STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERTO MARTINEZ VILLA,

Defendant-Appellant.

UNPUBLISHED
November 16, 2001

No. 220751
Eaton Circuit Court
LC No. 99-020014-FC

Before: O'Connell, P.J., and White and Smolenski, JJ.

PER CURIAM

Following a jury trial, defendant was convicted as charged of safe breaking, MCL 750.531, possession of burglar tools, MCL 750.116, and receiving or concealing stolen property over $100, MCL 750.535. He was sentenced as a fourth habitual offender to three concurrent terms of twelve to twenty years' imprisonment. He appeals as of right. We affirm.

I

Defendant claims that the evidence was insufficient to convict him of the charged offenses. We disagree. In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecutor 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 Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and the reasonable inferences that arise from the 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).

First, regarding receiving or concealing stolen property, the evidence indicated that the vehicle used in the offense, a mini-van with a fair market value over $3,500, was stolen from a used-car lot. Defendant admitted in his statement to the police that he knew the mini-van was stolen and that codefendant Hart had used a screwdriver to start the van, because the ignition was missing. There was also evidence that the license plate on the stolen vehicle was registered to defendant, which would support a finding that defendant participated in possessing or concealing the vehicle. Thus, the evidence was sufficient to enable the jury to find that defendant was guilty of receiving or concealing stolen property over $100. *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993).

Second, the police found, inside the stolen mini-van, a flat-bladed screwdriver that was identified as having made the mark on the ATM machine. A flat-blade screwdriver can be a tool or implement adapted and designed for breaking and entering. See *People v Olson*, 65 Mich App 224, 229; 237 NW2d 260 (1975). Additionally, a witness testified that he saw one man bent over the ATM machine, while another man shined a flashlight, thereby indicating that defendant and codefendant Hart were coparticipants in the offense. The jury could reasonably conclude that defendant shared constructive possession of the screwdriver, which was found between his passenger seat and the driver's seat in the stolen mini-van. See *People v Burgenmeyer*, 461 Mich 431, 436-440; 606 NW2d 645 (2000).

Third, defendant argues that the evidence was insufficient to convict him of safe breaking because only the structure housing the ATM machine was damaged, not the ATM machine itself.

MCL 750.531 provides, in pertinent part:

> Any person who, with intent to commit the crime of larceny, or any felony, . . . *shall attempt to break . . . or otherwise injure or destroy any safe, vault or other depository of money . . . in any building or place, shall, whether he succeeds or fails in the perpetration of such larceny or felony*, be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years. [Emphasis provided.]

In *People v DeVriese*, 77 Mich App 737, 738; 258 NW2d 93 (1977), this Court stated:

> In enacting MCL 750.531; MSA 28.799, the Legislature sought to protect structures intentionally constructed to protect valuables. *People v Ferguson*, 60 Mich App 302; 230 NW2d 406 (1975). In our opinion this includes those constructed by a manufacturer for sale or an individual for his own use so long as the structure is one which is substantially impenetrable. *People v Collins*, 273 Cal App 2d 1; 77 Cal Rptr 741 (1969). The issue of whether a depository is substantially impenetrable so as to fall within the terms of the statute is a question of fact. *People v Collins, supra*.

The evidence at trial indicated that the "kiosk," which is the structure housing the ATM machine, was part of the ATM's security structure for money contained in the vault of the ATM. There was sufficient evidence that defendant and codefendant Hart sought to break into the ATM machine and steal money from the vault by first breaking through the outer security structure. Specifically, the testimony indicated that "the rear door of the ATM machine had been pried open causing damage to the locking mechanisms." Thus, there was sufficient evidence to sustain defendant's conviction for safe breaking under MCL 750.531.

II

Next, defendant argues that he was denied a fair trial because of prosecutorial misconduct. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in

context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

We find no merit to defendant's claim that the prosecutor improperly diminished the people's burden of proof and improperly shifted the burden of proof to defendant. Viewing the challenged remarks in context, it is apparent that the prosecutor was responding to defense counsel's statements. We find no indication that the remarks improperly shifted the burden of proof. Further, any prejudice that may have resulted was sufficiently cured by the trial court's instructions that defendant was presumed innocent, that the prosecution had the burden of proving defendant guilty beyond a reasonable doubt, and that what the lawyers said was not evidence.

Defendant also alleges that the prosecutor improperly denigrated defense counsel during rebuttal closing argument. Because defendant did not object to the challenged remarks, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 761-764, 774. Because we find nothing in the prosecutor's remarks that could plainly be construed as denigration of defense counsel, this issue does not warrant appellate relief.

III

Next, defendant claims that the trial court erred in failing to give CJI2d 9.4 regarding abandonment. We disagree.

The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). "[W]hen a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge. . . . A trial court is required to give a requested instruction, except where the theory is not supported by evidence." *People v Lemons*, 454 Mich 234, 245 n 14; 562 NW2d 447 (1997).

Here, the evidence indicated that defendant and codefendant Hart were thwarted in their attempt to break into the ATM machine due to the arrival of the police, resulting in a subsequent police chase. Such evidence does not support an abandonment defense. *People v Cross*, 187 Mich App 204, 206-207; 466 NW2d 368 (1991); *People v Stapf*, 155 Mich App 491, 495-496; 400 NW2d 656 (1986). Accordingly, the trial court properly refused to instruct the jury on abandonment.

IV

Finally, defendant argues that his double jeopardy rights were violated where he had previously pleaded guilty in the 54-A District Court in Ingham County to prowling and interfering with a police animal, contrary to Lansing city ordinances 660.01a and 602.08. We disagree. Because neither the district court in Ingham County, nor the Eaton Circuit Court had jurisdiction over all of the offenses, and because the criminal acts in question consist of different

types of conduct subject to separate prohibitions involving laws intended to prevent different evils, the trial court did not err in denying defendant's motion to dismiss. *People v Stiff*, 190 Mich App 111; 475 NW2d 59 (1991).

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Michael R. Smolenski