

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 27, 2012

v

TERRY WAYNE GROVER, II,

Defendant-Appellant.

No. 306734
Otsego Circuit Court
LC No. 11-004341-FH

Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of larceny in a building, MCL 750.360, and receiving or concealing stolen property valued less than \$200, MCL 750.535(5). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 13 months to 15 years for larceny and 93 days for receiving or concealing stolen property. We affirm.

Defendant was working his first and only day at a garage operated by the Otsego County Bus System when his supervisor observed him outside. The supervisor discovered that a battery and a bucket of scrap metal had been hidden by a garbage can. The supervisor told defendant to return the battery and scrap metal to the garage or he would call the police. Defendant apologized and took the materials back inside, and the supervisor sent defendant home.

Defendant's supervisor later noticed that the battery was still in the garage, but that the bucket of scrap had gone missing. The next day defendant was apprehended after turning in a number of materials to a salvage company. The garage's head mechanic identified various items as coming from the bus garage.

First, defendant argues that the trial court abused its discretion by denying defense counsel's motion to excuse a prospective juror for cause. We disagree. We review for an abuse of discretion a trial court's decision to excuse a juror for cause. *People v Eccles*, 260 Mich App 379, 382-383; 677 NW2d 76 (2004).

A prospective juror may be challenged for cause if the prospective juror "is the guardian, conservator, ward, landlord, tenant, employer, employee, partner, or client of a party or attorney[.]" MCR 2.511(D)(9). Here, defense counsel sought to challenge for cause a prospective juror who was a retired Otsego County police officer on the grounds that the prospective juror was an employee of the plaintiff. The trial court denied the challenge for

cause, and the prospective juror was later excused via a peremptory challenge by defense counsel.

The language of MCR 2.511(D)(9) is couched in the present tense. The prospective juror was no longer employed by the State Police and defendant presented nothing that would cast reasonable doubt upon the prospective juror's assertion that he could be impartial. The trial court did not abuse its discretion by denying defense counsel's challenge of that prospective juror for cause. Moreover, because the prospective juror was later excused via peremptory challenge and because defendant did not exhaust his available peremptory challenges, defendant was not prejudiced by the trial court's decision.

Next, defendant argues that there was insufficient evidence presented at trial to support his convictions. We disagree. Due process requires that the prosecution introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). We review de novo the evidence in the light most favorable to the prosecution, to determine if a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). We will not interfere with the finder of fact's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992).

The elements of larceny in a building are: (1) actual or constructive taking; (2) asportation; (3) with felonious intent; (4) of another's property; (5) without consent; and (6) in a building. *People v Cavanaugh*, 127 Mich App 632, 636; 339 NW2d 509 (1983). The evidence presented at trial established that the bucket of scrap metal belonged to the garage, was located inside the garage, and that defendant took the bucket from the garage without consent. The evidence showed that defendant was explicitly told not to take the bucket of scrap but did so nevertheless. Defendant generally denied the testimonial evidence against him, but the jury was entitled to decide which testimony to accept as credible. *Wolfe*, 440 Mich at 514. Sufficient evidence supported defendant's conviction of larceny in a building.

The elements of receiving or concealing stolen property valued less than \$200 are: (1) the property was stolen; (2) the value of the property met the statutory requirement; (3) defendant received, possessed, or concealed property with the knowledge that the property was stolen; (4) the identity of the property as being that previously stolen; and (5) the guilty actual or constructive knowledge of the defendant that the property received or concealed was stolen. *People v Pratt*, 254 Mich App 425, 427; 656 NW2d 866 (2002).

Here, the evidence established that some of the material that defendant turned in for scrap was stolen from the garage and that defendant stole the property. Defendant asserts that the prosecution failed to establish the exact value of the stolen goods, but evidence showed that the stolen goods had at least some value as scrap. That showing was sufficient to establish that the property had a value of less than \$200. The evidence was sufficient to support defendant's convictions of receiving or concealing stolen property valued less than \$200.

Next, defendant argues that the trial court erred by failing to consider mitigating factors when sentencing him for his conviction of larceny in a building. We disagree. "If a minimum

sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.” MCL 769.34(10). This limitation on this Court’s review is not applicable to claims of constitutional error. *People v Powell*, 278 Mich App 318, 323; 760 NW2d 607 (2008).

Here, defendant does not argue that his sentence for larceny in a building is outside of the appropriate sentencing guidelines range or that the sentence was based on improper scoring or inaccurate information. Instead, defendant merely asserts that the trial court failed to give sufficient weight to various mitigating factors. This assertion, however, is an insufficient basis for challenging a sentence under MCL 769.34(10). Defendant’s sentence was within the guidelines and was not based on improper scoring or inaccurate information.¹ Defendant’s sentence is not unconstitutional. *Powell*, 278 Mich App at 324.

Next, defendant argues that the trial court erred when it sentenced him to 93 days for receiving or concealing stolen property valued less than \$200 because the sentence was not mentioned during the sentencing hearing. We disagree.

The record not only reflects that the sentence was discussed at sentencing, but that defense counsel acquiesced to the sentence. Defendant’s argument has been waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Finally, defendant argues that the trial court erred by ordering him to reimburse attorney’s fees without first conducting an inquiry into his ability to pay. We disagree.

A trial court is not required to conduct an ability-to-pay assessment before imposing an order for reimbursement of attorney’s fees. *People v Jackson*, 483 Mich 271, 281; 769 NW2d 630 (2009). Such an assessment is only required prior to the enforcement of such an order. *Id.* at 290-291. Thus, the trial court did not err by failing to conduct an assessment of defendant’s ability to pay.

Affirmed.

/s/ Stephen L. Borrello
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens

¹ Defendant also argues that given his mitigating factors, his sentence for larceny in a building is cruel and unusual punishment. Sentences within the guidelines, however, are presumed to be proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), and defendant has not overcome this presumption. *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000).