STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 21, 2013
v	No. 309083 Missaukee Circuit Court
RANDOLPH LEE HELSEL, Defendant-Appellant.	LC No. 2011-002449-FH

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of larceny involving property valued at $1,000 or more but less than $20,000, MCL 750.356(3)(a). The trial court sentenced him as a second-offense habitual offender, MCL 769.10, to 6 months in jail for each conviction, to be served concurrently, and to 18 months of probation. Defendant appeals as of right. We affirm.

Defendant was charged with stealing approximately 17 cords of oak hardwood, valued at $1,360, from William Kay, Jr., on July 28, 2010, and with stealing approximately 15 cords of oak hardwood, valued at $1,200, from Kay on July 30, 2010. Kay testified that he and defendant had entered into a written contract on July 17, 2010, whereby defendant was to take 100 cords of poplar and aspen, but he subsequently discovered that defendant had cut live oak trees from the front eight acres of his property and over 100 live oak, cherry, and maple trees from the back 40 acres. The jury rejected defendant's claim that he took the oak trees with permission.

Defendant first argues that Kay was not the owner of the property and that the trial court therefore erred in failing to direct a verdict of acquittal after the close of plaintiff's proofs.[1]

[1] Defendant alternately frames this issue and his subsequent issue as involving sufficiency-of-the-evidence claims. "[W]hen 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 that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (internal citations and quotation marks omitted).

> In ruling on a motion for a directed verdict, the trial court must consider in the light most favorable to the prosecutor the evidence presented by the prosecutor up to the time the motion is made and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997). Circumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). "However, it is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for directed verdict of acquittal, no matter how inconsistent or vague that testimony might be." *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). This Court applies the same standards in reviewing the trial court's ruling on a motion for a directed verdict. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). [*People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).]

The property was owned by a trust of Kay's mother, who was deceased. Kay's father, who was in an assisted-living facility in Oklahoma City, was the trustee. The evidence established that Kay was the only family member in Michigan and that he had managed and hunted on the property since his family had acquired it over 20 years earlier.

In *People v Sheldon*, 208 Mich App 331, 334; 527 NW2d 76 (1995), the Court held that "[l]arceny is not limited to taking property away from the person who holds title to that property, but also includes taking property from a person who has rightful possession and control of the property." See also *People v Wakeford*, 418 Mich 95, 112 n 16; 341 NW2d 68 (1983). Moreover, CJI2d 22.2 applies to larceny and provides: "'Owner' in this case means the actual owner of the property [or any other person whose consent was necessary before the property could be taken]." In *People v Hatch*, 156 Mich App 265, 267-268; 401 NW2d 344 (1986), the Court cited the precursor criminal jury instruction for purposes of determining whether the person from whom the property was taken was an owner: "Further, CJI 22:1:02 defines owner for purposes of the larceny statute as any agent or employee of the owner who at the time of the alleged larceny had custody and possession of the property for the owner."

The evidence was sufficient to infer that Kay's parents had entrusted him with the authority to control the property and that he did in fact control the property. His wife testified that he had managed it "from day one." There was no evidence that the trustee had ever rescinded Kay's authority over the property. The longstanding arrangement and evidence that he did in fact control the property by, for example, arranging for contracts for the sale of timber, were sufficient to establish that he was an agent of the owner who had custody of the property for the owner and that his consent was necessary before the trees could be taken.

Defendant next argues that the trial court erred in failing to direct a verdict of acquittal after the verdict was returned because the requisite value of the trees had not been established. Larceny by stealing is governed by MCL 750.356. Subsection (3)(a) makes a first-offense

larceny[2] a felony if the stolen property has a value of $1,000 or more but less than $20,000, whereas subsection (4)(a) makes it a misdemeanor if the value is $200 or more but less than $1,000. "The value of the property alleged to have been stolen is an essential element of the crime where, as here, it is the test differentiating felonies and misdemeanors." *People v Fuzi*, 46 Mich App 204, 209; 208 NW2d 47 (1973).

In *People v Johnson*, 133 Mich App 150, 153; 348 NW2d 716 (1984), the Court stated:

> While the larceny statute itself does not provide a guide for determining the value of property which is the subject of a theft, case law supports the use of fair market value as the relevant standard when such a value exists. *People v Hanenberg*, 274 Mich 698; 265 NW 506 (1936); *People v Gilbert*, 163 Mich 511; 128 NW 756 (1910). Generally, proof of value is determined by reference to the time and place of the offense. *People v Cole*, 54 Mich 238; 19 NW 968 (1884); *Gilbert, supra*. Value has been interpreted to mean the price that the item will bring on an open market between a willing buyer and seller. *People v Otler*, 51 Mich App 256; 214 NW2d 727 (1974); *People v Tillman*, 59 Mich App 768; 229 NW2d 922 (1975).

Tillman indicates that "value does not necessarily connote what a liquidator will pay" but is "the price an item will bring on the open market." *Tillman*, 59 Mich App at 771. *Otler* indicates that fair market value is the highest price the market will bear. *Otler*, 51 Mich App at 260. In *Sheldon*, 208 Mich App at 338, the Court indicated that value for purposes of the larceny statute denotes the value to the designated victim; thus, the "value" of a car stolen from the wrecker service that impounded it was the towing and storage fees to which the wrecker service would have been entitled, not what the car would have brought at auction. The focus is the victim's "possessory interest in the property . . . ." *Id*. at 338.

The test for "fair market value" is set forth in CJI2d 22.1:

> (1) The test for the value of property is the reasonable and fair market value of the property at the time and in the area of the [state crime].
>
> (2) Fair market value is defined as the price the property would have sold for in the open market at that time and in that place [if the following things were true: the owner wanted to sell but did not have to, the buyer wanted to buy but did not have to, the owner had a reasonable time to find a buyer, and the buyer knew what the property was worth and what it could be used for].

Jason Lutke, who owns a logging business, hauled the wood for defendant to a mill. He said he would have paid $20 to $40 a cord for "stumpage," which means "what you would pay the landowner if their trees are standing on their property." He further testified that defendant

[2] The statute contains specific provisions pertaining to persons with one or more prior larceny convictions, but defendant did not have a prior larceny conviction.

was ultimately paid $80 a cord, for a total of $1,360 for the 17-cord load and a total of $1,200 for the 15-cord load.[3]

Defendant contends that the evidence did not support felony charges because of Lutke's testimony that he would pay only $20 to $40 a cord for *standing* oaks.[4] However, as noted, evidence was presented that defendant received $1,360 and $1,200 for the respective loads of wood. Therefore, it was within the province of the jury to determine that the value of the property stolen from Kay exceeded $1,000 for each count. It is true that, in order to receive that amount of money, Kay would had to have cut and transported the trees. However, it is not unusual that, to obtain money for a particular item (a diamond, for example, or a car), certain expenses might have to be incurred, such as travel or advertising expenses to find a suitable buyer. As noted by the prosecutor, the jury was presented with evidence and arguments relating to the different approaches to valuation, and the jury, as evidenced by its verdict and its rejection of the lesser-included misdemeanors, chose to accept the prosecutor's valuation methodology. We must view the evidence in the light most favorable to the prosecutor, and in doing so, we find no basis for reversal. The jury properly applied the test provided by the trial court for "fair market value"[5] and did not err in finding that Kay could have received over $1000 for each load of wood taken from his land.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Michael J. Riordan

[3] The loads were slightly larger than 17 and 15 cords, but some "docking" occurred because of subpar logs.

[4] Using the $40 figure would produce values of $680 and $600, respectively, for the 17-cord and 15-cord loads. The lower price for standing trees obviously results from the fact that labor and materials must be used to extract the trees from the property and deliver them.

[5] The trial court used CJI2d 22.1.