STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY LEE SCHERER, JR.,

Defendant-Appellant.

UNPUBLISHED
February 23, 2010

No. 290304
Kalkaska Circuit Court
LC No. 08-003005-FH

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

A jury convicted defendant of larceny in a building, MCL 750.360, and the trial court sentenced defendant to 9 months in jail. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Vanessa Freeman testified that a $300 Western Union money order disappeared from her home. Defendant had been at her home on the day the money order disappeared. Five days later, defendant cashed the money order. Other persons had been in Freeman's home on the day in question. Mary Allen testified that she found the money order in a parking lot and then gave it to defendant.

Defendant first argues that the evidence was insufficient to establish that he took the money order. 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, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id*. at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). [*People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007) (footnote omitted)].

"[P]ossession of recently stolen property permits an inference that the possessor committed the theft." *People v Mosley*, 107 Mich App 393, 397; 309 NW2d 569 (1981); see also *People v Miller*, 141 Mich App 637, 641 367 N.W.2d 892 (1985). As this Court noted in *People v Hayden*, 132 Mich App 273, 283 n 5; 348 NW2d 672 (1984), "[n]o Michigan decisions have considered what lapse of time between the theft, and defendant's possession of, a firearm renders the inference that the possessor was the thief too attenuated to allow the inference to be drawn." However, the *Hayden* Court cites to Anno: *What Constitutes "Recently" Stolen Property Within Rule Inferring Guilty From Unexplained Possession of Such Property*, 89 ALR3d 1202, § 13, pp 1228-1229. The annotation notes that "'recent' is a relative term which depends upon all the facts and circumstances of each case and must be left for the determination of the trier of fact." However, it cites cases involving checks and money orders where intervals of four days to two and one-half months have been held to be sufficiently "recent" to give rise to the inference. See *Considine v United States* 112 F 342 (CA 6, 1901) (inference arose where the defendant had possession of unsigned money orders two and one-half months following theft); *United States v Winbush*, 428 F2d 357 (CA 6, 1970) (period was not too remote for inference where one month lapsed between theft and possession); *Cloud v United States*, 361 F2d 627 (CA 8, 1966) (inference was available where there were two months between the theft of money order and its possession); *People v Hanson*, 97 Ill App 2d 338, 240 NE2d 226 (1968) (inference arose with a nine-to-ten-day lapse between a burglary and the possession of checks stolen during the burglary; *State v Wilson*, 198 Kan 532, 426 P2d 288 (1967) (possession of checks four days after theft was well within the requisite time frame). Accordingly, the interval of five days in the present case was sufficiently "recent" to give rise to an inference that defendant committed the theft.

Possession was not the only evidence giving rise to the inference that defendant committed the theft. The evidence showed that defendant was present at Freeman's home on the day that the theft occurred, and that defendant exercised control over the property stolen by cashing the money order. This evidence was sufficient to establish that defendant took the money order. Although other people in Freeman's home might have had the opportunity to take the money order, the prosecutor was not required to negate defendant's theory. It had only to present its own theory beyond a reasonable doubt in the face of defendant's contradictory evidence. *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002).

Defendant next argues that the prosecutor improperly elicited testimony on cross-examination establishing that defendant did not come forward to talk to the officer investigating this crime. On direct examination, defense counsel established that the officer did not talk to defendant during the investigation. The officer indicated that he could not find defendant. Defendant maintains that his silence was used in violation of the Fifth Amendment, that there was prosecutorial misconduct, and that his counsel provided ineffective assistance for failing to object to the question. We disagree.

An unpreserved constitutional claim is reviewed for plain error that affected a substantial right, i.e., the error affected the outcome of the lower court proceedings. Reversal is warranted only if the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Similarly, unpreserved claims of prosecutorial misconduct are reviewed for plain error. However, an error will not require reversal if a timely instruction could

have cured the prejudicial effect of the prosecutor's remarks. *Id*. at 764-765. In reviewing a claim of ineffective assistance of counsel, this Court must determine whether counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, whether there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and whether the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

This case is analogous to *People v Crump*, 216 Mich App 210; 549 NW2d 36 (1996). There, the defendant's counsel inquired of an officer whether the officer talked to the defendant after the defendant was arrested to inquire whether the defendant had committed a rape. The officer indicated that he had not questioned the defendant on the evening of his arrest. On cross-examination, the prosecutor was allowed to establish that the officer met with the defendant on the following day and that, although the defendant was given an opportunity to make a statement, he did not do so. The *Crump* Court held:

> In [*People v Allen*, 201 Mich App 98; 505 NW2d 869 (1993)], the defendant testified that the trial was his first opportunity to explain his side of the story. Pursuant to the prosecutor's request, the trial court allowed a police officer to testify that the defendant declined to make a statement following his arrest. This Court found the testimony properly admitted, not to contradict the defendant's assertion of innocence, but *to discredit the defendant's testimony that he was not provided an opportunity to tell his side of the story*. *Id*. at 103.
>
> Similarly, here, defendant's counsel, by his questioning of Officer Sirard, implied that the police officers arrested defendant without affording him an opportunity to present his side of the story. Having done this, we conclude that the door was opened to the prosecutor under *Allen, supra*, to allow the jury to know of defendant's postarrest silence in order *to explain that the opportunity for defendant to give his side of the story was offered, but refused.*
>
> Although *Allen, supra*, involved a defendant who testified and defendant here did not, we do not find this distinction controlling because the justification behind this Court's opinion in *Allen* applies. The evidence in this case was not adduced to contradict defendant's assertion of innocence, but *to counter the inference that he was treated unfairly by the police*. *Id*. [*Crump*, 216 Mich App at 214-215 (emphasis added).]

Here, defense counsel's questioning gave rise to an inference that defendant had been treated unfairly since he was not interviewed during the investigation and suggested that he was not given an opportunity to explain his side of the case. The prosecutor's questioning established that defendant was not precluded from offering his version of events. The prosecutor never used defendant's silence to argue that it somehow implicated his guilt. Instead, it established that, although he was not contacted, there was nothing that precluded him from coming forward. Based on *Crump*, and to a lesser degree on *Allen*, we conclude that the questioning was

permissible, and that there was no prosecutorial misconduct.[1] Coextensively, given that an objection would presumably not have resulted in exclusion of this evidence, there was no ineffective assistance of counsel.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Alton T. Davis

[1] Although the *Crump* Court warned of using post arrest silence at trial, we do not find this significant since the prosecutor did not use the silence to suggest that it implicated defendant.