

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS ALEXANDER LEONARD,

Defendant-Appellant.

UNPUBLISHED

January 28, 2010

No. 289914

Oakland Circuit Court

LC No. 2008-221274-FH

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of attempted first-degree home invasion, MCL 750.92 and MCL 750.110a(2). Defendant also pleaded guilty to larceny over \$200 but less than \$1,000, MCL 750.356(4)(a). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 52 months to 20 years' imprisonment for the attempted home invasion conviction and 198 days in jail for the larceny conviction and awarded restitution. Because the prosecutor's statements during closing argument were based on reasonable inferences from the evidence and, therefore, did not constitute plain error, we affirm defendant's convictions and sentences. However, because the prosecution did not adequately establish the amount of restitution, we vacate only the portion of the judgment of sentence requiring defendant to pay restitution of \$1,241.92 and remand for further proceedings limited to the restitution amount. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise from an incident on May 10, 2008, when he went to the victim's home and attempted to gain entry. During the incident, defendant repeatedly knocked on the victim's door, asked for money, removed security cameras that were mounted outside the home, and eventually attempted to enter the home through a window. The police arrived before defendant was able to enter the home.

According to the victim, four of her window screens were bent out at the corners. During a pat down search, the police found a "small folding box cutter or pocket knife" or "utility knife" in defendant's pocket. Four security cameras were missing from their mounts. The police recovered three of the cameras from defendant's car and the fourth camera was found in the victim's backyard. The police also recovered a kitchen knife under a bush in the front yard, five feet from where a police officer first observed defendant. According to the victim, the six-inch "chopping knife" did not come from her house. Although the grass had been freshly cut, there

were no grass clippings or dew on the knife. After defendant was arrested, he told a police officer that he “was just trying to get his hundred dollars back and then . . . things got a little crazy and before he knew it he was trying to get in the windows.”

On appeal, defendant argues that he was denied a fair trial when the prosecutor stated during closing argument that, “if he didn’t get that money, the situation could’ve been a lot worse,” and that if defendant “ran into trouble he might have to get that money by force.” Defendant contends that these statements were improper because they “reached beyond the evidence” and were intended to appeal to the emotions of the jury. Because defendant did not object to the prosecutor’s arguments at trial, this issue is not preserved. Accordingly, we review this issue for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant specifically asserts that the prosecutor’s remarks improperly implied that he might have used force against the victim if he had been successful in entering her house. A prosecutor may argue the evidence and draw reasonable inferences from the testimony. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). The challenged remarks were reasonable inferences from the evidence that defendant had forcefully attempted to gain entry for more than an hour and had a box cutter in his pocket, and the evidence that a six-inch knife, which did not belong to the victim, was found in the area where defendant was observed by a police officer. Although defendant argues that the remarks were “designed to get an emotional reaction from the jury,” a prosecutor is “not required to state inferences or conclusions in the blandest terms possible.” *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Defendant has not shown plain error.

Defendant also challenges the amount of restitution ordered in the judgment of sentence. This Court reviews a trial court’s factual findings for clear error, and generally reviews the amount of restitution ordered for an abuse of discretion. *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006).

The presentence investigation report did not include any information from the victim regarding restitution, and indicated that she had not responded to efforts to contact her. At sentencing, however, the prosecutor informed the trial court that the victim had faxed a statement and was requesting restitution “for the cameras and for lost wages in the amount of \$1,241.92. The breakdown is \$540.96 for lost work time and \$700.96 for the damage to the cameras and security system.” Defense counsel challenged the amount the victim claimed for the cameras because the evidence indicated that they had been recovered and there was no indication that they were damaged. Defense counsel suggested, and the prosecutor agreed, that “we leave the amount to be determined later.” In accordance with this suggestion, the trial court announced that restitution would be determined later, stating:

You will pay whatever restitution is determined through the reimbursement division and the probation department. . . . Restitution is to be determined

When the trial court issued the judgment of sentence, however, the judgment ordered defendant to pay restitution of \$1,241.92, the original amount requested by the victim.

Crime victims have a constitutional right to restitution. Const 1963, art 1, § 24. The Crime Victim's Rights Act ("CRVA"), MCL 780.751 *et seq.*, also mandates that a defendant make full restitution. The CRVA affords criminal defendants adequate process by requiring that "[a]ny dispute over the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence." MCL 780.767(4); *People v Gahan*, 456 Mich 264, 275-276; 571 NW2d 503 (1997). In particular, MCL 780.767 provides:

(1) In determining the amount of restitution to order under section 16, the court shall consider the amount of the loss sustained by any victim as a result of the offense.

(2) The court may order the probation officer to obtain information pertaining to the amounts of loss described in subsection (1). The probation officer shall include the information collected in the presentence investigation report or in a separate report, as the court directs.

(3) The court shall disclose to both the defendant and the prosecuting attorney all portions of the presentence or other report pertaining to the matters described in subsection (1).

(4) Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney. [MCL 780.767.]

Where the crime involves loss or damage to property, MCL 780.766(3) provides:

(3) If a crime results in damage to or loss or destruction of property of a victim of the crime or results in the seizure or impoundment of property of a victim of the crime, the order of restitution shall require that the defendant do 1 or more of the following, as applicable:

(a) Return the property to the owner of the property or to a person designated by the owner.

(b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (i) or (ii), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:

(i) The fair market value of the property on the date of the damage, loss, or destruction. However, if the fair market value of the property cannot be determined or is impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.

(ii) The fair market value of the property on the date of sentencing. However, if the fair market value of the property cannot be determined or is

impractical to ascertain, then the replacement value of the property shall be utilized in lieu of the fair market value.

(c) Pay the costs of the seizure or impoundment, or both. [MCL 780.766(3).]

In this case, defendant challenged the amount of restitution at sentencing. The prosecutor did not establish the appropriate amount of restitution by a preponderance of the evidence, but instead agreed that the amount could be determined later. Despite this agreement, the judgment of sentence required defendant to pay restitution in the unsubstantiated amount that was initially requested at sentencing, but never resolved. Under the circumstances, we vacate the restitution portion of the judgment of sentence and remand for reconsideration of this issue in accordance with the statutory standards. On remand, the prosecutor shall be afforded an opportunity to present evidence to establish the appropriate amount of restitution by a preponderance of the evidence, as provided by MCL 780.767(4).

We affirm defendant's convictions and sentences, but vacate the restitution portion of the judgment of sentence and remand the case only for reconsideration of that issue. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray