STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 11, 2016
v	No. 325115 Livingston Circuit Court
MICHAEL RAY BROWN, Defendant-Appellant.	LC No. 13-021638-FH

Before: O'CONNELL, P.J., and OWENS and BECKERING, JJ.

PER CURIAM.

Defendant, Michael Brown, appeals as of right his jury trial convictions of larceny over $1,000 but not more than $20,000, MCL 750.356(3)(a), and unlawfully driving away a motor vehicle (UDAA), MCL 750.413. He was sentenced on July 24, 2014, as a fourth habitual offender, MCL 769.10, to four to 20 years' imprisonment for each conviction. Following a restitution hearing, Brown was ordered to pay $5,036.40 jointly and severally with codefendant Terry Garten. We affirm defendant's convictions, but vacate his sentences and remand for resentencing and for the trial court to order that defendant's restitution be paid jointly and severally with his two codefendants.

This case involves the theft of copper wire and a service truck from a Detroit Edison (DTE) service center in Howell on December 8, 2012. Brown allegedly worked with codefendants Terry Garten and Patrick Cronan to break into the service center and push large spools of copper wire onto a service truck. According to Cronan, Brown drove the service truck to Cronan's residence, while Cronan followed in his wife's car and Garten followed in his blazer. The men unloaded the wire into Cronan's barn, before Brown and Garten abandoned the service truck on US-23. Cronan testified that the next day, Brown and Garten helped him strip the wire, then Cronan took it to a recycling yard for money, which the three of them split.

Cronan pleaded guilty and received a lenient sentence in exchange for his testimony against Garten and Brown. Brown and Garten were tried together in front of two separate juries, and both were convicted of larceny and UDAA.[1] Defendant Brown raises issues in a brief filed

[1] Defendant Garten appeals his convictions as of right in Docket No. 323670.

by appellate counsel, as well as in propria persona in his supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4.

I. APPELLATE BRIEF ISSUES

Defendant raises two issues in his brief submitted by appellate counsel, arguing that the trial court denied him a fair trial by admitting other acts evidence and that he is entitled to resentencing based on the erroneous scoring of Offense Variable (OV) 16.

A. OTHER ACTS EVIDENCE

At trial, the prosecutor presented voluminous evidence that the three men made similar thefts before and after the theft at the Howell Service Center. Defendant argues that this evidence led the jury to convict defendant based on his propensity to steal, rather than for actually committing the charged offenses. We review a trial court's decision whether to admit or exclude evidence for an abuse of discretion. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). We review de novo preliminary questions of law, such as whether a rule of evidence precludes admission. *Id.*

MRE 404(b)(1), which addresses the admission of other acts evidence, provides,

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Our Supreme Court in *Mardlin*, "unanimously confirmed that the opinions in *People v VanderVliet*, 444 Mich 52, 508 NW2d 114 (1993), amended 445 Mich 1205, 520 NW2d 338 (1994), *People v Crawford*, 458 Mich 376, 582 NW2d 785 (1998), and *People v Sabin (After Remand)*, 463 Mich 43, 614 NW2d 888 (2000), 'continue to form the foundation for a proper analysis of MRE 404(b).' " *Mardlin*, 487 Mich at 615 n 6, quoting *People v Knox*, 469 Mich 502, 510, 674 NW2d 366 (2004). The Court summarized the principles set forth in those cases:

> To admit evidence under MRE 404(b), the prosecutor must first establish that the evidence is logically relevant to a material fact in the case, as required by MRE 401 and MRE 402, and is *not* simply evidence of the defendant's character or relevant to his propensity to act in conformance with his character. The prosecution thus bears an initial burden to show that the proffered evidence is relevant to a proper purpose under the nonexclusive list in MRE 404(b)(1) or is otherwise probative of a fact other than the defendant's character or criminal propensity. Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only if* it is relevant *solely* to the defendant's character or criminal propensity. Stated another way, the rule is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to properly admit

> evidence that may nonetheless also give rise to an inference about the defendant's character. Any undue prejudice that arises because the evidence also unavoidably reflects the defendant's character is then considered under the MRE 403 balancing test, which permits the court to exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. Finally, upon request, the trial court may provide a limiting instruction to the jury under MRE 105 to specify that the jury may consider the evidence only for proper, noncharacter purposes. [*Mardlin*, 487 Mich at 615-616 (citations omitted).]

1. RELEVANCE

Mardlin explains that the first inquiry is whether the prosecutor showed that defendant's prior conviction is relevant to a proper noncharacter purpose under MRE 404(b)(1). Relevance involves two components: materiality and probative value. *Crawford*, 458 Mich at 388. "Materiality is the requirement that the proffered evidence be related to 'any fact that is of consequence' to the action." *Id.* Whereas, "[t]he probative force inquiry asks whether the proffered evidence tends 'to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *Id.* at 389-390, quoting MRE 401. Any tendency is sufficient, but under MRE 404(b), the evidence "truly must be probative of something *other* than the defendant's propensity to commit the crime." *Id.* at 390.

In this case, the prosecutor sought to admit evidence regarding the thefts at another DTE service center and a Consumers Energy service center to show defendant's common plan or scheme, intent, and identity in committing the theft at the Howell Service Center. The trial court held that the evidence was relevant to prove all three noncharacter purposes.

a. SCHEME, PLAN, OR SYSTEM

First, we agree with the trial court that the other acts evidence was relevant to show defendant's scheme, plan, or system in doing an act. The evidence is material in this sense because it tends to prove that defendant committed the charged offenses of larceny and UDAA—a fact which he denied. "It is well established in Michigan that all elements of a criminal offense are 'in issue' when a defendant enters a plea of not guilty." *Crawford*, 458 Mich at 389. Defendant's common plan or scheme was material to a fact of consequence, specifically to show that defendant acted in concert with the codefendants to commit the charged offenses.

With regard to the probative force inquiry, when the theory of relevance is based on similarities between the other acts and the charged offense, the uncharged misconduct and the charged offense must be "sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Sabin*, 463 Mich at 63. In this case, the similarities between the uncharged misconduct and the charged offenses were striking, as to establish a sufficient factual nexus between the two. There was testimony that the three defendants acted in concert to steal copper wire from electrical companies to salvage it and make a profit. For each of the three incidents, defendants would meet at Cronan's residence and drive to the service center. Once there, one of the defendants would cut the fence and enter the property. One

defendant would then find a service truck with keys and back it up to the rack containing spools of copper wire, while the other two would push the spools onto the service truck. One defendant would then cut the gate to allow another defendant to exit the property with the service truck. Two defendants would follow the service truck back to Cronan's residence, where they would unload the wire into Cronan's barn. Brown would then abandon the service truck along US-23 and Garten would give him a ride home. Cell phone mapping supports this evidence and further places all three defendants together and in the general area of the service centers and truck routes from the time the trucks were started to the time they were abandoned. The proffered evidence was highly probative to show that defendant employed a similar plan in doing an act in this case and to overcome the improper inference of character. See *Crawford*, 458 Mich at 391 (noting that "the question becomes whether the prosecutor carried its burden of demonstrating that the defendant's prior conviction establishes some intermediate inference, other than the improper inference of character, which in turn is probative of the ultimate issues in th[e] case"). Therefore, the trial court did not abuse its discretion by concluding that the other acts evidence was relevant to prove defendant's scheme, plan, or system in doing an act in this case.

b. INTENT

We also agree with the trial court that the evidence was relevant to prove defendant's intent. Larceny is a specific intent crime that requires an intent to permanently deprive an owner of his property. *People v Pohl*, 202 Mich App 203, 205; 507 NW2d 819 (1993), remanded on other grounds by 445 Mich 918 (1994). One element of UDAA is that it must be "done willfully." *People v Dutra*, 155 Mich App 681, 685; 400 NW2d 619 (1986). While this does not require the prosecution to establish an intent to permanently deprive the owner of possession, it does require that the defendant have "guilty knowledge." *Id.* Defendant denied committing the charged offenses, which required the prosecution to prove specific intent, thereby making defendant's intent a fact of consequence to the action. But see *Sabin*, 463 Mich at 68-69 (noting that other acts evidence was not logically relevant under a theory that it proved the defendant's intent where the crime was a general intent crime, and thus, intent was not in issue). Therefore, the evidence was material to prove defendant's intent.

With regard to the probative force inquiry, the factual relationship of the evidence was not too remote to draw a permissible inference of defendant's intent in the present case. This is unlike in *Crawford*, where the past conduct was factually dissimilar. See *Crawford*, 458 Mich at 395-396 (finding that the factual relationship between the prior conviction and charged offense was too remote for the jury to draw a permissible intermediate inference of the defendant's mens rea). The strong similarities between the conduct, as discussed earlier, likely overshadows any impermissible character evidence and makes the evidence truly probative of defendant's intent. Therefore, the trial court did not abuse its discretion by concluding that the other acts evidence was relevant to prove defendant's intent.

c. IDENTITY

Lastly, the evidence was also offered to prove defendant's identity. When similar conduct is being used to prove identity, there must be "a high degree of similarity" between the similar conduct and the charged offense. Specifically, there must be "special characteristics so uncommon, peculiar and distinctive as to lead compellingly to the conclusion that all were the

handiwork of the defendant because all bore his distinctive style or 'touch.' " *People v Golochowicz*, 413 Mich 298, 325; 319 NW2d 518 (1982). While there was a high degree of similarity between the uncharged misconduct and the charged offense, we find it questionable whether the other acts evidence bore uncommon and peculiar characteristics distinctive to defendant. Close questions concerning the trial court's discretion to admit evidence, however, do not call for appellate reversal. *Id.* at 322. Further, any error in admitting the other acts evidence to prove identity is harmless, where the evidence was admissible for other noncharacter purposes, such as a common plan or scheme and intent.

2. MRE 403 BALANCING TEST

As explained in *Mardlin*, once it is determined that the evidence is relevant to a proper noncharacter purpose under MRE 404(b)(1), it must be shown that the evidence is not substantially outweighed by the danger of unfair prejudice under MRE 403. Defendant argues that the other acts evidence was unfairly prejudicial because it implied defendant was being tried for three thefts. We acknowledge that the amount of evidence presented regarding the other acts committed by defendants was almost equal to the amount of evidence presented for the charged offenses. This certainly prejudices defendant to an extent and carries a high risk of confusion and misuse, as cautioned in *Crawford*, 458 Mich at 398.

However, MRE 403 does not prohibit prejudicial evidence. Rather, it prohibits evidence that is unfairly prejudicial. *Id.* "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id.* In *Crawford*, the other acts evidence was factually dissimilar from the charged offense such that the only inference the jury could draw from the past conduct was an impermissible character inference that "if the defendant did it before, he probably did it again." *Id.* at 398-399. In other words, the evidence was marginally probative and the jury was very likely to give it undue weight. In this case, as discussed, the strong similarities between the uncharged misconduct and conduct of the charged offenses was ***highly*** probative to show that defendant employed a similar plan in doing an act in this case. Therefore, although the prosecution presented voluminous other acts evidence, given its probative value, the jury was less likely to give it undue weight.

Defendant also argues that the harm arising from the other acts evidence is substantial because he was the least culpable of the three defendants. Defendant argues that there was no evidence that he received payment for the copper wire, and Cronan, who was the primary witness to testify to most of defendant's involvement in the crime, received a benefit for testifying against defendant. However, the jury, who is tasked with determining credibility, *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008), was aware of Cronan's plea deal, and although there was no evidence that defendant scrapped copper wire at the recycling yard, his codefendants did, and the cell phone mapping presented for the charged offense supported Cronan's testimony, which together, was sufficient to convict defendant beyond a reasonable doubt, even without the proffered evidence.

Finally, the trial court provided a limiting instruction to the jury explaining the proper, noncharacter purpose for which it could consider the other acts evidence. A trial court's limiting instruction will generally enable the jury to sort out the evidence and consider it only for its proper purpose. *Mardlin*, 487 Mich. at 629. Indeed, jurors are presumed to follow the trial

court's instructions. *Unger*, 278 Mich App at 235. Therefore, we conclude that the trial court did not abuse its discretion in admitting the other acts evidence.

B. SENTENCING ISSUE

Defendant next argues that the trial court erred when it assessed 10 points for OV 16. Although this scoring error is unpreserved, the error resulted in a minimum sentence that exceeded the appropriate sentencing guidelines range, and therefore, we may review it for plain error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004), citing MCL 769.34(10). Under the plain error standard of review, defendant must show that an error occurred, the error was plain, and the plain error affected his substantial rights. *Id.*, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Among other things, OV 16 directs the trial court to assess 10 points if property that was obtained, damaged, lost, or destroyed was valued at more than $20,000. MCL 777.46(1)(a) and (b). In this case, the prosecution concedes that the trial court plainly erred by assessing 10 points for OV 16 because the jury found defendant guilty of larceny over $1,000 but not more than $20,000, and there was no evidence that the property was valued at more than $20,000. Notably, a defendant is entitled to be sentenced on the basis of accurate information. *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006).

Further, this plain error prejudiced defendant because he received a sentence that exceeded the appropriate sentencing guidelines range. See *Kimble*, 470 Mich at 313 ("It is difficult to imagine what could affect the fairness, integrity and public reputation of judicial proceedings more than sending an individual to prison and depriving him of his liberty for a period longer than authorized by the law."). The parties agree that defendant should have been assessed five points for OV 16 for property that was valued between $1,000 and $20,000. MCL 777.46(1)(c). This reduction changes defendant's total OV score to five and reduces his OV level to I. As a fourth habitual offender, this drops his minimum guideline range from 12 to 48 months to nine to 46 months. MCL 777.66. Defendant is entitled to be sentenced according to accurately scored guidelines. *Francisco*, 474 Mich at 89. Accordingly, defendant is entitled to resentencing.[2]

II. STANDARD 4 BRIEF ISSUES

A. 180-DAY RULE

[2] We note that although the sentencing guidelines are now advisory pursuant to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), a trial court is still required to take them into account when sentencing a defendant. *Id.* at 392. Currently, there is no indication that *Lockridge* affected the relief afforded to a defendant under *Francisco* and *Kimble* when a scoring error changes the appropriate sentencing guidelines range. We note, however, that our Supreme Court has ordered supplemental briefing in a case addressing this issue. *People v Douglas*, __ Mich __; 870 NW2d 730 (2015) (Docket No. 150789).

Defendant first argues in his Standard 4 brief that his convictions should be vacated because he was not brought to trial within 180 days of his arraignment, which violates MCL 780.131. Because defendant did not move below to have his case dismissed for violating the 180-day rule, our review is for plain error affecting defendant's substantial rights. *Carines*, 460 at 774.

MCL 780.131(1) provides,

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail.

This general rule requires that an inmate housed in a state correctional facility who has criminal charges pending against him "shall be brought to trial within 180 days after" the Department of Corrections delivers written notice of the inmate's imprisonment to the prosecuting attorney. *People v Lown*, 488 Mich 242, 255; 794 NW2d 9 (2011). The 180-day period begins to run on the day after the prosecuting attorney receives the notice. *Id.* at 255-256.

According to MCL 780.133, if "action is not commenced on the matter" within the 180-day period, the trial court loses jurisdiction and must dismiss the matter with prejudice. Our Supreme Court in *Lown*, interpreted this provision to mean that the prosecutor does not have to ensure that the trial actually begins within that period. *Id.* at 256-257. Rather, the prosecutor must have undertaken action, or begun proceedings, against the defendant on the matter. *Id.* at 257. " 'If . . . apparent good-faith action is taken well within the period and the people proceed promptly and with dispatch thereafter toward readying the case for trial, the condition of the statute for the court's retention of jurisdiction is met.' " *Id.*, quoting *People v Hendershot*, 357 Mich 300, 304; 98 NW2d 568 (1959). However, if the prosecutor takes preliminary steps, but then delays inexcusably in " 'an evident intent not to bring the case to trial promptly,' " the rule may be violated. *Lown*, 488 Mich at 257-258, quoting *Hendershot*, 357 Mich at 303-304.

In this case, the record does not contain a written notice from the DOC. Defendant claims that the DOC sent the notice on October 2, 2013, but did not provide a copy to this Court, and the prosecutor did not respond to the Standard 4 brief. Assuming that the notice was sent and received on October 2, 2013, the 180-day period would have begun to run on October 3, 2013, and would have ended on April 1, 2014. The record shows that the prosecutor commenced

proceedings within this 180-day period and thereafter continued to ready the case for trial. Specifically, defendant was arraigned in September 2013 and bound over to circuit court on October 30, 2013. The prosecutor filed the information and witness list the following day. The prosecutor moved to join defendant's case with Garten's case and that motion was granted in November 2013. The pretrial conference was held in January 2014, where it was determined that all motions had to be heard before February 21, 2014, and the trial was scheduled for March 10, 2014. The prosecutor did delay in filing the notice of intent to introduce other acts evidence, which was filed on February 24, 2014, but explained that the notice was filed three days late because she had to address Fifth Amendment implications regarding Cronan's testimony before he would agree to testify about the other acts. The trial was then scheduled for June 9, 2014, and proceeded as scheduled. Therefore, because the prosecution commenced the action within the 180-day period and there is no indication based on the record that the prosecutor caused inexcusable delay or demonstrated an intent not to promptly bring the case to trial, the trial court did not lose jurisdiction even though the trial did not occur within the 180-day period.

B. PERJURED TESTIMONY

Defendant next argues that there were instances of perjury at trial that warrant a new trial. We review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 774.

"It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285, lv den 488 Mich 978 (2009). "If a conviction is obtained through the knowing use of perjured testimony, it must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* (citations and internal quotation marks omitted).

Defendant argues that Cronan lied at trial because he did not disclose the full extent of his plea agreement by testifying that he was placed on personal recognizance bond and freed during the period of his cooperation. However, Cronan testified that he "bonded out" when his wife paid $40,000 and that bond was later lowered by the trial court. Defendant presents no supporting evidence that this statement was untruthful. Further, the jury was informed of the fact that Cronan received a plea deal in exchange for his testimony, as well as his lengthy criminal history. Those were the important facts for the jury to hear to evaluate Cronan's credibility. Even if Cronan was allegedly untruthful about his plea agreement, it is unlikely that the verdict would have changed had the jury known that he was placed on personal recognizance bond and freed during the period of his cooperation. Accordingly, defendant has failed to establish plain error warranting reversal.

Defendant also argues that he is entitled to a new trial based on newly discovered evidence that Cronan was a police informant prior to the charged offenses. Defendant argues that this would have affected the outcome of the trial because it shows Cronan was untruthful and affects his credibility. Essentially, defendant wishes to introduce this evidence to impeach Cronan's credibility. Ordinarily, newly discovered impeachment evidence will not justify a new trial. *People v Grissom*, 492 Mich 296, 317-318; 821 NW2d 50 (2012). To justify a new trial based on newly discovered impeachment evidence, there must be "an exculpatory connection on

a material matter between as witness's testimony at trial and the new evidence" and a different result must be probable on retrial. *Id.* at 319. Defendant has failed to prove these two requirements. While Cronan's credibility was certainly an issue at trial, the fact that he was allegedly a police informant would not tend to prove that defendant was innocent. As discussed, Cronan's lengthy criminal history and his plea deal were made known to the jury, and the jury was free to judge his testimony as it saw fit. Defendant has not shown how the "newly discovered evidence" would have made a different result probable, particularly where there was concrete evidence to support Cronan's testimony.

Defendant finally argues that Sheila Edie committed perjury when she testified that there was missing copper wire at the Howell Service Center, when the inventory report indicated that no wire was missing. It appears defendant is referring to Edie's testimony regarding exhibit 10, which was the preliminary report generated from data in the DTE's computer system and printed by Edie, indicating how much wire was missing and the value. Edie testified at one point that the exhibit indicated that over $10,000 of wire was missing, but on cross-examination, Edie could not explain some of the numbers of exhibit 10. Specifically, the spreadsheet indicated that the Howell Service Center was missing 3,840 feet of wire, but the stock balance was zero, indicating that the service center was not supposed to have any of that type of wire in stock. Edie could not explain why. She testified that the computer automatically ran the data and she would have to go back and look at the data in the computer. Contrary to defendant's assertion, this is not an example of perjury. It is simply Edie's inability to recall details of a document generated by the computer. In fact, it appears Edie was actually honest in that she admitted she could not explain the discrepancy. This affects the weight and credibility of the document and does not indicate perjury. Accordingly, defendant has failed to establish plain error warranting reversal.

C. DISCOVERY VIOLATION

Defendant next argues that the prosecutor violated the rules of discovery by not disclosing Cronan as a witness until the day before trial, and by withholding evidence. We review these unpreserved issues for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 774.

First, contrary to defendant's argument, the prosecution listed Cronan as a witness on the first witness list that the prosecutor filed on October 31, 2013. The prosecutor amended the witness list four times thereafter, each time incorporating the first list. Accordingly, the prosecutor did not violate the discovery rules. See MCR 6.201(A)(1) (requiring the prosecutor to disclose every witness who he or she may call at trial).

Second, defendant argues that the black ski masks found in Cronan's barn during the execution of the search warrant must be missing because they were never presented at trial. Defendant argues that DNA would have shown that he did not commit the crime. Defendant

attempts to frame his argument as a *Brady*[3] violation, in that the prosecutor withheld valuable evidence from trial.

To establish a *Brady* violation, defendant must show that "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material." *People v Chenault*, 495 Mich 142, 155; 845 NW2d 731 (2014). Defendant assumes because the prosecutor did not present the ski masks as evidence at trial they must be missing. This is insufficient to prove the prosecutor actually suppressed evidence. Further, defendant fails to show how the ski masks, or DNA testing on the masks, would have been favorable to his defense. Cronan testified that defendant did not wear a black ski mask—that he always came dressed in his own clothes, particularly a camouflage facemask and brown clothing. Accordingly, defendant has failed to prove a *Brady* violation occurred.

D. EXPERT WITNESS QUALIFICATION

Defendant next argues that the trial court erred by qualifying Whitefeather Cherokee as an expert witness under MRE 702 regarding the analysis of Metro PCS's records and equipment. We review for an abuse of discretion a trial court's decision to qualify an expert and admit expert testimony. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

MRE 702 governs the admissibility of expert testimony and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

When evaluating proposed expert testimony, MRE 702 requires a court to ensure that the testimony "(1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case." *People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012).

With regard to the first inquiry, "[t]he party proffering the expert's testimony must persuade the court that the expert possesses specialized knowledge which will aid the trier of fact in understanding the evidence or determining a fact in issue." *People v Smith*, 425 Mich 98, 112; 387 NW2d 814 (1986), citing MRE 702. This must be something beyond common knowledge. *Kowalski*, 492 Mich at 123. In other words, the testimony must regard a matter that is not commonly understood by the average person. *Id.* In this case, Cherokee's testimony helped the jury understand the functions of Metro PCS's cell phone towers and techniques of locating or

[3] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

plotting origins of cell phone calls using Metro PCS's cell phone records. Cherokee explained how the cell phone data could show the general area where a call was placed. This information was not something an average juror would have previously known because it involved specialized training and knowledge.

With regard to the second inquiry, Cherokee testified that he has been employed with Metro PCS for five years as a custodian of records and an analyst. He has testified in approximately 300 trials, both federal and state, during his employment with Metro PCS. Cherokee testified that he was trained by the staff of the various departments at Metro PCS regarding legal issues, how the towers and phone records work, and how to retrieve and order the records. Further, Cherokee testified that every six months, or when new technology comes out, he attends more training. Cherokee testified that prior to his experience with Metro PCS, he worked for the United States Army in the intelligence unit, analyzing and tracking enemies by phones and satellites. He also testified that he worked for Homeland Security and part of his job "in investigating personnel breaches of agents was to keep track of them by phone and other means." Cherokee's testimony demonstrates that he was qualified to provide cell phone tracking testimony using Metro PCS's records based on his knowledge, experience, and training. MRE 702.

The final inquiry involves reliability. "MRE 702 requires the trial court to ensure that each aspect of an expert witness's proffered testimony—including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data—is reliable." *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004). The inquiry is a flexible one and a trial court must ask "whether the opinion is rationally derived from a sound foundation." *Elher v Misra*, 308 Mich App 276, 289-290; 870 NW2d 335 (2014) (internal quotation marks and citation omitted). Cherokee's testimony was based on his specialized knowledge regarding Metro PCS's cell phone towers and cell phone records. He explained how the Metro PCS's towers work and how calls are routed to the various towers. Cherokee used this data to determine the defendants' general location. He explained exactly how the data was reflected in the cell phone records. This was reliable testimony. Therefore, the trial court did not abuse its discretion in qualifying Cherokee as an expert witness regarding the analysis of Metro PCS's records and equipment.

E. RIGHT TO CONFRONTATION

Defendant next argues that Cherokee testified about the reliability of reports prepared by Michigan State Police (MSP) analysts and that defendant was denied the opportunity to confront those witnesses regarding the reports. We review this unpreserved, constitutional issue for plain error affecting substantial rights. *Carines*, 460 Mich at 764.

Defendant correctly notes that the Confrontation Clause of the Sixth Amendment is meant to protect defendants from hearsay evidence that is testimonial in nature. *People v Nunley*, 491 Mich 686, 697-698; 821 NW2d 642 (2012). Out-of-court testimonial statements are inadmissible at trial unless the declarant appears at trial or the defendant had a prior opportunity to cross-examine the declarant. *Id.* at 698. Contrary to defendant's argument, the MSP analysts did appear at trial, the reports were admitted into evidence while they testified, and defendant had the opportunity to cross-examine both analysts. Further, Cherokee did not testify as to the

reliability of the reports. Rather, he was asked look at the GPS markings on the reports indicating the routes that the stolen trucks traveled and testify as to what proximity the various cell phone calls by defendants were in relation to the trucks' routes. Therefore, defendant has failed to establish a Confrontation Clause violation.

F. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the prosecutor presented insufficient evidence to convict him beyond a reasonable doubt of UDAA and larceny. We review de novo claims of insufficient evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010).

"Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact to conclude that the defendant is guilty beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003), aff'd by 472 Mich 446 (2005). Accordingly, we must examine the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Ericksen*, 288 Mich App at 196. All evidentiary conflicts must be resolved in favor of the prosecution, and we "will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *Unger*, 278 Mich App at 222. "Circumstantial evidence and the reasonable inferences it permits are sufficient to support a conviction, provided the prosecution meets its constitutionally based burden of proof beyond a reasonable doubt." *Ericksen*, 288 Mich App at 196. Further, "because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

UDAA, MCL 750.413 provides,

> Any person who shall, wilfully and without authority, take possession of and drive or take away, and any person who shall assist in or be a party to such taking possession, driving or taking away of any motor vehicle, belonging to another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years.

"Larceny is the taking and carrying away of the property of another, done with felonious intent and without the owner's consent." *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996). Brown was specifically charged with stealing property that had a value of $1,000 or more, but less than $20,000. MCL 750.356(3)(a).

Defendant primarily argues that there was no evidence to corroborate Cronan's testimony of his involvement in either crime. To the contrary, however, extensive cell phone and GPS evidence places the three men together in the same area of the Howell Service Center and the stolen truck. Cronan's wife also testified that she witnessed Brown bringing copper wire into the barn at her residence. Further, text messages indicate Brown was acquainted with Cronan and Garten and was involved in the common plan or scheme to steal copper wire where he texted Garten on January 1, 2013, stating, "K we need to check out 96 and Latson Road area. Heard a

new on off ramp being put in there, lots of wire upgrades." Finally, the jury was free to judge Cronan's credibility and give his testimony the necessary weight. *Unger*, 278 Mich App at 222. While the evidence against Brown was certainly more circumstantial, it was still sufficient to convict Brown beyond a reasonable doubt of both crimes. *Ericksen*, 288 Mich App at 196.

G. RESTITUTION

Defendant next argues that the trial court erred by ordering that restitution was joint and several with codefendant Garten, but not codefendant Cronan and by ordering $900 in restitution for the cost to repair a fence that was allegedly cut to access the Howell Service Center because it was not supported by a preponderance of the evidence. We review a trial court's restitution order for an abuse of discretion. *People v Fawaz,* 299 Mich App 55, 64; 829 NW2d 259 (2012).

The Crime Victim's Rights Act (CVRA), which governs restitution to crime victims, provides that "the court shall order . . . that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction . . . ." MCL 780.766(2).

Defendant's presentence investigation report states that DTE was seeking total restitution of $12,135 for the copper wire and investigative costs. Following a restitution hearing for Garten and Brown, the trial court ordered the two defendants to pay joint and several restitution of $5,036.40, which included $3,416.40 for the copper wire,[4] $720 for investigative costs incurred by DTE, and $900 for the fence repair. The trial court's opinion indicated that these figures were DTE's total losses, rather than the $12,135 originally provided in the PSIR. The record does not indicate, however, how much restitution, if any, the trial court ordered against Cronan.

There is no authority mandating the trial court to order that restitution be paid jointly and severally among codefendants. However, ordering that restitution be paid jointly and severally only between Garten and Brown would provide the victim an opportunity to recover additional monies from Cronan if each defendant paid their restitution. Although defendants were not charged with conspiracy, they were each convicted of the same crime against the same victim arising out of the same series of events, and it is clear they acted together. MCL 780.766(2) mandates that the trial court order restitution, making Cronan responsible to pay restitution, as well. Accordingly, if Cronan was ordered to pay restitution over and above the total losses the trial court found of $5,036.40, it provides DTE the opportunity to recover more than what it lost. See *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006) ("Restitution encompasses only those losses that are easily ascertained and are a direct result of a defendant's criminal conduct."). Therefore, we remand for the trial court to order that defendant's restitution be paid jointly and severally with his two codefendants.

With regard to the $900 for the fence repair, when determining the appropriate amount of restitution to order, a court "shall consider the amount of the loss sustained by any victim as a

[4] Based on the record, it appears the trial court arrived at this number based on the recycling yard receipts following the Howell theft.

result of the offense." MCL 780.767(1). Therefore, the loss DTE incurred to repair the fence would be recoverable. However, when the defendant challenges the amount of restitution, the trial court must resolve the dispute by making express findings by a preponderance of the evidence, and the prosecutor bears the burden of demonstrating the amount of the victim's loss. MCL 780.767(4). The trial court's opinion states that based on the evidence presented at the restitution hearing and the trial, and the parties' arguments, it found by a preponderance of the evidence that DTE incurred costs of $900 to repair the fence. Defendant argues that the prosecutor never introduced evidence of an invoice or work order showing that the repair cost $900. Defendant did not provide this Court with the transcripts of the hearing so this Court could properly verify defendant's argument. See *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000) (stating that "defendant bore the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated"). Further, although the trial court's opinion does not specifically explain how it determined the $900, it did find by a preponderance of the evidence that DTE incurred $900 to repair the fence. On this record, it appears the trial court did not err in ordering defendant to pay $900 for the fence.

H. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that he received ineffective assistance of counsel because counsel failed to object to various errors a trial, failed to request DNA testing for the black ski masks and clothing, and failed to challenge the qualifications of the expert witness. Defendant failed to raise this issue in a motion for a new trial or request an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973); therefore, "our review is limited to mistakes apparent from the record." *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008).

Criminal defendants have a right to the effective assistance of counsel under the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. However, effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). To establish that a defendant's trial counsel was ineffective, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see also *Vaughn*, 491 Mich at 669. Defendant must also overcome the strong presumption that counsel's performance constituted sound trial strategy. *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

First, contrary to defendant's argument, defense counsel did object to the other acts evidence when he filed a motion to exclude the evidence before trial. Because the trial court correctly determined that the evidence was admissible, defense counsel was not required to renew the objection. See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998) (noting that defense counsel is not required to make a frivolous or meritless objection). Defense counsel also objected to the qualification of Cherokee as an expert witness. Therefore, these two claims of ineffective assistance are without merit.

Next, defendant argues that counsel was ineffective for failing to request DNA testing on the black ski masks and clothing found at Cronan's residence. Defendant argues that DNA testing would have showed that defendant did not wear the masks or clothes. "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004). In this case, counsel's failure to request DNA testing did not undermine confidence in the trial's outcome. DNA testing is time consuming and expensive. Cronan testified that Brown never wore the masks or clothes at his residence—that he always came dressed in his own clothes. Therefore, it likely would have been a waste of time and money to DNA test the masks and clothes, and defendant has failed to overcome the strong presumption that it was sound trial strategy not to do so.

Next, defendant argues that trial counsel should have objected to evidence that a fence had been cut to gain access to DTE's property because there was no physical evidence to support this assertion. At least three witnesses, including two DTE employees and Cronan, testified that the fence was cut. Defendant provides no authority for the argument that there must be physical evidence to support testimony. Further, every person is competent to be witness, MRE 601, and credibility of a witness is for the jury to decide. *Unger*, 278 Mich App at 222. Accordingly, this claim is without merit.

Finally, defendant argues that defense counsel was ineffective for failing to object to the restitution order. As discussed, on this record, there is no indication that the trial court erred by ordering defendant to pay $900 for the fence repairs. Therefore, counsel is not ineffective for failing to make a frivolous or meritless motion. *Darden*, 230 Mich App at 605. While counsel should have moved the trial court to reconsider its restitution order regarding joint and several liability, counsel's failure to challenge the order does not affect defendant's convictions or warrant a new trial, and we have concluded that a remand for the trial court to order that defendant's restitution be paid jointly and severally with his two codefendants is necessary.

We affirm defendant's convictions, but vacate his sentences and remand for resentencing and for the trial court to order that defendant's restitution be paid jointly and severally with his two codefendants. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Donald S. Owens
/s/ Jane M. Beckering