

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 13, 2012

V
BRETT ANDREW CZUBAJ,
Defendant-Appellant.

No. 304419
Missaukee Circuit Court
LC No. 2010-002323-FH

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of larceny of property valued at over \$1,000 but less than \$20,000, MCL 750.356(3)(a). He was sentenced, as a second habitual offender, MCL 769.10, to serve 45 days in jail and 24 months of probation. Because defendant was not denied the effective assistance of counsel, we affirm.

In November 2009, Consumers Energy set up a staging site in Missaukee County for the purpose of repairing and replacing electrical line over a two-mile stretch to the east of the site. As wire was replaced, the old wire to be turned in for scrap was spooled and stored in an unlocked dumpster on the site. On November 6, 2009, a large spool of new copper wire valued at over \$1,100.00 was delivered to the staging site and was stored out of sight, approximately 40 feet away from the dumpster. A GPS unit valued at \$500.00 was located inside the reel.

At 6:22 p.m. on Sunday, November 8, 2009, the GPS device alerted Consumers that the reel of copper had been moved and was headed south. Using the coordinates relayed from the GPS unit, Consumers was able to track the reel and a Michigan State Police Trooper was dispatched to the location (a gas station) where the reel had stopped. Upon arrival, the trooper saw defendant in a truck with “reels of metal” and a set of bolt cutters in the back. Defendant was arrested and read his *Miranda*¹ rights. The trooper testified that defendant admitted taking the reel from next to a blue dumpster. Consumers employees testified that other items recovered had been located on the back of one of their trucks at the work site on Friday and had the following values:

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

300 pounds of aluminum ASCR number two which has a deliver price of 2[.]52 per pound, a value of \$756 delivered; 2.52 times 300 or \$174 scrap; 54 by 300 which is the Klunkston's price, which is a scrap yard; 15 pounds of aluminum copper pieces which are ties; and partial reel of copper 25 pound reel, value \$7.12 per pound, \$106.80 . . .

Defendant testified that he had been searching for scrap metal and noticed the dumpster. Believing that the contents of the dumpster were abandoned, defendant took the metal inside. According to defendant, he found everything that was in the back of his truck in the dumpster. He denied telling the police that the reel of copper had been next to, rather than inside, the dumpster.

On appeal, defendant argues that he was denied the effective assistance of trial counsel. Defendant did not preserve the issue of ineffective assistance of counsel because he failed to move for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Thus, review is limited to errors found in the trial record. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1991).

In order to establish ineffective assistance of counsel, a defendant must meet the following standard:

First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable. [*People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 281 (2011).]

Defendant first argues that trial counsel was ineffective in failing to object to the admission of the value of the GPS device. Defendant contends that because the GPS was hidden in the copper coil, he was unaware of it and thus unable to have had the intent to steal it. According to defendant, because no felonious intent existed with respect to the taking of the GPS, it follows that an element of larceny was not met and any attempt to admit evidence about the value of the GPS should have been objected to.

The basic elements of larceny are:

“(1) an actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the subject matter must be the goods or personal property of another, (5) the taking must be without the consent and against the will of the owner.” [*People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999), quoting *People v Anderson*, 7 Mich App 513, 516, 152 NW2d 40 (1967).]

Here, assuming defendant did not intend to steal the GPS, he does not argue that he did not intend to steal the rest of the items. Each element of the charged crime must be proven, and the failure to prove one element with respect to one item has no bearing on the need to prove all remaining elements beyond a reasonable doubt. An element of the charged crime is the value of

the things actually stolen. The GPS having actually been stolen, its value was relevant as defined in MRE 401 (“evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”) and thus generally admissible under MRE 402. Counsel was thus not ineffective for failing to raise a futile objection to the admission of evidence regarding the value of the GPS. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

More importantly, the value of the reel of copper wire stolen was, by itself, valued at over \$1,100.00. Because defendant was convicted of larceny over \$1,000 but less than \$20,000 the addition or deletion of evidence concerning the value of the GPS unit has no bearing on his ultimate conviction. Even if a jury were to find that defendant had no intent to steal the GPS unit, to convict defendant as it did, it would necessarily have had to have found that defendant intended to steal the reel of copper wire, as explained below.

Defendant also argues that trial counsel was ineffective because he failed to argue that defendant lacked the requisite intent to steal the GPS device. At trial, however, defendant’s theory of defense was that because all of the things that defendant took appeared to have been abandoned, he reasonably believed that he was claiming abandoned property and he therefore lacked the felonious intent element of the charged crime. Thus, when defendant argued that he did not intend to steal *anything*, he necessarily made the argument that he lacked the intent to steal the GPS.

Finally, defendant argues that counsel was ineffective in failing to request a special verdict or unanimity instruction regarding which items the jury found that defendant stole. This argument is without merit. While defendant is correct that he is entitled “to have a properly instructed jury pass on the evidence,” *People v Liggett*, 378 Mich 706, 714; 148 NW2d 784 (1967), overruled in part on other grounds by *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999), any lack of a specific instruction did not affect the outcome of the trial here.

The crime that defendant was convicted of has a statutory minimum of \$1,000. Testimony was presented showing that one of the items stolen, the used aluminum wire was worth \$174, the used copper was worth \$106.80, the new copper reel was worth \$1,117, and the GPS device was worth \$500. If the jury had found that everything except the new copper reel had been stolen, only \$780.80 in value would have been stolen. It necessarily follows that for the jury to find that defendant stole goods with a value in excess of \$1,000, they had to have found that the new reel of copper was stolen. Because the reel itself was testified to be worth more than the minimum value necessary for the crime, it did not matter whether the jury found that defendant had the intent to steal the GPS.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot