STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 9, 2013
v	No. 308879 Saginaw Circuit Court
JULIE MARIE MALISZEWSKI, Defendant-Appellant.	LC No. 11-035863-FH

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals by right from her jury trial conviction of larceny in a building, MCL 750.360. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant, who is mentally impaired, was a regular visitor at the home of Peggy Janovich. Janovich testified that she had shown defendant her jewelry collection, and that defendant had expressed interest in her jewelry. Janovich testified that she later found defendant alone in her room, and that the next time she checked her jewelry box, she discovered that thousands of dollars worth of jewelry was missing and that a ring and a cross necklace belonging to defendant had been left behind. Defendant denied taking the jewelry, and both defendant and defendant's mother denied that the ring or necklace left in the jewelry box belonged to defendant.

Defendant was found guilty of larceny in a building, and was sentenced to 18 months probation. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

First, defendant argues that the prosecution failed to present sufficient evidence to convince a rational trier of fact that she committed larceny in a building. We disagree.

We review a defendant's challenge to the sufficiency of the evidence de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). However, we do not interfere with the factfinder's role of determining the weight of evidence or

the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

An individual commits larceny in a building by "stealing in any dwelling house, house trailer, office, store, gasoline service station, shop, warehouse, mill, factory, hotel, school, barn, granary, ship, boat, vessel, church, house of worship, locker room or any building used by the public[.]" MCL 750.360. The elements of larceny in a building are (1) an actual or constructive taking of goods or property; (2) a carrying away or asportation; (3) the carrying away must be with felonious intent; (4) the goods or property must be the personal property of another; (5) the taking must be without the consent and against the will of the owner; and (6) the taking must occur within the confines of the building. *People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1998). "Felonious intent" is the intent to steal the property. *People v Mumford*, 171 Mich App 514, 518; 430 NW2d 770 (1988); see also *People v Bradovich*, 305 Mich 329, 332; 9 NW 560 (1943).

Peggy Janovich testified that the stolen jewelry had been in a jewelry box inside her home, and that defendant knew the location of the jewelry box and had been present in Janovich's house prior to the disappearance of the jewelry. Janovich also testified that defendant had asked if she could have some of the jewelry in the box, and that Janovich had told defendant that she could not. Janovich also testified that her missing jewelry had been replaced by jewelry that was habitually worn by defendant. This evidence was entirely circumstantial, but circumstantial evidence and reasonable inferences arising therefrom may be used to prove the elements of an offense. *People v Brantley*, 296 Mich App 546, 550; 823 NW2d 290 (2012). As such, given Janovich's testimony, a reasonable trier of fact could conclude that defendant was the one who took the jewelry from a building, that it was without Janovich's consent, and that defendant intended to steal the jewelry.

Janovich's testimony was directly contradicted by the testimony of defendant and defendant's mother, but the verdict indicates that the jury found Janovich's testimony more credible than the testimony of defendant and her mother. Questions of witness credibility and the weight of the evidence are reserved for the finder of fact. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). Accordingly, we conclude that the prosecution presented sufficient evidence to support defendant's conviction.

III. EVIDENTIARY CHALLENGE

Second, defendant argues that the trial court erred by not permitting certain hearsay testimony offered by Nicholas Janovich. We disagree.

Evidentiary rulings are within the discretion of the trial court and are reviewed by this Court for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). A trial court abuses its discretion when it chooses an outcome that falls outside of the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

In a separate record made outside the presence of the jury, Peggy Janovich's son, Nicholas Janovich, testified that a year prior to the theft of the jewelry he had overheard his sister

confess to his ex-wife that she had stolen jewelry from Peggy in the past. The prosecution objected to the offered testimony as hearsay, and the trial court excluded the testimony.

On appeal, defendant concedes that the offered testimony was hearsay, but argues that the testimony should have been admitted as a statement against penal interest. MRE 804(b)(3) governs statements against interest, and reads:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

MRE 804(b)(3) only applies, however, if the declarant is unavailable as a witness. MRE 804(b); *People v Barrera*, 451 Mich 261, 267; 547 NW2d 280 (1996). Unavailability requires a showing that the proponent of the declarant's statement has been unable to secure the declarant's attendance or testimony and, in a criminal case, that due diligence is shown. MRE 804(a)(5); *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 715 (1992). Defendant does not explain how the declarant was unavailable in this instance, and the trial court record does not indicate that the declarant was unavailable to testify. Defendant has also provided no evidence of any efforts to secure the declarant's attendance or testimony, or any proof of due diligence, defined as diligent good-faith efforts to procure the testimony. *Id.* Accordingly, the hearsay exception for statements against interest is not applicable to these facts, and the trial court did not err by excluding the hearsay testimony.

IV. DENIAL OF MOTION FOR MISTRIAL

Finally, defendant argues that the trial court erred by failing to grant her motion for a mistrial. We disagree, because although there was juror misconduct, the trial court acted properly to cure the error.

We review the trial court's decision regarding a motion for mistrial for an abuse of discretion. *People v Shaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). An abuse of discretion occurs if the trial court chooses an outcome "that is outside the range of principled outcomes." *Id.* The decision to grant a mistrial is within the discretion of the trial court, but a motion for mistrial should be granted "only for an irregularity that is prejudicial to the rights of the defendant and impairs [her] ability to get a fair trial." *Id.*

The trial court learned during jury deliberations that a juror had done internet research on "reasonable doubt" and "corroborating evidence," and that the juror had printed several pages of Wikipedia[1] results on those topics that were subsequently read by six other members of the jury.

[1] Wikipedia is a "multilingual, web-based, free-content encyclopedia project . . . based on an openly editable model. . . . Wikipedia is written collaboratively by largely anonymous Internet

In addition, the jury foreman read the research concerning reasonable doubt to all the jurors. The trial court questioned the members of jury as to whether they could disregard the search results and rely solely on the jury instructions that had been provided to them. The jurors responded in the affirmative, and the trial court denied defendant's motion for a mistrial.

"A jury's use of a dictionary to define a relevant legal term is error, but it is not prejudicial per se." *People v Messenger*, 221 Mich App 171, 176; 561 NW2d 463 (1997), lv den 456 Mich 955 (1998), habeas corpus den 2010 WL 2772314 (2010), citing *US v Gillespie*, 61 F3d 457 (CA 6, 1995). In *Messenger*, the trial court became aware that the jurors were using a definition of "premeditation" drawn from a legal dictionary in their deliberations. *Id.* at 174. The trial court re-read its instructions on first degree murder and reminded the jury to give the words and terms in the instruction their ordinary meaning. *Id.* The trial court then denied the defendant's motion for a mistrial. *Id.*

In *Messenger*, this Court stated that "there is no specific procedure that a trial court must follow when informed that the jury may have used a dictionary." *Id.* at 176, citing *Gillespie*, 61 F3d at 459. We further stated that "the trial judge has extensive discretion in devising procedures to ensure that the jury uses the court's instructions and not a dictionary definition."

Here, the jurors were initially instructed by the trial judge that they were to consider only evidence properly admitted in the case in making their decisions. The jurors were further instructed that the trial judge would provide detailed instructions at the end of the case concerning about the law in the case, and that the judge's instructions were the law they must follow. The jury was given such detailed instructions after closing arguments, and was reminded "to apply the law as I give it to you." When informed of potential juror misconduct, the trial court questioned all of the jurors about the internet research and whether they would be able to disregard what they had read or heard about it. The trial court in fact cited *Messenger* as being a guide to fashioning the appropriate remedy. The trial court also reminded the jury to follow the court's instructions.

Jurors are presumed to follow their instructions. *People v Hana*, 447 Mich 325, 351; 524 NW2d 682, amended 447 Mich 1203 (1994). Considering the fact that the trial court conducted a voir dire of the entire jury pool, that the jurors reported that they could disregard the search results, and that the jurors were properly instructed at both the beginning and end of trial, the trial court's decision not to grant a mistrial was not outside the range of principled outcomes, and did not impair defendant's ability to receive a fair trial.

Affirmed.

/s/ Mark T. Boonstra
/s/ Henry William Saad
/s/ Joel P. Hoekstra

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volunteers . . . . Anyone with Internet access can write and make changes to Wikipedia articles . . . ." en.wikipedia.org/wiki/Wikipedia:About (last visited March 22, 2013).