

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 20, 2011

V

No. 298986
Wayne Circuit Court
LC No. 09-001994-FH

RICKY J. BALLARD,

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

V

No. 299626
Wayne Circuit Court
LC No. 09-001994-01

RICKY J. BALLARD,

Defendant-Appellant.

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of larceny by conversion in an amount between \$1,000 and \$20,000, MCL 750.362, and practicing as a residential builder without a license, MCL 339.601(3) and (6)(a). In August 2009, he was sentenced to three years' probation with 52 weekends to be served in jail, and he was ordered to pay restitution of \$61,000. Defendant subsequently violated his probation and was resentenced in May 2010 to another three-year term of probation but with 365 days to be served in jail. The court also reimposed the \$61,000 restitution obligation. Defendant now appeals as of right in Docket No. 298986 from the judgment of sentence for his probation violation, and he appeals by delayed leave granted in Docket No. 299625 from the August 2009 judgment of sentence on his original convictions. We affirm.

Defendant's convictions stem from a transaction regarding a residential construction project in Detroit. Gwendolyn Burton, the victim, testified that she met with defendant in November 2007 to discuss repairs to her house, which had sustained fire damage. The victim

and defendant entered into a contract in November 2007, the victim gave defendant a check for \$15,000 on November 12, 2007, and defendant commenced the repair work that month. After defendant had completed the first phase of the repairs, the victim gave defendant a second check for \$12,500 on November 29, 2007. On December 14, 2007, the victim wrote defendant a third check in the amount of \$5,700.

The focus of the larceny charge involved a December 24, 2007, transaction between the victim and defendant. The victim testified that defendant called her on December 23, 2007, to advise that he needed a deposit for some windows that he had already measured. The victim met with defendant on December 24, 2007, they signed a contract for the windows, and the victim gave defendant a check for \$5,000 “for the windows,” which defendant was to purchase. The victim estimated that she subsequently called defendant “about fifty times” without success before she suffered a mild heart attack and was hospitalized in January 2008. During her hospitalization, she was able to contact defendant, who told her that he “just had to put the casing around the windows and they should be finished within a day or two.” When the victim visited her home the first week in February 2008, she discovered that defendant had not installed the windows. The victim was unsuccessful in her attempts to contact defendant afterward, and he never installed the windows.

Defendant testified that the \$5,000 payment on December 24, 2007, was not for the windows alone, but rather represented a deposit for three contracts encompassing the purchase of kitchen cabinets, painting, and the balance for the windows,. Defendant conceded that, while he was responsible for buying and installing the windows, he did not order them. Defendant stated that he had spent the \$5,000 to buy cabinets, pay his painters paint bill, and install glass block basement windows. According to defendant, after the victim was released from the hospital, she informed him that she wanted to get someone else to do the windows and he agreed to work out the credit and apply it toward other work that defendant performed for the victim.¹ When asked why he had not refunded any money to the victim, he responded that “we never sat down and agreed to anything.” Defendant denied that he ever told the victim that the windows were ordered or had arrived.

Defendant initially challenges the sufficiency of the evidence supporting his larceny by conversion conviction. Defendant asserts that because the victim “conveyed both title and possession” of the December 24, 2007, check to him, he cannot be guilty of larceny by conversion. We review de novo a challenge to the sufficiency of the evidence. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004).

When 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

¹ Defendant specified that he had paid a company \$2,880 to repair the victim’s furnace and install new duct work, and also arranged for plumbing repairs, cleaning out fire-damaged materials inside the victim’s garage, and replacing attic insulation, among other additional items of work the victim had requested.

that the essential elements of the crime were proven beyond a reasonable doubt. The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000) (internal quotations omitted).]

“It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).²

This Court has summarized the requisite elements for establishing a larceny by conversion pursuant to MCL 750.362:

(1) [T]he property at issue must have some value, (2) the property belonged to someone other than the defendant, (3) someone delivered the property to the defendant, irrespective of whether that delivery was by legal or illegal means, (4) the defendant embezzled, converted to his own use, or hid the property with the intent to embezzle or fraudulently use it, and (5) at the time the property was embezzled, converted, or hidden, the defendant intended to defraud or cheat the owner permanently of that property. [*People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001) (internal quotation and citations omitted)].

“[L]arceny by conversion occurs ‘where a person obtains possession of another’s property with lawful intent, but subsequently converts the other’s property to his own use.’” *Id.*, quoting *People v Christenson*, 412 Mich 81, 86; 312 NW2d 618 (1981).

In *Mason*, 247 Mich App at 73-79, this Court examined the issue of when legal title to money is given. In the five consolidated cases at issue in *Mason*, the defendant had entered into five contractual agreements with prospective purchasers of mobile homes, each of whom made substantial down payments. The defendant deposited those funds into a personal bank account or negotiated the instruments without ever obtaining or ordering the mobile homes. *Id.* at 66-69. With respect to the defendant’s suggestion that the mobile home purchasers had surrendered the legal title of their down payments to him, the Court analyzed, in relevant part, as follows:

[W]e think it plain under the circumstances of the five cases being appealed, including the contracts for sale, that *each complainant intended to retain legal title to the down payment money, though not possession of it, until each complainant received the home each sought to purchase*. It would make little sense for each of these complainants to intend to give their hard-earned money to Mason to keep irrespective of whether they ever received the home for

² See also *People v Kanaan*, 278 Mich App 594, 618-619; 751 NW2d 57 (2008) (describing the same standards applicable to review of a bench trial).

which they bargained, especially with no contractual provision to that effect. . . . Read as a cohesive whole, each contract contemplated an exchange of goods (the home being purchased) and services (Mason's assistance as a dealer in completing that transaction) for each complainant's money. *Without a completed transaction, or any negotiation for a purchase-sale in certain instances, Mason can hardly claim that he was entitled to keep even a portion of the money each complainant gave him, especially in the absence of any contractual language to that effect.* [*Id.* at 74-75 (emphasis added).]

The Court in *Mason* distinguished the circumstances of *Christenson*, 412 Mich 81, in which homeowners had "made progress payments to the defendant," *Mason*, 274 Mich App at 76, on the ground that

the homeowners and the defendant [in *Christenson*] did not have an agreement concerning *specific funds*. In other words, had the defendant agreed to take the money the homeowners gave him only to pay the debts at issue, then he would have been guilty of larceny by conversion because he would have had possession of the money only for the purpose of giving it to these creditors, but used it for other purposes. The defendant, though in actual possession of the money, never would have obtained legal title to the money under those facts because he could not do with it as he wished, a limitation that generally does not exist for title owners of property. [*Id.* at 76-77 (emphasis added, footnotes and internal citation and quotations omitted).]

The larceny charge against defendant stemmed from the December 24, 2007, check in the amount of \$5,000, which the victim testified was intended for defendant's purchase of new windows for her house. According to the victim, she spoke to defendant the previous day, and he advised her that he had measured the dimensions of the windows and needed a deposit to order them. The testimony of the victim and defendant agreed that although the victim gave defendant the check, he never ordered the windows, contrary to his representations to the victim in January 2008.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the trial court to find beyond a reasonable doubt that (1) the victim gave defendant only possession of the December 24, 2007, check, with the specific expectation that defendant would acquire and install windows with the money, and (2) when defendant neglected to apply any portion of the December 24, 2007, check to a window purchase, he wrongfully converted to his own use an amount of money in excess of \$1,000. *Mason*, 247 Mich App at 72. The victim's testimony describing her many unsuccessful efforts to contact defendant, and defendant's lies to the victim when they finally spoke about his completion of the window installation, reasonably support the trial court's determination beyond a reasonable doubt that defendant "intended to

defraud or cheat . . . [the victim] permanently of that property.” *Id.*³ We thus reject defendant’s argument that insufficient evidence supported his larceny by conversion conviction.

Defendant additionally attacks the trial court’s order of restitution, on the grounds that “the . . . court did not make detailed findings supported by a preponderance of the evidence and denied Mr. Ballard his right to a restitution hearing.” “This Court reviews a restitution order for an abuse of discretion.” *People v Cross*, 281 Mich App 737, 739; 760 NW2d 314 (2008). But “[w]hen the question of restitution involves a matter of statutory interpretation, this Court reviews the matter de novo.” *Id.*

“Crime victims retain both statutory and constitutional rights to restitution. Const 1963, art 1, § 24; MCL 780.766.” *Cross*, 281 Mich App at 739.

[W]hen sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, 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) (emphasis added).]

MCL 780.767 provides, in pertinent part:

(1) In determining the amount of restitution to order under section 16, the court shall consider *the amount of the loss sustained by any victim* as a result of the offense.

* * *

(4) Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney. [Emphasis added.]

“[T]he amount of restitution should be based upon the evidence.” *People v Gubachy*, 272 Mich App 706, 713; 728 NW2d 891 (2006) (internal quotations omitted).

In *Gubachy*, 272 Mich App at 713, this Court summarized the legislative purpose behind the crime victim restitution statutes:

In our view, the Legislature has clearly manifested an intent to make victims of crime as whole as they can fairly be made and to leave the determination of how best to do so to the trial court’s discretion on the basis of the evidence presented and subject to the prosecuting attorney’s burden of proving losses attributable to [the] defendant’s crime-related acts. The CVRA was not

³ The trial court’s factual findings indicate that the court found the victim’s testimony credible.

intended to be narrowly construed merely as a special-purpose replevin action: the focus is consistently not on what a defendant took, but what a victim lost because of the defendant's criminal activity. . . .

In this case, the victim filed a request for restitution that identified 11 components: (1) "Payments made to Rick Ballard (checks)," \$38,700; (2) "Home Depot Receipts," \$5,730.49; (3) "Scheer's Hardware Store," \$122.66; (4) "Sherwin Williams Paint Store," \$104.38; (5) "Wyoming Plumbing: furnace repair material," \$556.70; (6) "Repair Furnace," \$1,500; (7) "Weather King Windows," \$5,476.27; (8) "Crandall Worthington: Cleaning supplies," \$35.48; (9) "Payments . . . made to repair persons (checks)," \$27,528.03; (10) "Temporary Housing Costs: Merrillwood Apts. (\$1,590.00 monthly 3/08-2/09)," \$19,080; and (11) "Star EMS Transportation," \$403. The restitution requests totaled \$99,237.01.

Defense counsel suggested at the sentencing hearing that the trial court order restitution of only \$2,440, the value attributable to "the window portion of" the December 24, 2007, check. The prosecutor responded that the victim should receive the entire amount of the December 24, 2007, check, and approximately \$90,000 more in additional restitution. The victim addressed the court at some length and specified some of the expenses she had incurred as a result of defendant's actions: the cost of a residence rented between February 2008 (when the victim's homeowner's insurance company ceased paying for her to stay elsewhere), and March 2009 (when she returned to her house); the costs involved in the purchase and installation of new windows; and expenses related to "health problems" she suffered. It is noteworthy that her request for restitution related to her "health problems" was limited to the cost of EMS transportation when she suffered a heart attack that she attributed to the stress of being out of her home due to defendant's failure to install the windows and repair her furnace. Defendant insisted, as he had at trial, that in lieu of returning a portion of the victim's December 24, 2007, check, he had applied the money toward "extra work [he did] at her house," like furnace repair, plumbing, and other work. The trial court asked defendant if he disputed the necessity of the \$2,056.70 itemizations for furnace repair that appeared on the victim's restitution request, and defendant replied that someone likely had taken advantage of the victim because he already had fixed the furnace. The trial court found the victim's sentencing hearing testimony credible. With regard to the victim's restitution requests, the trial court noted her health problems and temporary housing costs, before concluding as follows:

I'm going to grant restitution in the amount of \$6[1],000. And I am subtracting from the ninety-nine [thousand requested], the thirty-eight, seven[] [hundred] that was paid by the insurance company, checks that were given to Mr. Ballard[,] and including the temporary housing and all the other things that are on the request for restitution.

Concerning defendant's assertion that the trial court deprived him of due process, MCL 780.767(4) "affords criminal defendants adequate process so that there is no constitutional violation," because "the statute affords [the] defendant an evidentiary hearing when the amount of restitution is contested and further provides that the prosecution bears the burden of establishing the proper amount." *People v Gahan*, 456 Mich 264, 275-276; 571 NW2d 503 (1997). In this case, the trial court held a restitution hearing when it devoted a portion of the

sentencing hearing to testimony by the victim and defendant concerning restitution, and the court's review of the victim's list of restitution requests.

We further conclude that the prosecution proved by a preponderance of the evidence, through the introduction of the list of restitution expense requests and the victim's testimony, that the victim sustained amounts of loss totaling approximately \$61,000. MCL 780.767(1)(a). We disagree with defendant's contention that the trial court made inadequate factual findings to support a restitution award encompassing nearly all the listed entries on the victim's restitution request. Although the trial court did not go through the listed items and specifically approve or disapprove each of them, the court found the victim's account of the expenses credible, and explained its view of the necessity of including post-February 2009 rent as an element of restitution. In light of (1) the purpose behind the restitution statutes to reimburse crime victims as fully as possible, *Gubachy*, 272 Mich App at 713, (2) the presentation of the list of requested restitution and the victim's testimony, and (3) the absence of any evidence in rebuttal to the prosecutor's evidence and defendant's failure to ask for the production of additional documentary evidence substantiating the requested restitution elements, we conclude that the trial court made sufficient factual findings to support its order of restitution, *People v Lanzo Constr Co*, 272 Mich App 470, 479; 726 NW2d 746 (2006) (generally, "[i]f the trial court was aware of the issues in the case and correctly applied the law to the facts, its findings are sufficient"), and that a preponderance of the evidence of record supported the victim's entitlement to \$61,000 in restitution. Additionally, we are satisfied that the amounts sustained by the victim resulted from defendant's abandonment of the construction project at the victim's house. Defendant's failure to complete his work by February 2008, when the victim's insurance reimbursement for an alternate residence concluded, caused the victim to incur the cost of housing through early 2009, as well as the amounts necessary to complete the refurbishment of her house. MCL 780.767(1)(a) (directing a court to consider "the amount of loss sustained by any victim *as a result of the offense*") (emphasis added).

In summary, the trial court did not abuse its discretion when it ordered defendant to pay the victim restitution totaling \$61,000. *Cross*, 281 Mich App at 739.

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause