supporting legal authority constitutes abandonment of the issue. See *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Even if defendant had not abandoned this issue, there is no factual support in the record for reversal because of prosecutorial misconduct; accordingly, defendant failed to establish plain error that affected his substantial rights. See *Carines, supra*.

Affirmed.

/s/ Janet T. Neff
/s/ Mark J. Cavanagh
/s/ Henry William Saad