STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2010
v	No. 294788 Oakland Circuit Court
GLENN DONNELL WILLIS, Defendant-Appellant.	LC No. 2008-220153-FH

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of larceny in a building, MCL 750.360. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to imprisonment for 2 to 15 years. Because defendant has not established that the prosecution's decision to charge him with alternative offenses constituted a plain error that affected his substantial rights, we affirm.

Defendant's conviction is the result of a March 2008 larceny. Defendant entered a private office building, and then entered a private office belonging to a building employee. The employee, who had been absent from his office, returned to the office and found defendant rummaging through his desk drawers. When confronted, defendant admitted to the employee that he had taken stamps and change from the employee's desk drawer. Defendant was charged with both breaking and entering with intent to commit larceny, MCL 750.110, and with larceny in a building, but was found guilty of only the larceny in a building charge.

On appeal, defendant argues that the prosecution abused its discretion by charging him with both breaking and entering and larceny in a building for a single offense, and contends that he should only have been charged with larceny in a building. We disagree.

Defendant did not object to the charges at trial, and therefore the alleged error is unpreserved. This Court reviews unpreserved, nonconstitutional claims of error for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The defendant must show that an error occurred, the error was plain, and the plain error affected his or her substantial rights. *Id.* To establish that the plain error affected substantial rights, a defendant must show that the error affected the outcome of the proceedings. *Id.*

In this matter, defendant has failed to show plain error affecting the outcome of his trial. First, defendant was not convicted of the charge to which he now objects, breaking and entering, (MCL 750.110). The fact that he was charged with this alternative crime, then, had no bearing on the ultimate outcome of the trial.

Second, the prosecution may bring any charges supported by the evidence. *People v Nichols*, 262 Mich App 408, 506; 686 NW2d 502 (2004). And, when criminal statutes each require proof of an element the other does not, the statutes proscribe different conduct and the prosecutor may charge under either or both statutes. *People v Werner*, 254 Mich App 528, 536-537; 659 NW2d 688 (2002).

The elements of the offense of breaking and entering with intent to commit larceny are: (1) the defendant broke into a building; (2) the defendant entered the building; and, (3) at the time of the breaking and entering, the defendant intended to commit a larceny therein. *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998). The elements of larceny in a building 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 goods or property must be the personal property of another; (5) the taking must be without the consent and against the will of the owner; and, (6) the taking must occur within the confines of the building. *People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1998). Breaking and entering does not require that any of the elements of larceny actually occur; it requires only an intent to commit a larceny, whereas larceny in a building requires that all of the elements of larceny be proven to obtain a conviction. A breaking and entering also requires a breaking, whereas larceny in a building does not. Because breaking and entering and larceny in a building each require proof of different elements, the prosecution was free to charge defendant with both crimes.

Defendant contends that, pursuant to *People v Patterson*, 212 Mich App 393, 394-395; 538 NW2d 29 (1995), a prosecutor must charge under the more specific and more recent statute when two statutes prohibit the same conduct. According to defendant, the statute prohibiting larceny in a building, MCL 750.360, is an example of the "Legislature carving out an exception to a general statute and providing a lesser penalty for a more specific offense, in which case the prosecutor [has] to charge the defendant under the statute fitting the particular facts." *People v Avery*, 115 Mich App 699, 702; 321 NW2d 779 (1982). However, given the differing elements of each crime, not every violation of MCL 750.360 will also be a violation of MCL 750.110. The larceny in a building statute is thus not an exception to the breaking and entering statute. *Werner*, 254 Mich App at 536-537; *Avery*, 115 Mich App at 702. The prosecution did not commit an error by charging defendant under both MCL 750.110 and MCL 750.360, and the evidence in this case supported charging under both statutes, in the alternative.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto