

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS LOWELL PASCALE,

Defendant-Appellant.

UNPUBLISHED

October 6, 2011

No. 299016

Kalamazoo Circuit Court

LC No. 2009-000813-FH

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

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, of larceny, \$1,000 or more but less than \$20,000, MCL 750.356(3)(a). Defendant was sentenced to 15 days in jail and five years of probation and ordered to pay fines, costs, and restitution. We affirm defendant's conviction but vacate the restitution award and remand this case for a restitution hearing.

Defendant first claims there was insufficient evidence to support his conviction. This Court reviews de novo a claim of insufficient evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In performing this review, this Court must view the evidence "in a light most favorable to the prosecution . . ." See *id.* at 683. "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). This Court must determine if there was sufficient evidence for a rational trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). "All conflicts in the evidence must be resolved in favor of the prosecution . . ." *People v Unger (On Remand)*, 278 Mich App 210, 222; 749 NW2d 272 (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). Additionally, MCL 750.356(3)(a) requires a showing that the property had a value of at least \$1,000 and less than \$20,000. See *People v Pratt*, 254 Mich App 425, 428-429; 656 NW2d 866 (2002).

There was significant circumstantial evidence linking defendant to the theft of musical instruments from the instrument control room. “Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime.” *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Viewed in the light most favorable to the prosecution, the evidence showed defendant was one of only a few people with access to the instruments, defendant was caught in the instrument control room after hours and lied about it, defendant lied to police about having the key to the instrument control room on his personal key chain, defendant made suspicious comments to coworkers about stealing instruments from the room, and, most importantly, defendant’s father sold five of the stolen instruments on eBay. “A jury may infer consciousness of guilt from evidence of lying or deception.” *Unger*, 278 Mich App at 227. The jury was “free to believe or disbelieve” defendant’s father’s story that he innocently purchased the instruments from a man named David Ogden. *People v Eisenberg*, 72 Mich App 106, 115; 249 NW2d 313 (1976). A rational trier of fact could disbelieve defendant’s father’s story that Ogden existed, because defendant was unable to present any evidence of Ogden’s existence. This Court will not interfere with the trier of fact’s credibility determinations. *Kanaan*, 278 Mich App at 619. Also, there is no dispute that the value of the property was between \$1,000 and \$20,000.

In sum, the circumstantial evidence and reasonable inferences arising from the evidence, viewed in the light most favorable to the prosecution, was sufficient to show that defendant stole musical instruments and carried them away with felonious intent, that the taking was without the consent of the owner, and that the value of the property was between \$1,000 and \$20,000, thus satisfying the essential elements of larceny.

Defendant next claims the prosecutor committed misconduct in referring to Ogden as a “boogeyman” during closing arguments. Claims of prosecutorial misconduct are reviewed de novo to “determine whether defendant was denied a fair and impartial trial.” *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). “Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor’s remarks in context.” *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Because defendant failed to object to the allegedly improper references, his claim of error is unpreserved. Unpreserved instances of prosecutorial misconduct are reviewed for plain error. *Unger*, 278 Mich App at 235. Error requiring reversal cannot be found where a curative instruction would have “alleviated any prejudicial effect.” *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003). “Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, . . . and jurors are presumed to follow their instructions.” *Unger*, 278 Mich App at 235.

To demonstrate plain error warranting appellate relief, a defendant must show that: (1) error occurred; (2) the error was plain; and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). “The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Id.* The burden is on the defendant to demonstrate prejudice. *Id.* Even if these three prongs have been established, this Court must exercise its discretion in deciding whether reversal is warranted. *Id.* Reversal is not warranted unless the plain error resulted in a conviction of an “actually innocent defendant” or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764.

The prosecutor called Ogden a boogeyman to highlight her theory that Ogden did not exist. Where a defendant's theory of the case suggests a crucial witness, but the defendant is unable to produce the witness or any evidence that the witness exists, it is not improper for a prosecutor to suggest that "the alleged witness is a fictional character." *People v Fields*, 450 Mich 94, 117-118; 538 NW2d 356 (1995). A prosecutor's remarks are not considered in a "vacuum" and "must be read in context." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). "A prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief . . . and is not required to state inferences and conclusions in the blandest possible terms." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Further, the boogeyman references challenged by defendant came during the prosecutor's closing argument, and prosecutors are generally given "great latitude regarding their arguments" *Unger*, 278 Mich App at 236. Viewing the limited nature of the boogeyman references in context, the prosecutor's reference to Ogden as a boogeyman was not plain error. Moreover, the jury was specifically instructed that the lawyers' statements and arguments were not evidence. "[J]urors are presumed to follow their instructions" *Id.* at 235. Therefore, defendant has failed to demonstrate that the prosecutor's references to Ogden as a boogeyman constituted plain error affecting his substantial rights.

Finally, defendant claims he was denied due process because the trial court failed to hold a restitution hearing. When restitution is awarded under the Crime Victims' Rights Act, MCL 780.751 *et seq.*, "[a]ny 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." MCL 780.767(4).

The trial court itself stated that "[t]here may be some dispute in the end about the total amount" of restitution. Restitution was set at \$139,147, but this amount was based on instruments missing according to a 2007 inventory sheet.¹ Defendant did not begin working in the instrument room until the start of the fall 2008 semester. There was a dispute at trial regarding whether the loss of all the instruments claimed to be missing by the prosecutor should be attributed to defendant, and the trial court itself acknowledged this dispute. In light of these facts, and in light of the fact that defendant argues on appeal that his attorney rendered ineffective assistance of counsel by failing to adequately request a restitution hearing,² we vacate the restitution award and remand this case for a restitution hearing. The totality of the evidence demonstrates that the lack of a restitution hearing was either a plain error affecting substantial rights, see *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008), or resulted from ineffective assistance of counsel, see *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294

¹ Defendant's conviction was based on the theft of five instruments, but the prosecutor alleged that defendant was responsible for the loss of many more instruments than just these five.

² Defense counsel indicated at sentencing that there was an issue concerning the recommended amount of restitution. The record is somewhat ambiguous, but counsel implied that this issue would be dealt with at a later time. It appears he never followed up on the issue.

(2001), and it is possible that defendant was ordered to pay a greater amount in restitution than was warranted by the evidence.

Affirmed but remanded for a restitution hearing in accordance with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Jane M. Beckering