STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 18, 2009
v	No. 284014 Wayne Circuit Court
DAVID RICHARD DAVIDSON, Defendant-Appellant.	LC No. 07-010715-FH

Before: Fort Hood, P.J., and Cavanagh and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals by right his jury conviction of larceny by conversion of property valued at $1,000 or more but less than $20,000, MCL 750.362. We affirm.

I. Basic Facts

Defendant was convicted of receiving $4,500 to paint the complainant's 1970 Pontiac GTO, and converting both the money and the car to his possession. The complainant and his wife testified that they entered into an agreement with defendant to have their GTO painted and made into a show car in exchange for $4,500. When the car was delivered to defendant, it was operational and in good condition. Defendant promised to complete the paint job within six months. Defendant was a close family friend of the complainant's wife's family, and needed the money up front because he owed back taxes on his home. According to the complainant and his wife, there was no agreement regarding the purchase of parts, because they hired defendant to paint the car. Years passed and defendant still had possession of the complainant's car and the $4,500. After several inquiries, the complainant and his wife went to defendant's garage. Defendant showed them a frame surrounded by parts, and they saw four or five other GTO cars surrounded by parts.

In contrast, defendant testified that the parties orally agreed that he would restore the complainant's severely damaged 1970 GTO car. The complainant was to pay him $9,000 for the labor, with $4,500 paid up front, and to purchase and provide all the necessary parts for the restoration. He further claimed that he advised the complainant that he would not be able to begin to work on the car for at least a year. Defendant indicated that he made several attempts to work on the vehicle and contacted the complainant about parts he needed to purchase, but he never purchased any parts.

II. Prosecutor's Conduct

Defendant argues that he was denied a fair trial by the prosecutor's conduct. We disagree. Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Here, however, defendant objected to only one of the prosecutor's remarks. We review unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). This Court will not reverse if the alleged prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant argues that the prosecutor mischaracterized the evidence during the following exchanges on cross-examination and then relied on the misstated evidence to call him a liar:

> *Q*. So it's the wife said she was going to reimburse you now but you never said that, did you?
>
> *A*. Excuse me?
>
> *Q*. You never said they were going to reimburse you - -
>
> *A*. Yes, I did.
>
> *Q*. *Well, we'll see.*
>
> Now, sir, you also stated earlier that the car was kept inside the entire time; is that correct?
>
> *A*. Except for a week or two when I had it outside to put the heater up, that's right.
>
> *Q*. Didn't you say the car was outside because the place didn't have heat, you couldn't work on it for the first year?
>
> *A*. Yeah. That's right.
>
> *Q*. Now you just said it was outside for two weeks; which one is it, a year or two weeks?
>
> *A*. Could you ask me the question again?
>
> *Q*. You just said that the car was only outside for two weeks.
>
> *A*. For a few weeks, yes.
>
> *Q*. Didn't you originally say the car was outside for a whole year because it was wintertime - -

A. I never said that.

Q. Sir, don't interrupt me while I am asking my question. Okay?

A. Sure.

Q. Now earlier you said that you couldn't work on the car because it was cold and your place didn't have any heat. So, which one is it, two weeks or one year?

A. I don't know how to answer that because you're misleading me into a trap.

Q. No, I didn't. *I caught you in a lie.*

* * *

Q. So you stripped off paint, you primed parts and continue to buy new one?

A. Can I answer that with more than a yes or no?

Q. Just answer the question.

You had parts, you painted them. You had all this pre work done to them - -

Defense counsel: I object. He's never said that parts were painted.

A. Never painted.

Q. You had them primed. You had all the stuff done - -

Defense counsel: Objection. He never said they were primed. Counsel is not paying attention to the testimony.

The prosecutor: I'm paying attention. *Your client is lying*.

The court: The objection's overruled.

A prosecutor may not denigrate a defendant with prejudicial or intemperate comments. *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). Here, however, the prosecutor's brief, isolated remarks were made during a vigorous adversarial proceeding and do not require reversal. Defendant's right to a fair trial was protected when, in its final instructions, the court instructed the jury that the lawyers' statements, arguments, and questions are not evidence, that it was to decide the case based only on the properly admitted evidence, and that it was to follow the court's instructions. In addition, in response to defense counsel asking the court if the prosecutor can "call [defendant] a liar," the court indicated, "No because that would be passing judgment on the credibility of the witness." The court's instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Defendant also argues that the prosecutor impermissibly argued facts not in evidence during closing and rebuttal arguments when he remarked that defendant had taken parts off the complainant's car for his own use, and that they "still don't know where the car is." After the prosecutor's rebuttal, defendant moved for a mistrial based on the prosecutor's remarks, and the court ruled as follows:

> The assistant prosecuting attorney has every right to formulate inferences premised upon the testimony that was elicited during the course of trial to substantiate or support his theory as to how the defendant is guilty beyond a reasonable doubt of the charges that have been leveled against him.
>
> In this particular case the defendant is charged with larceny by conversion and there were many arguments that could have been raised by the prosecuting attorney in regard to inferences stemming from the facts that were elicited during the course of trial.
>
> During the course of this trial there was more than sufficient testimony to indicate that there were more than just two GTOs that were being worked on during this period of time, but also that the defendant had been involved with four or five GTOs. Could have very well have been an exchange of parts.
>
> When the car was given to Mr. Davidson the car was in its entirety, in its whole. According to the defendant's witnesses they believed that the car was inoperable.
>
> The car, as indicated when it was first given to Mr. Davidson in September 2002, had all of the parts connected to it. Now apparently the car is in shambles. These are parts that are lying about everywhere when the contract supposedly that existed between [the complainant] and Mr. Davidson was for the painting.
>
> I understand that defense counsel and the defendant contend that there was supposed to be a total restoration of this vehicle to mint condition. Well, that doesn't necessarily have to be believed by the jury.
>
> Certainly the assistant prosecuting attorney can argue his position. Nothing said during the course of his argument was prejudicial at all.

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Here, as aptly noted by the trial court, there was evidence that the complainant delivered his intact GTO to defendant and, years later, the car had been dismantled and four or five other GTOs were in the garage. The prosecutor was free to argue the evidence and all reasonable inferences arising from it as they related to his theory of the case. See *Bahoda*, *supra* at 282.

For the same reasons, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial).

III. Prosecution's Charging Discretion

Defendant further argues that the prosecution abused its discretion by charging him with "two separate and distinct crimes" in one count. We disagree. Because defendant did not raise this issue below, we review this unpreserved claim for plain error affecting substantial rights. See *Carines*, *supra*. "[T]he decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). A prosecutor abuses his discretion only if "a choice is made for reasons that are 'unconstitutional, illegal, or ultra vires.'" *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996).

Defendant argues that some jurors may have found that he committed the offense by converting only the vehicle, while others may have found that he converted only the $4,500. This argument is misplaced. Defendant was charged with larceny by conversion of property valued at $1,000 or more but less than $20,000, MCL 750.362, and the converted property was listed as "a 1970 GTO and $4,500." It was never argued that defendant converted only the money or the car. Consequently, we reject this claim of error.

Within this issue, defendant argues that he was entitled to a special unanimity instruction and an instruction regarding the time of each alleged offense. However, defense counsel's affirmative approval of the trial court's jury instructions, which included a general unanimity instruction, waived any claim of error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

IV. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to sustain his conviction. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id*. at 514. It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of larceny by conversion are: (1) the property at issue had some value; (2) the property belonged to someone other than the defendant; (3) someone delivered the property to the defendant; (4) the defendant embezzled, converted to his own use, or hid the property with the intent to embezzle or fraudulently use it; and, (5) at the time the property was embezzled, converted, or hidden, the defendant intended to defraud or cheat the owner permanently of the

property. *People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001). Larceny by conversion is a specific intent crime. Minimal circumstantial evidence on the issue of intent is sufficient to prove state of mind. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998).

In this case, evidence was presented that the complainant entered into an agreement with defendant to paint his 1970 GTO and transform it into a show car in exchange for $4,500. Defendant admitted that he accepted delivery of the complainant's GTO and the money. There was testimony that the car was operational and intact, and only needed painting. There was also evidence that defendant subsequently dismantled the car and used the parts for other purposes. Five years after delivery of the vehicle and the money, defendant had not returned either, despite repeated inquires. Viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that defendant committed larceny by conversion.

Although defendant argues that there were alternative ways of viewing the evidence or resolving the case, it was up to the trier of fact to evaluate the evidence, and the prosecutor was not required to disprove every possible theory consistent with innocence. See *Nowack*, *supra* at 400; *Wolfe*, *supra* at 533. The evidence was sufficient to sustain defendant's conviction.

V. Great Weight of the Evidence

Defendant argues that the verdict was against the great weight of the evidence. We disagree. This Court reviews a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

In evaluating whether a verdict is against the great weight of the evidence, the question is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998); *People v Horn*, 279 Mich App 31, 41 n 4; 755 NW2d 212 (2008). A verdict may be vacated only when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted).

For the reasons discussed in section IV, the verdict is not against the great weight of the evidence. The evidence does not clearly preponderate so heavily against the verdict that a miscarriage of justice would result if the verdict was allowed to stand. See *Lemmon*, *supra*.

VI. Failure to Provide Witness List and Amended Information

We reject defendant's final argument that he was prejudiced by the prosecutor's failure to timely provide the amended information and a signed witness list. The prosecutor moved to amend the warrant and the complaint before the preliminary examination. The amendment, which did not significantly change the nature of the charge against defendant, altered the date, the location of the incident, and added the vehicle to the previously listed $4,500. The same attorney represented defendant at both the preliminary examination and at trial, and was aware of the amendment more than four months before trial. In addition, concerning the absence of a signed witness list, the prosecution witnesses consisted of the complainant and his wife. The

trial court noted that a witness list was in the court file that listed the complainant and his wife as the only endorsed witnesses. Even if the witness list was not signed, defendant had actual notice that the complainant and his wife intended to testify, and these witnesses should not have surprised the defense. Under these circumstances, defendant has failed to show that he was prejudiced.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly