STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2009
v	No. 279516 Wayne Circuit Court
BARBARA ANN WESLEY, Defendant-Appellant.	LC No. 06-013107-01

Before: Whitbeck, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant Barbara Ann Wesley was convicted of one count of malicious destruction of personal property valued at $1,000 or more but less than $20,000, MCL 750.377a(1)(b)(*i*), one count of felonious assault, MCL 750.82, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. She was sentenced to concurrent terms of 18 months' probation for the malicious destruction and felonious assault convictions and a mandatory term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of assaulting Joanna Underwood and shooting her vehicle with a gun on October 30, 2006. The victim had driven to her aunt's residence, where her father also lived, so that her father could repair her vehicle. Several hours later, while the victim and her father were speaking in front of the house, defendant approached them from across the street. Defendant yelled profanities at the victim's father and demanded that he fix her car immediately. Defendant and the victim began to fight. Defendant left after the victim's father broke up the fight, but returned shortly thereafter with a gun. The victim testified that she ran when she saw defendant with the gun because she feared for her life. A friend, Sherita Coates, and the victim's aunt pushed the victim into the house. The victim, her aunt, and Coates each testified that they watched from a window in the house as defendant fired gunshots into the victim's vehicle.

At trial, defendant argued that the prosecution witnesses were biased and not credible. Defense counsel also argued that the value of the property destroyed was less than $1,000. In addition, defendant raised an insanity defense, relying on the testimony of a forensic psychologist, Steven Miller. Miller opined that defendant suffered from a mental illness based on a mood disorder at the time of the incident, and that she met the criteria for legal insanity because the mood disorder left her unable to conform her behavior to the requirements of law. In

rebuttal, the prosecution's expert, Ellen Garver, opined that defendant did not have a mood disorder that satisfied the criteria for a mental illness.

On appeal, defendant argues that the prosecutor engaged in misconduct during closing and rebuttal arguments by urging the jury to use Garver's testimony concerning statements that defendant had made to her during the forensic examination as substantive evidence of guilt. Defendant argues that under MCL 768.20a(5), her statements were inadmissible for any purpose other than the insanity defense.

Because defendant failed to challenge the prosecutor's remarks on this ground, she has failed to preserve this issue, and we review her claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-763, 774; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A defendant has the burden of showing prejudice, that is, error affecting the outcome of the trial. *Schutte*, *supra* at 720. If these requirements are satisfied, we must exercise discretion in deciding whether to reverse. *Carines*, *supra* at 763. Reversal is warranted only if the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of the defendant's innocence. *Id*.

The prosecution concedes on appeal that it used defendant's statements for an improper purpose. Therefore, we shall limit our review to whether defendant has shown the requisite prejudice. We find no outcome-determinative error with respect to the malicious destruction charge because the evidence that defendant shot at and damaged the victim's vehicle was overwhelming. In fact, defense counsel conceded as much when remarking during closing argument that defendant "committed the crime of malicious destruction of property, $200, but less than $1,000, but she's not guilty by reason of insanity." The prosecutor's challenged remarks regarding defendant's admissions to Garver were not relevant to the disputed value element of the charge.

With respect to the felonious assault charge, we are mindful that "[p]rosecutorial 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." *Schutte*, *supra* at 721. We apply a contextual review in evaluating a prosecutor's remarks. *Id.* Here, the thrust of the prosecutor's closing and rebuttal arguments was that the prosecution witnesses provided credible testimony to establish the felonious assault charge, and that their testimony was also consistent with defendant's statements to Garver during the forensic examination. A timely objection and request for a curative instructive during closing argument could have corrected any potential prejudice and prevented further comment on defendant's statements for an improper purpose. *Id.*

The record indicates that rather than object, defense counsel responded in her closing argument by suggesting a circumstance of the charged assault that was only supported by defendant's statements to Garver (specifically, that tools were thrown at defendant before she obtained the gun) and using this evidence to question the credibility of the prosecution witnesses who claimed to be standing outside when defendant returned with the gun. In addition, when later challenging the prosecutor's rebuttal argument, defense counsel only requested that the content of defendant's statements be accurately presented to the jury.

We also note that although the jury found defendant guilty of one count of felonious assault, it acquitted defendant of feloniously assaulting the victim's aunt and attempting to commit first-degree home invasion at the aunt's home. Examining the record as a whole, we are not persuaded that the jury would have resolved the felonious assault charge of which defendant was convicted differently if the prosecutor had not suggested that defendant's statements to Garver could be used for a substantive purpose. Therefore, we conclude that defendant failed to sustain her burden of demonstrating outcome-determinative plain error with regard to any of her convictions. *Id.* at 720.

Defendant also argues that the evidence was insufficient to establish that the value of property injured or destroyed was at least $1,000 for purposes of the malicious destruction conviction. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). It is the jury's function to decide the weight and credibility of testimony. *Id.* at 514-515.

To establish a violation of MCL 750.377a(1)(b)(*i*), the prosecution must prove that "[t]he amount of the destruction or injury is $1,000.00 or more but less than $20,000.00." The prosecution may establish the amount by showing either "(a) the difference in the market value of the property immediately before and after the injury, or (b) the reasonable cost of repairing or restoring the property." *People v Hamblin*, 224 Mich App 87, 96; 568 NW2d 339 (1997). "Proof of value is determined by reference to the time and place of the injury and has been interpreted to mean the price that the item will bring in an open market between a willing buyer and seller." *Id.* at 94.

Here, the victim testified that she purchased a 1994 Chrysler Intrepid for $1,600 at an auction in July 2006 with the assistance of her boyfriend. The victim testified that the vehicle had been stolen and sustained some damage as a result. She explained that "[t]hey ripped some stuff out from the front and the radio." The victim testified that her father planned to install a radio and some tires when she drove the vehicle to his residence for repairs on October 30, 2006. Although the vehicle was operable, it was "like smoking a little bit sometimes." The victim also indicated that her father worked on the vehicle, but he did not have time to complete the repairs before defendant shot it. The victim testified that the vehicle was not drivable after the shooting. Defendant shot the engine, the sides of the vehicle, the windows, and the tires, and she jumped on top of the hood. The victim testified that she junked the vehicle because it was too damaged to repair.

Although the prosecution offered no evidence regarding possible repair costs, after viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could find beyond a reasonable doubt that the vehicle was essentially worthless after the shooting. Although we agree that the difference-in-market-value approach in *Hamblin*, *supra*, requires that the fact-finder consider the value of the vehicle on the open market immediately before defendant shot the vehicle, the prosecution need not prove its case with mathematical precision. We are not persuaded that the auction sale was so remote in time or that the damage caused by the theft was so material that a rational trier of fact could not find beyond a reasonable doubt that the amount of destruction attributed to defendant was at least $1,000. Cf.

Showman v Lee, 79 Mich 653, 661; 44 NW 1061 (1890) (a sale at auction is some evidence of market value at the time and place of sale, albeit an eight-month delay between the sale and a conversion was deemed too remote to be admissible to establish value in trover action, absent other evidence); *Krause v Eugene Dodge, Inc*, 265 Or 486, 511; 509 P2d 1199 (1973) (where the value of personal property is at issue, evidence of property value three or four months before time at issue is not necessarily too remote to be admissible).

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Donald S. Owens