STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 7, 2013
v	No. 307351 Kalkaska Circuit Court
JOHN ALLEN RASHO, Defendant-Appellant.	LC No. 11-003341-FH

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of misdemeanor larceny of property valued at more than $200 but less than $1,000, MCL 750.356(4)(a). We affirm defendant's conviction, vacate the order of restitution, and remand for an evidentiary hearing on the proper amount of restitution.

Defendant's larceny conviction was based on testimony that he and his agents removed cut timber from a logging site without the permission of the owner of the wood. Defendant testified that he believed that he had permission to take the wood, but the jury apparently disbelieved him and convicted him as noted above. Defendant was sentenced to seven months in jail and was initially ordered to pay $3,750 in restitution. Defendant challenged the restitution in a motion to correct invalid sentence, and the trial court lowered the amount of restitution defendant was required to pay to $650.

Defendant first argues that there was insufficient evidence presented at trial to support his conviction. Specifically, defendant argues that the prosecution failed to prove beyond a reasonable doubt that he possessed the intent necessary to sustain a conviction of misdemeanor larceny; in essence, defendant argues that the jury should have accepted his testimony that he believed in good faith that he had permission from the rightful owner of the wood to remove wood from the site.

In reviewing a sufficiency of the evidence agreement, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. In doing so, we do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Bulls*, 262 Mich App 618, 623-624; 687 NW2d 159 (2004); *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). A trier of fact may make reasonable

inferences from direct or circumstantial evidence in the record. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

MCL 750.356(4)(a) defines misdemeanor larceny as follows:

> (1) A person who commits larceny by stealing any of the following property of another person is guilty of a crime as provided in this section:
>
> (a) Money, goods, or chattels.
>
> * * *
>
> (4) If any of the following apply, the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00 or 3 times the value of the property stolen, whichever is greater, or both imprisonment and a fine:
>
> (a) The property stolen has a value of $200.00 or more but less than $1,000.00.

At trial an employee of the company which owned the wood at the site from which defendant took the wood testified that defendant had no permission to remove wood from the site. Despite the number of witnesses verifying defendant's statement that he had permission to take the wood, the jury was entitled to accept the employee's testimony and to reject defendant's contrary testimony. *Bulls*, 262 Mich App at 623-624. Minimal circumstantial evidence of defendant's intent was sufficient. See *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005).

Defendant next argues that his trial counsel rendered ineffective assistance by failing to (1) call Lee Spence as a witness because Spence's testimony could have exonerated him, and (2) object to the restitution order at sentencing.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). If counsel's performance was deficient, that performance must also have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different, *Carbin*, 463 Mich at 600, and that the result that did occur was fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The trial court must find the facts, and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. A trial court's findings of fact are reviewed for clear

error, while its constitutional determinations are reviewed de novo. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008) amended 481 Mich 1201 (2008).

Defendant's argument that counsel's failure to call Spence as a witness constituted ineffective assistance of counsel is without merit. The decision to call a witness is a matter of trial strategy, and we do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The failure to call a witness constitutes ineffective assistance only when it deprives the defendant of s substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotation marks and citation omitted). Defendant indicates that Spence's testimony would have corroborated his own assertion that he believed that he had permission to take the wood. However, because the jury heard this version of events from defendant, Cooney and Rasho, he was not deprived of a substantial defense. Additionally, the jury did not accept defendant's and the other witnesses' testimony to this effect, so it cannot be said that the same assertion from Spence would have caused the jury to acquit defendant. Defendant has not established that the failure to call Spence resulted in prejudice, *Carbin*, 463 Mich at 600, and thus has not shown that counsel rendered ineffective assistance.[1]

Finally, defendant argues that the trial court abused its discretion when it entered a modified restitution order in the amount of $650. We agree, vacate that order, and remand for an evidentiary hearing on this issue.

Defendant correctly asserts that the trial court's restitution calculation should be reduced in the amount that corresponded to the value of the property that was ultimately returned to the victim, if that amount can be established. See MCL 780.766(3)(b); MCL 769.1a(3)(b). Moreover, the trial court did not consider all of the victim's losses that were associated with the course of conduct that gave rise to defendant's conviction, such as the costs resulting from the seizure or impoundment of the wood or both. MCL 780.766(3)(c). Without additional findings regarding the full amount of the victim's losses attributable to defendant, it is impossible to ascertain the appropriate amount of restitution that should have been ordered in this case.[2] For these reasons, we vacate the restitution order and remand this case to the trial court so that it may hold an evidentiary hearing on the issue of the appropriate amount of restitution to be paid by defendant.

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[1] Counsel's failure to challenge the amount of restitution at the time of sentencing and to seek an evidentiary hearing did not constitute the ineffective assistance of counsel. Given that the trial court offered to hold an evidentiary hearing after defendant challenged restitution in his motion to correct an invalid sentence, and given the fact that the trial court did alter the restitution amount, the failure to raise a challenge at the time of sentencing was not prejudicial. *Carbin*, 463 Mich at 600.

[2] The trial court essentially recognized this point at the motion hearing, and offered to hold an evidentiary hearing at a later date. Defendant declined the offer.

Affirmed in part, vacated in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ William C. Whitbeck