

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIMBERLY TARSHAY GREEN-WHITE,

Defendant-Appellant.

UNPUBLISHED

April 20, 2010

No. 288174

Wayne Circuit Court

LC No. 08-009209-FH

Before: M. J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant of malicious destruction of personal property (MDOP) valued between \$200 and \$1,000, MCL 750.377a(1)(c)(i), and acquitted defendant of felonious assault, MCL 750.82. The trial court sentenced defendant to three months' probation for the MDOP conviction. On appeal, defendant argues that there was insufficient evidence to support the trial court's finding as to the value of the damage that she caused. We agree that there was insufficient evidence to support the trial court's finding that the amount of damage equaled or exceeded \$200. However, because the trial court clearly found that defendant maliciously damaged the property at issue and there was clear evidence that the damaged property had some value, we vacate defendant's conviction and remand for entry of a judgment of conviction on the necessarily included lesser offense of malicious destruction of personal property valued at less than \$200. We have decided this appeal without oral argument under MCR 7.214(E).

Defendant argues that the evidence was insufficient to support her conviction because the prosecutor failed to present legally admissible evidence to prove that the value of the damaged property equaled or exceeded \$200. Because defendant's claim is unpreserved, we will review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Due process requires that the prosecutor prove each element of the crime charged beyond a reasonable doubt. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). As charged, the elements of MDOP are: (1) that the property belonged to another person, (2) that the defendant destroyed or damaged the property, (3) that the defendant knew what she did was wrong and acted with the intent to damage or destroy the property, and (4) the amount of the damage was at least \$200, but less than \$1,000. MCL 750.377a(1)(c)(i). The amount of damage caused may be proved by presenting evidence concerning the difference in the fair market value

of the property before and after the damage or by presenting evidence of the reasonable cost to repair or restore the property. *People v Hamblin*, 224 Mich App 87, 96; 568 NW2d 339 (1997).

In this case, there was testimony that defendant cracked the windshield of a Jaguar. The owner testified that he obtained a repair estimate of \$900. However, there was no evidence that the owner was familiar with windshield repair or that he actually paid for the repair. Rather, his testimony regarding the cost of repair was based on hearsay. MRE 801(c). In a bench trial, the trial court is presumed to possess an understanding of the law that enables it to ignore errors and decide the case on properly admitted evidence. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Hearsay is not admissible absent an exclusion or exception provided by the rules of evidence, MRE 802, and there is no apparent exclusion or exception that would apply in this case. Nevertheless, it is clear from the court's decision that it relied on the hearsay to find that the damage exceeded \$200 and there was no other evidence from which such a finding could be made. The trial court plainly erred in relying on this hearsay and the error affected defendant's substantial rights.

Where an appellate court reverses a conviction for a greater offense on grounds that do not affect a necessarily included lesser offense, the court may remand for entry of judgment of the necessarily included lesser offense. See *People v Bearss*, 463 Mich 623, 631; 625 NW2d 10 (2001), citing *Rutledge v United States*, 517 US 292, 306; 116 S Ct 1241; 134 L Ed 2d 419 (1996). The evidence was sufficient to prove that defendant maliciously damaged the windshield. Although the evidence was insufficient to prove that the value of the windshield was at least \$200, it clearly had some value because the owner testified that it was in good condition before defendant damaged it. The admissible evidence was thus sufficient to prove that defendant committed the necessarily included lesser offense of MDOP under \$200. Further, the sentence imposed on the charged offense could have been lawfully imposed on the lesser offense. MCL 771.2(1). Therefore, we vacate defendant's conviction of MDOP causing damage equal to or exceeding \$200 but less than \$1,000, MCL 750.377a(1)(c)(i), and remand for entry of a judgment of conviction for the lesser offense of MDOP under \$200, MCL 750.377a(1)(d). Under the unique facts of this case, we do not believe it is necessary to order the trial court to resentence defendant.

Vacated and remanded for entry of judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder