STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 27, 2007
v	No. 273008 Kent Circuit Court
NICHOLAS PAUL IGNASIAK, Defendant-Appellant.	LC No. 05-003787-FH

Before: Bandstra, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawful use of an automobile, MCL 750.414. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 17 months' to 15 years' imprisonment. We affirm.

I

Defendant first argues that the prosecution failed to present sufficient evidence to convict him of unlawful use of an automobile. Specifically, defendant asserts that there was insufficient evidence to establish his identity as the perpetrator beyond a reasonable doubt. We disagree. This Court reviews sufficiency of the evidence claims de novo, viewing the evidence in the light most favorable to the prosecution to determine if the evidence was sufficient for a rational jury to find the defendant guilty beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). Any conflicts regarding the evidence are resolved in favor of the prosecution, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), and conflicts regarding credibility of witnesses are resolved in support of the jury's verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We will not interfere with the jury's role, as factfinder, in determining the weight of the evidence or the credibility of witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

MCL 750.414 prohibits "[a]ny person [from] tak[ing] or us[ing] without authority any motor vehicle without intent to steal the same." Identity is also an element of the crime because it is always an essential element of a criminal offense. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Circumstantial evidence, and reasonable inferences drawn therefrom, may be sufficient to prove an element of a crime, including identity. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

The circumstantial evidence presented at trial was sufficient to establish defendant's identity as the perpetrator beyond a reasonable doubt. Defendant was convicted of unlawfully taking a Porsche and Dodge Viper from Messina's Imports (hereinafter "Messina's"). Defendant, an employee at Messina's, hosted a party on the evening of May 7, 2004. Two of defendant's friends testified that defendant left the party in a Buick Park Avenue and returned shortly thereafter in a Porsche. Defendant took a few people for rides in the Porsche. Later that night, defendant's girlfriend informed the party guests that defendant had been in an accident. Defendant subsequently admitted to his friends that he had crashed a Viper. The next morning, police officers found the Viper parked near the accident scene. The Park Avenue that defendant had driven away from the party and the Porsche were parked outside the garage at Messina's. Staff members at Messina's testified that the night before, the Porsche and Viper were locked inside the garage and that, as an employee, defendant had access to the garage after hours. Defendant did not return to work at Messina's following this incident. Additionally, the prosecution played a telephone recording at trial in which defendant's sister said that defendant stole a Porsche and Viper and then crashed the Viper.

Viewing this evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence to convict defendant of unlawful use of an automobile. *McGhee, supra* at 622. Reversal is not warranted on the grounds of insufficient evidence.

II

Next, defendant asserts that the trial court erred in admitting the telephone recording of his sister, Kristina Ignasiak, discussing his involvement in the incident with a friend. Defendant claims that the recording was admitted in violation of his Sixth Amendment, US Const, Am VI, right to confrontation. Because this issue is unpreserved,[1] we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Plain error exists if the error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id*. at 763.

Testimonial hearsay is inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford, supra* at 51.

At the offer of proof hearing, the trial court reviewed the pertinent portion of the telephone recording. In speaking to her friend, Kristina briefly referenced defendant's legal problems. She said that "[defendant] went to his work and broke in and stole the Porsche and

[1] Defendant did not object to the admission of the telephone recording before the trial court on the same ground that he presents on appeal. Therefore, the issue is unpreserved. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) (stating that an objection on one ground is insufficient to preserve an appellate attack on a different ground).

Dodge Viper . . . he did 180 [miles per hour in the Porsche] . . . and he crashed the $90,000 Dodge Viper." At trial, Kristina testified that she could not recall who told her about the incident, but she claimed that it was not defendant. A police officer testified, however, that less than two weeks after the incident, Kristina said that she learned about it from defendant.

Defendant asserts that because the source of Kristina's knowledge about the incident is unknown, the admission of the recording constituted a *Crawford* violation. We find, however, that *Crawford* is inapplicable to the instant case, because the statements in question cannot be characterized as testimonial. See *Id*. at 59-62. Kristina's statements on the recording are more like "a casual remark to an acquaintance," than "[a]n accuser who makes a formal statement to government officers." See *Id*. at 51. Moreover, defendant's suggestion that someone other than himself informed Kristina about the incident asks this Court to engage in improper speculation. See *Luce v United States*, 469 US 38, 41; 105 S Ct 460; 83 L Ed 2d 443 (1984) ("A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context.").

Defendant has failed to establish plain error affecting his substantial rights. Even if the telephone recording should have been excluded, defendant has failed to demonstrate that its admission constituted outcome determinative error requiring reversal. As indicated above, the circumstantial evidence presented at trial, including the testimony of defendant's friends and the staff at Messina's, was more than sufficient to find defendant guilty of unlawful use of an automobile beyond a reasonable doubt. See MCL 750.414. Accordingly, we find no error warranting reversal. *Carines*, *supra* at 763-764.

III

Defendant also argues that the trial court erred in allowing a nonendorsed witness to testify about the nightly closing procedures at Messina's. We review a trial court's decision to allow a nonendorsed witness to testify for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 402; 633 NW2d 376 (2001). The abuse of discretion standard acknowledges that there are circumstances in which there is no one correct outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *Id.*

This Court previously ruled that the prosecution's failure to comply with MCL 767.40a[2] does not require automatic reversal. See *People v Williams*, 188 Mich App 54, 58-59; 469

[2] MCL 767.40a provides in pertinent part:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
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> * * *

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NW2d 4 (1991). In *Williams*, the defendant moved for dismissal when the prosecution failed to provide a witness list 30 days before trial pursuant to MCL 767.40a(3). *Id.* at 58. This Court opined that "[a] trial court must exercise discretion in fashioning a remedy for noncompliance with a discovery statute," and that an abuse of discretion will not be found unless the defendant can show that he was prejudiced by the prosecution's failure to comply with the statute. *Id.* at 58-59.

In this case, the prosecution did not name Tom Gaetano, an employee at Messina's, on its witness list or as one of its potential witnesses during voir dire. Defendant waived his right to a preliminary examination, so it is unknown if the prosecution would have called Gaetano as a witness at that proceeding. At trial, the parties discussed Gaetano's testimony with the trial court off the record. As such, the record does not reflect whether the prosecution demonstrated good cause under MCL 767.40a(4). Gaetano subsequently testified about closing procedures at Messina's. According to his testimony, Gaetano was generally one of the last employees to leave Messina's, and he ensured that the garage doors, bay doors, and regular doors were locked on a nightly basis. On cross-examination, Gaetano admitted that although he believed he checked the locks on May 7, 2004 as part of his nightly routine, he had no specific memory of doing so that night.

While the trial court did not provide a specific finding with respect to "good cause" when it issued its ruling, it was implicit in the trial court's ruling that the prosecution moved to call Gaetano as a witness in response to the defense theory that defendant was not at work on May 7, 2004. As such, Gaetano's testimony "became pertinent at the last minute." Further, Gaetano's testimony about the nightly closing procedures at Messina's was admissible as evidence of habit. See MRE 406 ("[e]vidence of the habit of a person . . . whether corroborated or not . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit"). Gaetano's testimony on direct examination was brief, consisting of less than two pages in the trial transcript, and defense counsel subjected Gaetano to meaningful cross-examination.

We conclude that under the facts and circumstances of this case, defendant was not prejudiced by Gaetano's testimony. Defendant makes an unpersuasive argument that Gaetano was a crucial witness, because he testified that the garage was locked during the incident in question. Another staff member at Messina's testified that he locked the garage that night. Further, while MCL 750.414 proscribes the unauthorized taking or using of a motorized vehicle, there is no element of breaking or entering in the statute. Additionally, defendant suggests that allowing Gaetano to testify without advance notice prevented defense counsel from effectively cross-examining Gaetano at trial. This assertion lacks merit because in eliciting Gaetano's testimony that he had no memory of checking the locks on the night of the incident, defense counsel effectively cross-examined Gaetano. Further, defendant has failed to demonstrate how advance notice would have enabled defense counsel to conduct a more meaningful examination.

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> (4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

Under the circumstances, although the prosecution did not comply with MCL 767.40a, defendant was not prejudiced by the trial court's decision to allow Gaetano to testify. Because defendant has failed to demonstrate any prejudice, we find that the trial court did not abuse its discretion by allowing Gaetano to testify. *Williams, supra* at 58-59.

IV

Finally, defendant argues that the trial court erred in ordering restitution without any substantiation for the alleged damages. Defendant asserts that the trial court erred in failing to hold an evidentiary hearing to determine the proper amount of restitution. Defendant's arguments lack merit. In failing to object to the restitution amount at sentencing, defendant waived his opportunity for an evidentiary hearing. *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997). Further, "[a]bsent such objection, the court is not required to order, sua sponte, an evidentiary proceeding to determine the proper amount of restitution due." *Id.* at 276 n 17. Moreover, we find that the trial court properly exercised its discretion in relying on the amount of damages listed in defendant's presentence investigation report (PSIR). See *Id.*, quoting *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997) (stating that the trial court "is entitled to rely on the amount recommended in the [PSIR] 'which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information'").

Affirmed.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter
/s/ Jane M. Beckering