STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 31, 2009
v	No. 281622 Macomb Circuit Court
NUE DJINAJ, Defendant-Appellant.	LC No. 2007-002146-FH

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for larceny of property with a value of $1,000 or more but less than $20,000, MCL 750.356(3)(a). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 2 to 20 years' imprisonment. We affirm.

Defendant's conviction arises from the theft of $20 cash, a diamond ring, two gold chains and a crucifix. The victim testified that he paid $950 to purchase the ring in 1980 or 1982, and that the chains and crucifix cost $225. The victim also testified that his insurance company paid $795.00 on his claim for the stolen merchandise, after accounting for a $242.50 deductible.

Defendant first argues that there is insufficient evidence to support his conviction because the prosecution presented insufficient evidence to allow the jury to conclude that the value of the stolen items was more than $1,000. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo, "'view[ing] the evidence in a light most favorable to the prosecution and determin[ing] if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.'" *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007), quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The elements of larceny are: "(1) an actual or constructive taking of goods or property, (2) carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner." *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999). For the type of larceny charged in this case, the statute further requires that the property must be have a value of $1,000 or more but less than $20,000. MCL 750.356(3)(a). Defendant does not dispute that he committed larceny. Rather, he argues that there was

insufficient evidence that the value of the stolen items met the $1,000 threshold required for conviction under MCL 750.356(3)(a).

The larceny statute does not have a guide for determining the value of stolen property. Generally, this Court has relied on the fair market value to determine value in this context, placing the burden on the prosecution to establish the value of stolen items at the time and place of the crime. *People v Pratt*, 254 Mich App 425, 428-429; 656 NW2d 866 (2002). The fair market value is the price the item will bring on the open market between a willing buyer and seller. *Id*. at 429. An owner of property is permitted to testify regarding the value of his property unless that valuation is based on personal or sentimental value. *Id*. Personal value is subjective to the owner, and cannot be objectively defined or proven. *Id*.

Viewing the evidence in the light most favorable to the prosecution, the victim testified, as noted above, that he paid a total of $1,175 for the jewelry that was stolen, which he believed to be the value of these items at the time of their theft. The victim also testified that $20 cash was stolen from his wallet. An owner of property is permitted to testify about the property's value. *Pratt*, *supra* at 429. The victim based his testimony on the purchase price of the items, and there is nothing in the record to suggest that his valuation of the items was based on sentimental or personal value. The victim's testimony about the value of the stolen items, as well as the insurance company payout of his claim of loss for those items, was sufficient to permit the jury to conclude that the value of the stolen items met the $1,000 threshold required for conviction under MCL 750.356(3)(a).

Defendant argues that the insurance company payout included the value of a fur coat the victim previously believed to have been stolen, but which the victim found the day before trial. While the victim did initially report that the fur coat was stolen, he did not testify that the insurance company payout included the value of the fur coat. It was reasonable for the jury to infer that the fur coat was not included in the insurance company payout. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Further, the victim's testimony itself was sufficient to allow the jury to conclude that the value of the stolen items exceeded the $1,000 threshold required for conviction. Thus, there is sufficient evidence to support defendant's conviction.

Defendant next argues that he was denied the effective assistance of counsel by his trial counsel's failure to request an instruction for the necessarily lesser included offense of larceny of property valued at $200 or more but less than $1,000. We disagree. Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* This Court reviews the factual findings for clear error and the constitutional question de novo. *Id.* However, because there was no hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Defendant argues that, had his counsel requested the instruction on the lesser included offense, he would have been entitled to have it read because the jury reasonably could have

concluded that he was guilty of the necessarily included lesser offense. Defendant contends that all or nothing verdicts are disfavored, and that no reasonably sound trial strategy would justify defense counsel's failure to request the instruction, particularly because defendant asked his counsel to request it.[1] Moreover, defendant argues that there is a reasonable probability that the outcome of this case would have been different had his counsel requested the instructions as defendant instructed her to do. We disagree.

Under the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, the guaranteed right to counsel encompasses the right to effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *Dixon*, *supra* at 396.

A trial court, upon request, should instruct the jury regarding any necessarily included lesser offense, regardless whether the offense is a felony or misdemeanor, so long as the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and a rational review of the evidence would support it. *People v Cornell*, 466 Mich 335, 357-358; 646 NW2d 127 (2002), overruled in part on other grounds *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003). A necessarily included lesser offense is an offense in which the elements of the lesser offense are completely subsumed in the greater offense. *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). The elements of larceny of property with a value of $1,000 or more but less than $20,000 are: "(1) an actual or constructive taking of goods or property, (2) carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner," and (6) the property must be valued at $1,000 or more but less than $20,000. *Cain*, *supra* at 120; MCL 750.356(3)(a). The offense of larceny of property with a value of $200 or more but less than $1,000, has the same first five elements, but the statute requires that the value of the goods stolen must be valued at $200 or more, but less than $1,000. MCL 750.356(4)(a). Therefore larceny of

[1] Defendant contends in an affidavit attached to his brief that he asked his counsel to request the instruction, but that she refused. However, defendant's affidavit was not part of the lower court record and will not be considered because this Court generally does not review documents that are not part of the lower court record. MCR 7.210(A)(1); *People v Eccles*, 260 Mich App 379, 384 n 4; 677 NW2d 76 (2004). Also, we note that defendant did not properly avail himself of the motion procedure that would have permitted his affidavit to be reviewed. See MCR 7.211(C)(1)(a)(ii).

property with a value of $200 or more but less than $1,000 is a necessarily included lesser offense of larceny of property with a value of $1,000 or more but less than $20,000 because it is impossible to commit the greater offense without having first committed the lesser offense. The only difference between the offenses is the value of the goods stolen. In this case, the value of the goods was a disputed factual element and a rationale review of the evidence could have supported the lesser included offense because the testimony regarding the value of the goods placed their value so close to the $1,000 threshold.

However, the decision whether to request an instruction on a lesser included offense is a matter of trial strategy. *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996); *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982) ("The decision to proceed with an all or nothing defense is a legitimate trial strategy."). A decision to forgo a charge on a lesser included offense and instead "force the jury into an 'all or nothing' decision" does not constitute ineffective assistance of counsel. *People v Rone (On Second Remand)*, 109 Mich App 702, 718; 311 NW2d 835 (1981).

Defense counsel's decision to not request the lesser included instruction was a valid trial strategy. Counsel attacked the valuation of the items by the victim and pointed out gaps in the victim's testimony during her closing statement. And, counsel did not concede that defendant had committed any crime. Defendant has failed to overcome the presumption that his counsel's decision was not sound trial strategy and to show that her performance was "below an objective standard of reasonableness under prevailing professional norms." *Dixon*, *supra*, at 396. An unsuccessful trial strategy does not make counsel constitutionally ineffective. *Id.*; *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000).

Defendant also claims that the trial court erred in failing to sua sponte instruct the jury on the lesser included offense of larceny of property with a value of $200 or more but less than $1,000. We disagree. Because this issue was not raised with the trial court, it may not be considered on appeal absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A trial court generally does not have a duty to give lesser offense instructions that are not requested. *People v Kuchar*, 225 Mich App 74, 77; 569 NW2d 920 (1997). Because this instruction was not requested, the trial court did not err in failing to give the instruction sua sponte, and defendant was not denied his right to a properly instructed jury. Therefore, there was no plain error in the trial court's decision to not give an instruction for a lesser included offense without a request.

Next, defendant argues that the trial court abused its discretion by foreclosing the jury's opportunity to rehear the victim's direct examination. We disagree. This Court reviews for an abuse of discretion the trial court's decision on a jury request for rehearing testimony. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). However, because this issue was not properly preserved by a challenge before the trial court, this Court reviews for plain error affecting substantial rights. *Carines*, *supra* at 763; *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004).

Defendant argues that the trial court's response to the jury's request for part of the victim's testimony was inaccurate and improper. Defendant contends that when the jury requested the testimony on a Thursday, the trial court responded that the transcript could be available by the following Monday, but the trial court failed to suggest reading the testimony at

that time, and assumed that the jury required the actual transcript. Defendant argues that telling the jury the transcript could be available Monday was tantamount to foreclosing the possibility of it receiving the testimony. We disagree.

MCR 6.414(J) provides:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

On Thursday, July 19, 2007, the jury returned to the courtroom pursuant to a note, stating, "[j]udge, may we request testimony of [the victim] when he was questioned by the prosecuting attorney?" The trial court brought the jury back into the court room and responded by stating:

> The Court should explain to the jury something that might not be evident. The court reporter, who sits to my left is sitting here taking down every word that goes on and has been doing that all morning while you were in the jury room and will be doing this afternoon because there are other matters that we are handling this afternoon. And when she takes down my words, it looks as she's typing [sic]. But, what is doing in reality is putting down my words in code. If you were to read that transcript, so to speak, it would look like hieroglyphics to you. So those – that code must be translated to a transcript. The court reporter is charged with doing that. In recent years, some courts have converted to a realtime transcript, remember some television trials that had that capacity. This court, nor – no one in this circuit has yet to have the luxury of realtime transcripts. So, it's a lay [sic] way of saying this, I cannot give you the transcript now. If we're to – I were to order the transcript at this point in time, Angela may be able to get to this weekend [sic] and get it to you on Monday. But in the meantime what I'm going to have you do is return to the jury room and rely upon your collective memories to see if you can't work this matter out. All right. And I know of your request. I will honor your request if necessary but you also have to understand the limitations we're working on.

Under MCR 6.414(J), the trial court can order the jury to continue to deliberate without providing the requested testimony. Here, the trial court did this, and did not foreclose the possibility of having the testimony reviewed at a later time. While explaining the court's limitations and why a transcript was not available at that time, the trial court indicated that the transcript could be ready by Monday if necessary. Defendant contends that the testimony could have been read, but the trial court's comments clearly stated that a transcript from which to read the testimony was not available. By leaving open the future possibility of having the transcript ready, and stating that the jury's request would be honored if necessary, the trial court did not err.

Lastly, defendant argues defendant argues that this Court should revisit the issue of whether sentence credit should be given for the time spent in jail prior to sentencing even if the offender was arrested and held while on parole. We disagree. This Court reviews de novo questions of statutory interpretation. *People v Green*, 260 Mich App 710, 715; 680 NW2d 477 (2004). However, because this issue was not properly preserved by a challenge before the trial court, this Court reviews for plain error affecting substantial rights. *Carines*, *supra* at 763; *Sands*, *supra* at 160.

In *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006), this Court, addressing this issue and interpreting MCL 768.7a(2)[2] and MCL 769.11b,[3] held:

> "When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense." *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Instead, a parole detainee convicted of a new offense is entitled to have jail credit applied exclusively to the sentence from which parole was granted. *Id.* Credit is not available to a parole detainee for time spent in jail attendant to a new offense because "bond is neither set nor denied when a defendant is held in jail on a parole detainer." *Id.* at 707.

Moreover, the trial court decision that defendant relies upon has been overturned by a published opinion of this Court, *People v Filip*, 278 Mich App 635; 754 NW2d 660 (2008). In *Filip*, this Court further held that:

> MCL 791.238(1) provides that a parolee remains legally in the custody of the Department of Corrections, and that "[p]ending a hearing upon any charge of parole violation, the prisoner shall remain incarcerated." This provision unambiguously declares that parole violators cannot avoid confinement pending resolution of the violation proceedings. Such a period of incarceration thus constitutes part of the original sentence and in that sense is credited against it. Moreover, "denied," as used in MCL 769.11b, implies the exercise of discretion, not the recognition of outright ineligibility. For that reason, MCL 769.11b simply does not apply to parole detainees. [*Id.* at 641-642.]

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[2] MCL 768.7a(2) provides: "If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense."

[3] MCL 769.11b provides: "Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing."

It is undisputed that defendant was in jail on a parole detainer. Therefore, because of his status as a parole detainee, defendant is not entitled to sentence credit for the time he spent in jail on the current offense.

We affirm.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra