

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN MICHAEL ZELLER,

Defendant-Appellant.

UNPUBLISHED

February 6, 2007

No. 264137

Clinton Circuit Court

LC No. 05-007674-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of larceny of property valued at less than \$200, MCL 750.356(5), and was sentenced to twelve months' probation, with the first 30 days in jail. He appeals as of right. For the reasons set forth in this opinion we affirm the conviction and sentence of defendant. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On April 26, 2004, at approximately 1:50 a.m., defendant and his friend Nick Murphy, were caught in the act of loading brake drums taken from a scrap metal pile at Hickok Trucking Company. The company's owner, Gregory Hickok, testified he was watching the truck yard that night due to several recent thefts. When he noticed the men, Hickok phoned the police, who arrived shortly thereafter. Murphy told the police that he and defendant had the owner's permission to be there. However, Hickok denied giving them permission, and the two men were taken into custody. Defendant subsequently led police to his residence, where several more brake drums and a tarp kit purportedly taken from Hickok Trucking were located. In addition to the larceny charge, defendant was charged with one count of receiving or concealing stolen property valued at greater than \$1,000 but less than \$20,000, MCL 750.535(3)(a), and receiving or concealing stolen property valued at less than \$200, MCL 750.535(5).

At trial, defendant admitted that he and Murphy collected scrap metal from various businesses several times during April 2004, including two to four times from Hickok Trucking. He explained that he and Murphy obtained permission to collect the scrap metal, which they subsequently sold for cash. He denied having the intent to steal or to take property without permission, and affirmed his belief that he took the items lawfully. However, defendant admitted he did not personally go to Hickok Trucking to obtain permission to take the scrap metal. Defendant testified he believed that Murphy went to Hickok Trucking and obtained

permission. However, the bookkeeper for Hickok Trucking testified that she denied Murphy's request for scrap metal, and that she told him to speak to Hickok about it.

The jury acquitted defendant of the two receiving or concealing stolen property charges, but convicted him of the larceny charge. Defendant subsequently appealed to this Court, and filed a motion to remand to the lower court for a determination of whether he was entitled to a new trial based on the trial court's erroneous refusal to instruct the jury on his defense to larceny. This Court remanded pursuant to MCR 7.211(C)(1) and directed that defendant move for a new trial, which was to be limited to the issues raised in his motion to remand. *People v Zeller*, unpublished order of the Court of Appeals, issued February 22, 2006 (Docket No. 264137).

Defendant subsequently filed a motion for a new trial and argued that the trial court erroneously failed to instruct the jury on his defense to the larceny charge, that he honestly, albeit possibly mistakenly, believed he had permission to take and keep the scrap metal. Defendant claimed that he asserted the same defense to the other two charges, for which the trial court instructed the jury on CJI2d 26.5 (honest buying or receiving), and the jury acquitted him of those charges. Defendant acknowledged that the lower court record did not demonstrate that his trial counsel requested an instruction on his defense to the larceny charge. However, he submitted an affidavit sworn by his trial counsel in which he averred that he requested the instruction and that the trial court denied the request. He further averred that the matter was not subsequently raised and discussed on the record, and stated that had the trial court given the instruction, the jury would have acquitted defendant on the larceny charge.

At the hearing on defendant's motion, the trial court accepted a stipulation that the prosecutor, defense counsel, and the court had discussed the proposed jury instructions at an off-the-record, in-chambers conference. The parties further stipulated that if defense counsel testified, his testimony would reflect the content of his affidavit. However, the trial court ruled the issue was not properly preserved and was therefore waived. Despite that ruling, the court also went on to rule that defendant was not entitled to a new trial. The court reasoned that, because the specific intent instruction for larceny required the jury to find that defendant had the intent to steal in order to convict him, the jury instructions, as given, sufficiently protected defendant's rights.

On appeal, defendant argues he did not waive his request for an instruction on his defense to the larceny charge; rather, he failed to object to the jury instructions as given by the trial court. He additionally argues that the trial court committed reversible error when it refused to instruct the jury on his claim of right defense to the larceny charge, and when it neglected its duty to give a sua sponte instruction to the jury on this defense.

A party must challenge an instruction at trial to preserve the issue for appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). The failure to make a timely objection to a jury instruction constitutes forfeiture and relief is only warranted if the error was plain and it affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In contrast, if a party expresses satisfaction with the trial court's instructions, it constitutes a waiver that extinguishes any error regarding the instructions. *Carter, supra* at 215-216. Waiver is the intentional abandonment of a known right, and a party who waives a known right cannot seek appellate review of the claimed error. *Id.*

We conclude that defendant has waived appellate review of this issue. On several occasions, defense counsel expressed satisfaction with, or failed to object to, the instructions as given. *Carter, supra* at 215-216. In any event, even assuming the issue was properly preserved, we hold that the jury instructions as a whole fairly presented the issues for trial and sufficiently protected defendant's rights. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). The trial court instructed the jury that it had to find that defendant possessed the specific intent to steal in order to convict him of larceny. Hence, the instruction adequately advised the jury that it could not convict if it found that defendant honestly believed he had a right to take the property that was the subject of the larceny charge, i.e., he did not have the specific intent to steal.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Jessica R. Cooper