STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 28, 2012
v	No. 301705 Crawford Circuit Court
JESSIE LEE BAKER, Defendant-Appellant.	LC No. 09-002877-FC

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of breaking and entering a building with intent to commit a larceny therein, MCL 750.110. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to serve a prison term of four to twenty years with credit for 42 days served. For the reasons set forth in this opinion, we affirm the conviction and sentence of defendant.

This case originates from the theft of property in Crawford County belonging to Harold Jackson. Mr. Jackson lives in Hastings, Michigan, and owns a home in Crawford County. In March 2009, the Red Cross contacted Jackson about whether he would be willing to rent his Crawford County house to defendant and his girlfriend, whose home had recently been destroyed by a fire. Jackson agreed, and had a brief telephone conversation with defendant, wherein Jackson testified he informed defendant that the rental arrangement was only for the house, the pole barn that accompanied the land was "off-limits." After defendant and his girlfriend moved out of the house, Jackson discovered that defendant had accessed the pole barn and that a number of Jackson's possessions were missing from the barn. Jackson contacted the state police, who contacted defendant and requested that he come in for an interview. Defendant admitted to having entered the pole barn, but claimed Jackson had given him permission to do so. Defendant initially denied taking and selling or attempting to sell any of Jackson's property, but after being confronted with contrary statements by Jackson's neighbor, Lawrence Bonk, defendant confessed to having taken and sold some of Jackson's possessions because he needed the money.

On appeal, defendant argues that there was insufficient evidence to support his conviction. In reviewing a challenge to the sufficiency of the evidence, we examine the evidence in the light most favorable to the prosecution to see if there was sufficient evidence to permit a

rational juror to find proof beyond a reasonable doubt of each element of the crime. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991).

Under MCL 750.110, the three elements of breaking and entering with intent to commit larceny therein are: (1) breaking into a building; (2) entering into that building; and (3) possessing the intent to commit a larceny. *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998). The issue raised on appeal is whether defendant had permission to enter the pole barn, thus negating the elements of breaking and entering. *Id*. at 659. (There is no breaking if the defendant had the right to enter the building), citing *People v Brownfield*, 216 Mich App 429, 432; 548 NW2d 248 (1996).

At trial, a hand-written statement from defendant to the prosecutor attesting that Jackson gave him permission to enter the pole barn was introduced into evidence. But Jackson took the stand and testified as follows:

> *Q*: Did you ever talk to [defendant] about the agreement to rent the house?
> *A*: At that particular time, I gave him a price, and I can't even tell you now what that was, but it was strictly the house, because I hadn't moved anything out of the pole barn or out of the store room in the house or anything. I hadn't moved a thing. That was not included in the house. And that was the only time that I had—well, the only time I ever laid eyes on him was the last meeting that we had here six months ago or so.
> *Q*: Okay. So tell us how did you let him know that it was only the house, and the pole barn was off limits?
> *A*: That's what I told him on that phone call.

In determining whether the prosecution has presented sufficient evidence to sustain a conviction, an appellate court is required to apply the standard adopted by this Court in *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979), cert den 449 U.S. 885 (1980). "There, we stated that a reviewing court 'must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt.'" *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, amended 441 Mich 1201 (1992). Here, defendant argues that the letter he wrote to the prosecutor asserting Jackson's permission to enter the pole barn coupled with the fact that the victim's brother gave the keys to the pole barn along with the keys to the house to defendant, indicate that defendant had permission to enter the pole barn. However, testimony from the victim elicited by the prosecution at trial and cited above, clearly indicated that defendant was specifically told that the pole barn was not part of the rental agreement, and that the pole barn was "off limits." Additionally, the victim's brother testified the he did not alter the rental agreement in any manner relative to defendant's right to enter the pole barn when he delivered the keys. Thus, while defendant's unsworn letter may have put the issue into debate, the amount and type of evidence presented by the prosecution on this issue provided sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant did not have permission to enter the pole barn. Accordingly, defendant is not entitled to relief on this issue.

Next, defendant argues that the admission of improper testimony denied him a fair trial and his right to due process. Defendant did not object to any of the testimony complained of, and this issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). An unpreserved claim of non-constitutional error is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant bears the burden of demonstrating that it is more probable than not that the alleged erroneous admission of certain testimony affected the outcome of the trial, and even on such a showing, reversal is only warranted if defendant is actually innocent or the error "seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. at 763; *People v Blackmon*, 280 Mich App 253, 261; 761 NW2d 172 (2008).

First, defendant argues that references to the Red Cross, to the mess left inside the Crawford County house after he moved out, and references to the sinking of Bonk's boat were inadmissible, irrelevant and prejudicial testimony used to show defendant as a "bad man." Under MRE 404(b)(1), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

Our review of the record leads us to conclude that none of the testimony cited above was admitted "to prove the character of a person in order to show action in conformity therewith." In his brief, defendant implies that the prosecutor argued that defendant's financial difficulties made it more likely defendant committed the crime. However, defendant does not cite to any portion of the record where such an allegation was raised by the prosecution, and we find none. Rather, the circumstances under which defendant came to rent was background information used as part of the res gestae of the crime. "It is proper to provide background information to the jury to allow them to examine the full transaction." *People v Malone*, 287 Mich App 648, 661-662; 792 NW2d 7 (2010). "The more the jurors kn[ow] about the full transaction, the better equipped they [are] to perform their sworn duty." *People v Sholl*, 453 Mich 730, 742, 556 NW2d 851 (1996). See also *Malone*, 287 Mich App at 662. Hence, the fact that the rent on the home was initially going to be paid by the Red Cross was relevant as far as it applied to defendant's motive in selling Jackson's possessions, and defendant himself admitted to selling Jackson's possessions because he needed the money.

Second, defendant's argument that references to the unkempt condition of the Crawford County house after defendant left were irrelevant and used by the prosecution to show defendant to be a "bad man" is also without merit. Here, the prosecutor used the poor condition of the house as evidence of the lack of respect defendant had for Jackson's property; a lack of respect that paralleled the lack of respect he showed for the personal property inside the pole barn. As such, the complained of testimony was admitted to show the absence of mistake or accident in defendant's actions with regard to the pole barn, and is admissible under MRE 404(b)(1).

Third, defendant's argument that the prosecution used Bonk's story about defendant sinking Bonk's boat to show that defendant is a "bad man" is without merit. Bonk's first reference to the boat being sunk was unprompted and the prosecutor did not follow up on it on direct examination other than to interject, "Really?" Review of the testimony complained of, clearly reveals that the remark was an unresponsive answer to a proper question. "[A]n unresponsive, volunteered answer to a proper question is not cause for granting a mistrial."

People v Lumsden, 168 Mich App 286, 299; 423 NW2d 645 (1988). Accordingly, defendant is not entitled to relief on this issue.

Defendant also cites a section from the transcript where his counsel asked about the matter on cross-examination. "[I]n general, an appellant may not benefit from an alleged error that the appellant contributed to by plan or negligence." *People v Witherspoon (After Remand)*, 257 Mich App 329, 333; 670 NW2d 434 (2003). Moreover, defense counsel elicited from Bonk that he did not believe defendant had kept the boat from him or had tried to sell it. "It was strictly an accidental thing," Bonk testified. Such testimony, on its face, was not introduced for the purpose complained of by defendant.

Fourth, defendant argues that the numerous portions of the testimony of the state police trooper who questioned defendant constituted inadmissible hearsay under MRE 801(c). In support, defendant reproduces several extended passages of testimony where the trooper clearly provided narrative answers to opened-ended questions. But defendant does not specifically identify which portions of the testimony he believes were hearsay. Some of the cited testimony is simply the officer's description of the conditions he observed while investigating, and thus do not qualify as hearsay. In any event, the prosecutor does not dispute that some of the cited testimony contains numerous examples of hearsay, but notes that some of it was cumulative.

We agree with the prosecutor's assertion that the trooper's hearsay testimony with regard to conversations he had with Jackson, Jackson's brother, and Bonk were almost wholly cumulative to testimony that the three provided earlier in the trial. Cumulative hearsay testimony is not automatically harmless, but Michigan caselaw has held that hearsay evidence that is corroborated by competent evidence may be rendered harmless. *People v Petrov*, 75 Mich App 532, 534-535; 255 NW2d 673 (1977). As the cumulative hearsay testimony in this case was corroborated by the declarants themselves, we deem it harmless. As for any hearsay that was not cumulative, given the amount and type of evidence produced by the prosecutor in this case, defendant cannot meet his burden of showing that it is more likely than not that this testimony affected the outcome of the trial. *Carines*, 460 Mich at 763.

Defendant also asserts that the cited passages of the trooper's testimony were irrelevant and prejudicial, implying that the evidence was improper character evidence. To the extent that the evidence was cumulative, it was relevant both as res gestae and as substantive evidence of the elements of the crime. Any other evidence that is arguably irrelevant was inconsequential, and does not warrant reversal.

Next, defendant argues that his trial counsel's failure to object to the pieces of testimony complained of above amounted to ineffective assistance of counsel. Our review of this unpreserved contention is limited to mistakes apparent on review of the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Defendant must show both that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the outcome of the trial would have been different if not for counsel's deficiency. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

As noted above, we find the testimony complained of to be either admissible or non-prejudicial. As such, trial counsel's failure to object to those pieces of testimony was either

reasonable, see *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998), or non-prejudicial. Review of the record leads us to conclude that defendant has failed to demonstrate that there was a reasonable probability that the outcome of the trial would have been different if not for counsel's deficiency. Accordingly, defendant is not entitled to relief on this issue.

Defendant argues that he is entitled to resentencing and an evidentiary hearing as to the amount of restitution he owes to Jackson's insurance company. While defendant objected at sentencing to the amount of restitution, he did not request an evidentiary hearing either before or after the trial court ruled on the objection. Our Supreme Court in *People v Gahan*, 456 Mich 264, 276 n 17; 571 NW2d 503 (1997), stated: "It is incumbent on the defendant to make a proper objection and request an evidentiary hearing. Absent such objection, the court is not required to order, sua sponte, an evidentiary proceeding to determine the proper amount of restitution due. Instead, the court is entitled to rely on the amount recommended in the presentence investigation report "which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information."" (Internal citations omitted). See also, *People v Grant*, 455 Mich 221, 244; 565 NW2d 389 (1997). Here, defendant objected to the amount of restitution but did not request an evidentiary hearing. While *Gahan* supports a finding that any error was extinguished by defendant's failure to request a hearing, the record supports the finding of restitution made by the trial court and defendant has failed to provide this Court with sufficient evidence of error as to the amount of restitution. Hence, defendant is not entitled to relief on this issue.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello