STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2010
v	No. 294196 Clinton Circuit Court
CHRISTOPHER JAMES MAYER, Defendant-Appellant.	LC No. 08-008396-FH

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of receiving and concealing stolen property, MCL 750.535(1), (3)(a). Defendant was sentenced to serve 103 days in jail and placed on one-year probation, with credit for 103 days served. We affirm.

This case involves the theft of a safe from a grocery store. An eyewitness testified that around 1:00 a.m. on the day the safe was stolen, she saw two men moving the safe through a park and down a sidewalk. She followed the two in her vehicle and identified defendant on the scene after he had been apprehended by authorities. At trial, she steadfastly reiterated her identification of defendant as one of the two men she had seen.

Defendant first argues that the court erred in denying his motion for a directed verdict of acquittal. We disagree.

> When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. [*People v Aldrich,* 246 Mich App 101, 122; 631 NW2d 67 (2001).]

We respect the fact finder's role in weighing the evidence or making credibility determinations, and will not second-guess these matters on appeal. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992).

To establish the offense of receiving or concealing stolen property worth at least $1,000 but less than $20,000, the prosecutor must prove: (1) that the property was stolen; (2) that the

property had a value of at least $1,000 but less than $20,000; (3) the receiving, possession, or concealment of such property by the defendant; (4) the identity of the property as that being previously stolen; and (5) that the defendant had guilty actual or constructive knowledge that the property was stolen. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996). Defendant's argument is focused on his identification as one of the two men who took the safe, and on his knowledge that the property was stolen.

Defendant argues that the eyewitness's identification was dubious because she could not accurately identify the length of his hair and whether he had facial hair, the color of his eyes, his height, and the color of his jacket. Clearly, the witness's description of the man identified later as defendant was not flawless. Nonetheless, she testified that she was 100 percent certain that defendant was one of the two men she saw moving the stolen safe in the middle of the night. She testified that the two men were both wearing dark clothing and that the taller of the two individuals was wearing a camouflage jacket. She did not completely identify the jacket colors, nor did she notice a tear on the right sleeve, various stains, or that one of the pockets was coming loose. However, the jacket was a camouflage jacket and it was being worn by defendant. The fact that she could not completely identify its colors and condition is not surprising given the time of night and the lighting. The lighting also impacted her ability to see defendant's face, as did the hood of his jacket. Further, defendant may have been somewhat taller than her estimate, but there is no assertion that he was not the taller of the two suspects. Given the jury's role in assessing witness testimony and credibility, this evidence was sufficient to establish defendant as one of the two seen moving the safe.

Defendant also argues that a rationale trier of fact could not have found that he had knowledge the safe was stolen. The evidence demonstrated that the recovered safe was stolen from the store. Defendant and another man were in possession of the stolen safe and moving it through town in the middle of the night, sometime after the store had closed. Further, when approached by the eyewitness, defendant fled. Guilty knowledge can reasonably be concluded from these circumstances.

We also reject defendant's argument that the court erred in not instructing the jury according to CJI2d 5.12, the missing witness instruction,[1] because the prosecution did not exercise due diligence in providing assistance to locate and serve process upon a witness who told authorities on the night the safe was stolen that he had seen two individuals on the roof of the grocery store in issue. See MCL 767.40a. The record shows that defendant was aware of the witness and that the prosecution never endorsed the witness. Further, when requested by defendant, it is clear that the prosecution and police took great effort to locate and try and produce the witness (who did not want to testify).

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[1] "*[State name of witness]* is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case."

Under these circumstances, the prosecution fulfilled its statutory duty. Therefore, the lower court's decision to deny defendant's motion for an adverse inference instruction did not deny defendant a fair trial.[2]

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad

[2] Additionally, given that the witness told police he could not identify the two persons he saw on the store roof, no prejudice has been shown.