

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC LEON BALLENTINE,

Defendant-Appellant.

UNPUBLISHED

April 24, 2008

No. 275205

Oakland Circuit Court

LC No. 2006-210545-FH

Before: Bandstra, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of larceny, MCL 750.356(3)(a), for which he was sentenced as a fourth habitual offender, MCL 769.12, to 4 to 20 years in prison. We affirm defendant's conviction but vacate the order of restitution and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court impermissibly infringed on his right to counsel when it discharged his appointed attorney after he failed to appear for defendant's circuit court arraignment. Because defendant did not raise this constitutional issue below, it is unpreserved. *People v Geno*, 261 Mich App 624, 626; 683 NW2d 687 (2004). Unpreserved claims of constitutional error are reviewed for plain error affecting defendant's substantial rights. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007).

The Sixth Amendment directly guarantees the right to counsel in all criminal prosecutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). The right to counsel generally affords a criminal defendant the right to the attorney of his choice. *People v Portillo*, 241 Mich App 540, 542-543; 616 NW2d 707 (2000). However, an indigent defendant has a right to counsel, but not to counsel of his choice. *Id.*; *People v Flores*, 176 Mich App 610, 613; 440 NW2d 47 (1989). Nevertheless, a trial court may only remove an appointed attorney "for gross incompetence, physical incapacity, or contumacious conduct." *People v Coones*, 216 Mich App 721, 728; 550 NW2d 600 (1996). An attorney's failure to appear for a scheduled hearing constitutes contempt committed outside the presence of the court. *In re Contempt of McRipley*, 204 Mich App 298, 300-301; 514 NW2d 219 (1994). Because there was evidence that defense counsel had engaged in contumacious conduct by failing to appear for defendant's scheduled arraignment, defendant has not shown that the trial court's decision to remove him from the case was plain error.

Defendant next argues that the trial court erred by ordering restitution in the amount of \$12,500. Because the amount of restitution was not raised below, this issue is unpreserved. Accordingly, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

When a court imposes a sentence, it shall order "that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate." MCL 769.1a(2); MCL 780.766(2). The phrase "course of conduct" is defined broadly to require the defendant to "compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction." *People v Gahan*, 456 Mich 264, 272; 571 NW2d 503 (1997).

The trial testimony indicated that defendant attempted to steal a spool holding 400 feet of copper cable; a 122-foot section was partially severed from the spool. The cable was valued at \$24.04 a foot, making the value of the partially-severed section of cable approximately \$2,933 and the value of the entire spool of cable \$9,616. Because the restitution amount should be based on the evidence, *People v Guajardo*, 213 Mich App 198, 200; 539 NW2d 570 (1995), and because the evidence showed that the loss was less than \$12,500, the trial court clearly erred in ordering restitution in the amount of \$12,500. Plaintiff concedes this much. However, we disagree with plaintiff that it is appropriate to simply reduce the amount of restitution to \$9,619.

The restitution statutes plainly provide for restitution equal to the value of the property damaged "less the value . . . of that property or any part of the property that is returned." MCL 769.1a(3)(b); MCL 780.766(3)(b). Accordingly, we vacate the restitution provision in the judgment of sentence and remand for a determination of the value of the cable, as scrap or otherwise, which value should be deducted from \$9,616 to determine the proper amount of restitution.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey