STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 19, 2011
v	No. 298369 Kalkaska Circuit Court
JOSHUA ANTHONY KOWALEWSKI, Defendant-Appellant.	LC No. 09-003132-FH

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of two counts of unlawfully driving away a motor vehicle (UDAA), MCL 750.413, and breaking and entering a motor vehicle, MCL 750.356a(2)(a). For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

I. FACTS

Defendant's convictions arose from the thefts of two vehicles on the evening of June 1, 2009. Jeffery Sieting testified that he left the keys inside of his 1998 red Dodge Ram pickup truck when he parked it in his garage. He further testified that he had just put a new motor in the truck, the truck only had a temporary exhaust system, and it was low on transmission fluid. At approximately 1:00 a.m., Sieting ran outside when he heard the truck start. Sieting saw someone revving the truck's engine in an attempt to put it into gear. Sieting testified that he could not identify the person driving the truck; he could see only an outline of the individual, who appeared to be "tight-haired" with a short haircut, or wearing a ski cap. Sieting had just approached the driver's door when the person backed the truck down the driveway. After failing to catch the truck on foot, Sieting returned to his house and called 911.

Michigan State Police Trooper Robert Ziecina testified that he and Trooper Rick Sekely received a call concerning the stolen truck at 1:00 a.m. They located the truck approximately five minutes later in the parking lot of the Birch Street Dental office. Both Ziecina and Sekely testified that no one was near the truck when they found it. The troopers told the Kalkaska Sheriff's office that they had located the truck, and waited for the county officers to arrive.

Jamie Lynn Cousino testified that, the same evening, she and her roommate were at their home across the street from the Birch Street Dental office. Cousino testified that defendant

arrived at her house on foot at approximately 2:00 a.m. She testified that it was not uncommon for defendant to come to her house in the middle of the night and that he usually walked or rode his bike. According to Cousino, defendant was wearing a black "hoodie," which was also not unusual, and he had gloves hanging out of his pockets. Cousino noticed several police officers across the street at the dental office, and she also saw the truck in the parking lot. At her roommate's insistence, defendant left the house through a side door.

Daniel North testified that he left his keys in his silver station wagon when he parked it on the road in front of his house on Walnut Street. North went to bed between 9:30 p.m. and 10:00 p.m., and awoke at 4:30 a.m. to find the car missing. Trooper Sekely testified that he received a report from a sheriff corrections officer that he had seen a car matching the description of North's car abandoned on I-131 south of Kalkaska. North testified that after the police returned his car to him, he observed that the clutch would no longer engage. North also testified that he kept a number of compact discs (CDs) in the car, including compilations on which he had written his name. North recalled that he had reset the odometer earlier that day and that, when the car was returned to him, the odometer showed that the car had been driven four miles.

Trooper Ziecina testified that a sheriff deputy asked him to go with his partner to the Next Door Store because he had received a call concerning "information on a possible suspect in the stolen vehicles they were having in the village." The troopers spoke with the store's manager and took a description from her. Because they had information that the suspect had been drinking earlier in the evening, Ziecina and Sekely also spoke with the bartender of a nearby bar. The two then returned to the Next Door Store and determined the distance from the store to Sieting's home. After the troopers returned to the police post, they ascertained defendant's address, and unsuccessfully tried to contact him at home at 1:30 a.m. and at 3:15 a.m. At approximately 4:15 a.m., Ziecina and Sekely found defendant near the Next Door Store and detained him on an unrelated alcohol offense.

Ziecina testified that no fingerprints were found in North's car; however, police officers found a short blondish-colored hair, similar to defendant's hair length and color at the time of his arrest. North also identified six CDs that were taken from defendant when he was arrested, and troopers also found gloves and an LED flashlight in defendant's possession. Ziecina testified that approximately a week after his arrest, defendant admitted that he had taken the CDs from a car. Defendant also admitted that the hair was probably his, and that he was in the car.

II. INSUFFICIENT EVIDENCE

Defendant argues that the prosecution presented insufficient evidence to support his UDAA convictions. We review a defendant's allegations regarding insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). In reviewing this claim, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id*. Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and the reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences fairly can be drawn from the evidence and the weight to be accorded to those inferences. *People*

v Hardiman, 466 Mich 417, 428; 646 NW2d 158 (2002); *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992) amended on other grounds 441 Mich 1202 (1992). 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).

To support a conviction for UDAA, the prosecution must show: "(1) possession of a vehicle, (2) driving the vehicle away, (3) that the act is done wilfully, and (4) the possession and driving must be done without authority or permission." *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993). Here, defendant challenges the element of identity as to both offenses. Identity is an essential element of any crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976).

We hold that there was sufficient evidence to find defendant guilty of UDAA of North's car. As discussed, evidence showed that (1) defendant was present in the car, both through his own admission, the hair evidence, and the circumstantial evidence of defendant's possession of the CDs that North testified belonged to him; (2) defendant had criminal intent, as indicated by his theft of the CDs and evidence that he was found with gloves in his possession when the crime occurred; (3) the car, which North testified had keys in it when he parked it, was moved from his home to another location; (4) the car was damaged when it was found; (5) the theft of the CDs occurred on the same night as the theft of the car, and on the same night defendant was found to be in possession of the CDs; and (6) the thefts and other events occurred within walking distance. Viewing the direct and circumstantial evidence here in the light most favorable to the prosecution, defendant was in the car on the night of the theft, he had at least some form of criminal intent at the time he was present in the car,[1] the opportunity existed for him to steal the car because the keys were in it, and the car was moved and abandoned after it became disabled. This evidence and the inferences arising reasonably therefrom were sufficient to identify defendant as the person who took the car and thus to support the UDAA conviction for the car.

However, we hold that the prosecutor presented insufficient evidence to show that defendant stole Sieting's truck. Unlike the theft of the car, no direct evidence linked defendant to the theft of the truck. Moreover, the only circumstances tying defendant to the truck were his relative proximity to it, including his arrival at a home across the street from where the truck was found approximately an hour after it was found. Even when added to any inferences to be drawn as to his intent from the theft of CDs from another car, the fact that defendant possessed gloves and a flashlight, and that his appearance was not totally incompatible with Sieting's description, it is not enough to prove defendant's identity as the perpetrator. We hold that the evidence presented was insufficient to allow an objective jury to find beyond a reasonable doubt that defendant was the person who took the truck.

III. ADMISSION OF EVIDENCE

[1] Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

Over objection, the trial court allowed the prosecution to introduce testimony from police officers concerning information the officers received regarding defendant as a possible suspect in the thefts. Defendant argues that the evidence was irrelevant and unduly prejudicial as was information concerning the circumstances surrounding defendant's arrest and what led to his arrest. He further argues that the testimony concerning the information given by the bartender to the officers constituted impermissible hearsay.

The trial court overruled defendant's objection on relevancy grounds to testimony concerning the troopers' actions in questioning a bartender about the possible description of the thief. Thus, defendant preserved this issue. However, defendant did not raise any other objections to the introduction of this evidence. Because an objection on one ground is insufficient to preserve an appellate attack on a different ground, *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), defendant's alternate appellate challenges concerning this evidence are not preserved. Nor did defendant challenge the admissibility of the evidence of the circumstances of his apprehension. We review the preserved evidentiary challenge for an abuse of discretion, *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010), and the unpreserved challenges for plain error affecting defendant's substantial rights, *People v Hanks*, 276 Mich App 91, 92; 740 NW2d 530 (2007).

Defendant argues that the prosecutor elicited irrelevant testimony from Trooper Ziecina regarding information he and his partner had obtained from the bartender, concerning "information as to a potential suspect." Defendant also maintains that the evidence of the circumstances of defendant's arrest was irrelevant. We reject both arguments. The evidence concerning the questioning of the bartender was offered to show the police officers' motivation in seeking defendant in connection with the theft of the truck. This in turn led to defendant's eventual apprehension, and the subsequent discovery of the CDs, which directly linked him as having been present in North's car. The circumstances of defendant's movements during the evening and his later arrest were thus relevant to prove defendant's identity as the perpetrator of the theft of North's car and served as direct evidence to show defendant committed breaking and entering a motor vehicle.

Defendant's hearsay argument also lacks merit. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). When asked whether the bartender provided information regarding a potential suspect, Trooper Ziecina responded, "Yes she did." This response does not recount any assertion made by the bartender. Moreover, the evidence was proffered only to show the effect on Ziecina. "[A] statement offered to show why police officers acted as they did is not hearsay." *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007).

We also reject defendant's claim that the evidence of the troopers' investigation and apprehension of defendant was inadmissible under MRE 403. MRE 403 provides as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

As discussed, the evidence was relevant. All relevant evidence is inherently prejudicial to some extent, and it is only unfairly prejudicial evidence that may warrant exclusion. *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994). "'This unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock.'" *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995) (citation omitted). This evidence cannot be characterized as "interjecting considerations extraneous" to the prosecution given the trial's focus on the identity of the perpetrator.

IV. JURY INSTRUCTIONS

Defendant contends that the trial court erred when it failed to provide the jury with an instruction on "mere presence." He further maintains that counsel's failure to request the instruction was objectively unreasonable.

Because defendant failed to preserve this challenge to the trial court's jury instructions, we again review for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. Substantial rights are affected when a defendant is prejudiced, meaning the error affected the outcome of the trial. *Id*. at 763. As to defendant's concurrent claim of error, defendant did not move for a new trial on the basis of ineffective assistance of counsel, and failed to request a *Ginther*[2] hearing before the trial court; therefore, his claim of ineffective assistance of counsel is also not preserved. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). This Court's review of an unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *Id*.

A trial court must instruct the jury concerning the law applicable to the case and must fully and fairly present the case to the jury in an understandable manner. MCL 768.29; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995) modified on other grounds 450 Mich 1212 (1995); *People v Jones*, 419 Mich 577, 579; 358 NW2d 837 (1984). Jury instructions should be considered in their entirety, rather than extracted piecemeal, to determine whether there was error requiring reversal. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). "Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id*.

The mere presence instruction provides, "Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that [he] was present when it was committed is not enough to prove that [he] assisted in committing it." CJI2d 8.5. As the language of the instruction makes clear, it only applies to an aiding and abetting theory of guilt. As to the UDAA of the truck and the car, defendant was not charged as an aider and abettor and the prosecutor did not argue an aiding and abetting theory at trial. Rather, the prosecutor's theory at trial was that defendant was the person who drove away both the truck and the car. Further, defendant did not claim that he was merely present while someone else drove away the truck or the car. The instruction is inapplicable to the theories or defenses of either the

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

prosecutor or defendant, and the trial court did not err when it failed to provide this instruction to the jury. *Mills*, 450 Mich at 80; *Bell*, 209 Mich App at 276. Moreover, defense counsel's failure to object was not objectively unreasonable. Because the "mere presence" instruction did not fit the theories presented at trial, an objection on this ground would have been meritless. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Because we vacate one of defendant's UDAA convictions, we direct the trial court to review whether this affects the guidelines scoring of defendant's remaining convictions and take other action as appropriate.[3] We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Pat M. Donofrio

[3] We note that the judgment of sentence appears to contain a typographical error. While the notation on the second page of the document states that both UDAA sentences were to be 45 to 240 months in prison, which is consistent with the trial court's sentencing decision, the first page has a minimum sentence of 48 months for count two, the theft of the car. Our reversal of one of defendant's UDAA convictions requires the trial court to revisit its sentencing decision. However, should the trial court find that resentencing is not appropriate, the trial court should nevertheless make the ministerial correction to the judgment of sentence to accurately reflect defendant's sentence.