STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 11, 2009
v	No. 283889 Monroe Circuit Court
JULIE ANN GOBLE, Defendant-Appellant.	LC No. 07-036385-FH

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving or concealing a stolen motor vehicle, MCL 750.535(7), and sentenced to 23 to 60 months' imprisonment. She appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction results from her possession or concealment of a stolen pickup truck in Monroe County during the early morning hours of September 22, 2007. Earlier, on the evening of September 21, the owner of the truck made contact with defendant outside a restaurant in Washtenaw County. The owner testified that he stopped because defendant appeared to be in distress. The owner agreed to drive defendant to a mobile home park. After arriving at the mobile home park and exiting the truck, the owner was attacked by two men, one of whom hit him with a baseball bat. Defendant then took the keys from the owner, said "come on, let's go" to the two men, and left with them in the truck. After the owner made a police report regarding the theft, state police troopers found the truck at a Travel American Truck Stop in Monroe County. Before verifying that the truck was stolen, one of the troopers saw Jose Vigil walking around it and observed what appeared to be fresh damage to the truck. Defendant was observed shutting the tailgate of the truck. Defendant and Vigil were arrested after entering the truck stop. The keys belonging to the truck were not located.

After the prosecution rested, defendant testified that the truck owner picked her up for prostitution and that she then accompanied him to the mobile home park for drugs. She claimed that a drug dealer known as Johnny drove her and Vigil to the truck stop after the owner loaned his truck to Johnny in exchange for drugs, and that Johnny ran off when the police arrived.

Relying on *People v Wolak*, 110 Mich App 628; 313 NW2d 174 (1981), defendant argues on appeal that the trial court erred in denying her motion for a directed verdict, which was based

on the theory that conviction is not permitted under MCL 750.535(7) if she stole the truck. The proper meaning of a statute constitutes a question of law that we review de novo. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Our review of a trial court's denial of a motion for a directed verdict is also de novo. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). The evidence is viewed in a light most favorable to the prosecution to determine if a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Gillis*, *supra* at 113.

At the time this Court decided *Wolak, supra*, MCL 750.535(1) provided, in pertinent part, that "[a] person who buys, receives, *possesses, conceals*, or aids in the concealment of stolen, embezzled, or converted money, goods, or property knowing the money, goods, or property to be stolen, embezzled, or converted, if the property purchased, received, possessed, or concealed exceeds the value of $100.00, is guilty of a felony . . . " (emphasis added). The prior version of the statute contained similar language, but did not include the terms "possesses" or "conceals."

In *Wolak, supra* at 633, this Court, relying on our Supreme Court's construction of the statute in *People v Kyllonen*, 402 Mich 135; 262 NW2d 2 (1978), held that an actual thief of property may not be convicted under the statute. At the time *Kyllonen* was decided, the statute did not contain the terms "possesses" or "conceals," which were added by 1979 PA 11. Giving strict construction, and upon considering the early history of the statute (which indicated an intent to proscribe conduct by persons who help thieves dispose of stolen property), the *Kyllonen* Court concluded that "[u]nder the Michigan statutory scheme, thieves are to be punished for larceny. Persons who help thieves or others conceal stolen property are to be punished for aiding in the concealment of stolen property." *Kyllonen*, *supra* at 148.

In *People v Hastings*, 422 Mich 267, 271; 373 NW2d 533 (1985), our Supreme Court held that the 1979 amendment "removes the basis on which *People v Kyllonen* concluded that the thief could not be prosecuted under the statute." At the time defendant committed the charged offense in this case, the statute contained the same language that the *Hastings* Court concluded allowed a thief to be prosecuted under the statute. As amended by 2006 PA 374, the statute provides:

> A person shall not buy, receive, possess, conceal, or aid in the concealment of a stolen motor vehicle knowing, or having reason to know or reason to believe, that the motor vehicle is stolen, embezzled, or converted. A person who violates this subsection is guilty of a felony . . . A person who is charged with, convicted of, or punished for a violation of this subsection shall not be convicted of or punished for a violation of another provision of this section arising from the purchase, receipt, possession, concealment, or aiding in the concealment of the same motor vehicle. This subsection does not prohibit the person from being charged, convicted, or punished under any other applicable law. [MCL 750.535(7).]

Based on *Hastings, supra,* the evidence that defendant participated in the theft of the truck did not preclude a conviction under MCL 750.535(7). Therefore, the trial court did not err in denying defendant's motion for a directed verdict on this ground.

Defendant next argues that the trial court erred by denying her request for a jury instruction, based on *Wolak, supra,* that she could not be convicted of the receiving or concealing charge if the jury believed that she was involved in the theft of the truck. We review de novo questions of law involving jury instructions. *Gillis, supra* at 113. Having concluded that a thief may be convicted under MCL 750.535(7), we find no error in the trial court's refusal to give the requested instruction. A trial court's duty is to instruct the jury on the applicable law. MCL 768.29; *People v Dobek,* 274 Mich App 58, 82; 732 NW2d 546 (2007).

Finally, defendant argues that the trial court's denial of her request to have Vigil brought from the county jail to testify as a defense witness deprived her of her constitutional rights to present a defense and to compulsory process. Defendant claims that she preserved this issue by requesting that Vigil be brought from jail to the trial. We disagree.

The record indicates that defense counsel requested that Vigil be brought from jail to testify at trial, over the prosecutor's objection that Vigil was not disclosed as a possible witness, contrary to the trial court's scheduling order and the prosecutor's demand for discovery, but did not argue that the failure to allow Vigil to testify would affect defendant's constitutional rights. Defense counsel asserted that he could not call Vigil as a witness until Vigil pleaded guilty to his involvement in this case. The trial court rejected this argument, finding that Vigil could not be called as a witness only if it was known that he would assert his Fifth Amendment privilege against self-incrimination and, after confirming that Vigil was not listed as a defense witness and hearing the prosecutor's claim of prejudice, denied the request to allow Vigil to testify.

Having failed to present her constitutional claims to the trial court, defendant failed to preserve those issues for appeal. Therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999).

The right to present a defense is not absolute. As explained in *People v Unger,* 278 Mich App 210, 249-250; 749 NW2d 272 (2008):

> Few rights are more fundamental than that of an accused to present evidence in his or her own defense. *Chambers v Mississippi,* 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Holmes v South Carolina,* 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (internal quotation marks and citations omitted). This Court has similarly recognized that "[a] criminal defendant has a state and federal constitutional right to present a defense." *Kurr, supra* at 326 [*People v Kurr,* 253 Mich App 317, 326; 654 NW2d 651 (2002)].
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> However, an accused's right to present evidence in his defense is not absolute. *United States v Scheffer,* 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998); *Crane v Kentucky,* 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). "A defendant's interest in presenting . . . evidence may thus ' "bow to accommodate other legitimate interests in the criminal trial process." ' " *Scheffer, supra* at 308 (citations omitted). States have been traditionally afforded the

> power under the constitution to establish and implement their own criminal trial rules and procedures. *Chambers, supra* at 302-303.
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> Like other states, Michigan has a legitimate interest in promulgating and implementing its own rules concerning the conduct of trials. Our state has "broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' " *Scheffer, supra* at 308, quoting *Rock v Arkansas,* 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37 (1987).

Discovery in a criminal case is governed by MCR 6.201. *People v Phillips,* 468 Mich 583, 586-587; 663 NW2d 463 (2003). Pursuant to MCR 6.201(A)(1), a party, upon request, must provide the other party with "the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial." The record in the case indicates that the prosecutor requested discovery of all witnesses whom defendant may call at trial. In addition, the trial court entered a scheduling order that required the parties to file and exchange witness lists before trial.

Because defendant failed to comply with discovery, the trial court had the discretion to deny defendant's request to permit Vigil to testify at trial. MCR 6.201(J). In deciding whether to exclude evidence because of a discovery violation, "the trial court must balance the interests of the courts, the public, and the parties, in light of all the relevant circumstances, including the reasons for noncompliance." *People v Banks,* 249 Mich App 247, 252; 642 NW2d 351 (2002). In addition, the complaining party must demonstrate prejudice. *People v Greenfield (On Reconsideration),* 271 Mich App 442, 456 n 10; 722 NW2d 254 (2006).

Here, defendant has not demonstrated any abuse of discretion by the trial court in denying the untimely request to permit Vigil to testify. Indeed, defendant does not even address the trial court's discretionary authority to remedy a discovery violation. Furthermore, under MRE 103(a)(2), error may not be predicated on a ruling that excludes evidence unless "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Here, the substance of Vigil's proposed testimony is not apparent from the record and defendant did not make an offer of proof with regard to his testimony.

Considering that a defendant's right to present a defense does not excuse compliance with established rules and procedures, *Unger, supra* at 250, defendant's failure to demonstrate any abuse of discretion in the manner in which the trial court resolved the discovery violation, and defendant's ability to present a defense through her own testimony at trial, we conclude that

reversal is not warranted. Defendant has failed to show a plain constitutional error affecting her substantial rights. *Carines, supra* at 763.[1]

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto

[1] We also note that, absent a valid waiver, the Fifth Amendment privilege against self-incrimination exists until after sentence is imposed and the judgment of conviction becomes final. *United States v Rivas-Macias*, 537 F3d 1271, 1277 (CA 10, 2008), cert den ___ US ___; 129 S Ct 1371; ___ L Ed 2d ___ (February 23, 2009); see also *People v St Onge*, 63 Mich App 16, 18; 233 NW2d 874 (1975) (right still applies when appeal is pending after a conviction on the charge to which incriminating testimony would relate). Defense counsel may not knowingly call a witness who would assert the privilege. *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977). The record indicates that Vigil was not sentenced until after defendant's trial concluded. Thus, although not dispositive of our resolution of the constitutional issue raised by defendant, it appears that the concern expressed by defense counsel at trial when attempting to justify his failure to timely list Vigil as a possible witness still existed, because Vigil had not yet been sentenced. Defense counsel did not indicate, nor does the record disclose, that Vigil was willing to waive his Fifth Amendment privilege against self-incrimination in order to testify.