STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 14, 2010
V	No. 293257 Macomb Circuit Court
DAVID ANTHONY CURRIE, Defendant-Appellant.	LC No. 2009-000595-FH

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of larceny of property valued at $ 1,000 or more but less than $ 20,000, MCL 750.356(3)(a). He was sentenced as a third habitual offender, MCL 769.11, to two years of probation and 120 days in jail. Defendant appeals as of right, and we affirm.

First, defendant asserts that there was insufficient evidence to support the conviction and that the verdict was against the great weight of the evidence. We disagree. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). When reviewing a claim of insufficient evidence, this Court reviews the record in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *In re Contempt of Henry*, 282 Mich App 656, 677; 765 NW2d 44 (2009). Appellate review of a challenge to the sufficiency of the evidence is deferential. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The reviewing court must draw all reasonable inferences and examine credibility issues that support the jury verdict. *Id*. When assessing a challenge to the sufficiency of the evidence, the trier of fact, not the appellate court determines what inferences may be fairly drawn from the evidence and the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court must not interfere with the jury's role as the sole judge of the facts when reviewing the evidence. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). "Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of the offense." *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). When there is a challenge to the sufficiency of the evidence, the focus is on whether the evidence presented justifies submission of the case to the jury or whether judgment as a matter of law is appropriate. *Id*. When the resolution of the issue involves the credibility of diametrically opposed versions of events, the test of credibility

lies where statute, case law, common law, and the constitution have reposed it, with the trier of fact. *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998).

The trial court's decision regarding a motion for new trial on the ground that the verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Horn*, 279 Mich App 31, 41 n 4; 755 NW2d 212 (2008).

The 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). The intent necessary to commit larceny is "the intent to steal another person's property." *Cain*, 238 Mich App at 120. MCL 750.356 distinguishes the types of larceny based on the value of the property stolen. In the present case, defendant was charged with the felony for theft of property valued between $1,000 and $20,000, MCL 750.356(3)(a).

In the present case, there was sufficient evidence to support the larceny conviction, and the jury verdict was not against the great weight of the evidence. The operations manager of Transpack received a telephone call from the company's alarm company indicating that the alarm had been disarmed earlier than usual. The human resources director arrived on the premises to find that defendant, a company employee, had entered the building, but had not punched in for work. The company was an automotive supplier for General Motors (GM). GM provided resin containers to Transpack for shipment of glove box literature to its plants. Damaged or defective containers were returned to GM for recycling. GM would pick up the damaged containers and replace them with empty containers. Transpack and GM maintained an inventory of the containers with a yearly audit. The human resources director heard defendant speak to a second man who was outside the building near a truck. She testified that she observed defendant use a HiLo to place the resin containers on the truck. Cameras located in the building captured defendant on video moving the resin containers outside, but did not record the outside activity involving placement on the truck. Company representatives testified regarding the amount of the trays removed based on the video recording and the value of the trays. Employees knew that the resin containers did not belong to Transpack, could not be discarded, and had to be returned to GM.

The testimony of the human resources director established that defendant removed resin containers onto a truck, the truck left the premises, the property did not belong to defendant, and consent to remove the containers was not given. The operations manager estimated that the containers were valued at approximately $15,000. MCL 750.356(3)(a); *Cain*, 238 Mich App at 120. Accordingly, the challenge to the sufficiency of the evidence and the great weight of the evidence is without merit.

Next, defendant contends that he is entitled to a new trial because of prosecutorial misconduct. We disagree. Defendant did not preserve this issue for appellate review.

Therefore, appellate review is for outcome-determinative, plain error. *Unger*, 278 Mich App at 235. Reversal is warranted only when plain error resulted in the conviction of an actually innocent person or seriously impacted the fairness, integrity, or public reputation of the judicial proceedings. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Error requiring reversal will not be found where a curative instruction would have alleviated the prejudicial effect. *Id*. at 329-330. Prosecutorial misconduct claims are reviewed on a case-by-case basis, examining the prosecutor's comments in context, and in light of the defense arguments and the evidence admitted at trial. *People v Odom*, 276 Mich App 407, 413; 740 NW2d 557 (2007). "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

During trial, the human resources director identified a recent photograph of the containers at the plant. She was also depicted in this photograph. The photograph was admitted without objection, and the witness presented the photograph to the jury. We cannot conclude that this action constituted prosecutorial misconduct or that it denied defendant a fair and impartial trial. *Dobek*, 274 Mich App at 63.

The second claim of prosecutorial misconduct involves the prosecutor's inquiry of defendant regarding the divergent testimony presented by the other witnesses. Although it is improper for the prosecutor to ask the defendant to comment on the credibility of prosecution witnesses, a timely objection would cure any prejudice by precluding further questioning or by obtaining a cautionary instruction. *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1985). This challenge does not provide defendant with appellate relief because trial counsel did not object to this line of questioning and did not request a curative instruction. *Id*.

The final claim of prosecutorial misconduct asserts that the prosecutor argued facts not in evidence during closing argument. Specifically, defendant asserts that the prosecutor stated that he asked a specific question of defendant that was not, in fact, posed. While we agree that the specific question was not asked, the essence of the question was asked. Specifically, the prosecutor asked defendant about his relationship with his supervisor and the lack of a motive to fabricate the charge. The record does not support the contention that the prosecutor argued facts not in evidence.

Defendant also argues that he is entitled to a new trial because trial counsel was ineffective by failing to object to prosecutorial badgering and the failure to move to strike the testimony of the witnesses. We disagree. To establish a claim of ineffective assistance of counsel, the defendant bears the burden of demonstrating that trial counsel's performance fell below an objective standard of reasonableness and that this representation was so prejudicial that it deprived defendant of a fair trial. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). With regard to the second part of the test, the defendant must demonstrate that a reasonable probability exists that the outcome of his trial would have been different but for trial counsel's error. *Id*. at 6.

Our review of the record reveals that the prosecutor did not unnecessarily badger defendant. Additionally, trial counsel did not err in failing to move to strike the testimony by the prosecution witnesses. The video recording provided circumstantial evidence of the removal of the containers. Additionally, the human resources director testified that she observed defendant

move the containers onto the truck. She testified that she did not remain with defendant while he continued. Rather, she returned to the office to wait for defendant's supervisor. The divergent testimony by the parties' witnesses presented an issue for resolution by the trier of fact. *Lemmon*, 456 Mich at 646-647. A basis to strike the testimony of the prosecution witnesses did not exist. Based on the record, we cannot conclude that trial counsel was ineffective.

Defendant failed to present an aggregate of actual errors the cumulative effect of which would warrant a new trial. *People v Bahoda*, 448 Mich 261, 293 n 64; 531 NW2d 659 (1995).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ William C. Whitbeck