

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUNIOR FRED BLACKSTON,

Defendant-Appellant.

UNPUBLISHED

May 23, 1997

No. 190006

Van Buren Circuit Court

LC No. 95-009527

Before: Young, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

This case arises out of events that occurred in early July, 1995, in which a house owned by Steven Rahrig was broken into and the majority of the contents therein were stolen. Defendant admits he helped sell some of the stolen property but he denies that he stole it or had knowledge that it was stolen. Defendant was convicted by a jury of receiving and concealing stolen property over \$100, MCL 750.535; MSA 28.803. He was sentenced as an habitual offender, third offense, to 80 to 120 months' imprisonment and was ordered to pay restitution in the amount of \$3,265 for the unrecovered stolen property. Defendant was also assessed \$40 for the Crime Victim Rights Fund. Defendant appeals as of right. We affirm defendant's conviction and sentence, but vacate the trial court's order for restitution and remand for reconsideration.

Defendant first argues that the trial court abused its discretion in failing to consider the factors set forth in MCL 780.767(1); MSA 28.1287(767)(1) before determining the amount of restitution to be paid by defendant. We agree. MCL 780.767(1); MSA 28.1287(767)(1) states:

The court, in determining whether to order restitution under section 16 and the amount of that restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources and earning ability of the defendant, the financial needs of the defendant and the defendant's dependents, and such other factors as the court considers appropriate.

In *People v Grant*, 210 Mich App 467, 470-471; 534 NW2d 149 (1995), this Court noted that an evidentiary hearing may not be required where defendant does not specifically challenge

restitution on the grounds that he is unable to pay. However, in determining the appropriate amount of restitution, the sentencing court must, at a minimum, comply with the statutory requirement of stating the factors considered. *Id.*; See also *People v White*, 212 Mich App 298, 317; 536 NW2d 876 (1995), and *People v Avignone*, 198 Mich App 419, 424-425; 499 NW2d 376 (1993).

In this case, the trial court indicated that it considered the presentence investigation report [PSIR] in the overall sentence imposed on defendant. The PSIR stated that the total value of property taken was approximately \$6,000 and that the victim was still missing approximately \$3,500 worth of property. However, the PSIR did not offer any evidence as to the source or accuracy of those figures. The trial court ordered that defendant pay \$3,265 in restitution for the unrecovered property, stating only that that was the amount the victim claimed would account for the unrecovered property. According to the statutory language and this Court's holding in *Grant, supra*, the trial Court must consider the statutory factors in determining the appropriate amount of restitution. Failure to articulate those factors on the record constituted an abuse of the trial court's discretion. We therefore vacate the court's order of restitution and remand for reconsideration on the record in accordance with the statutory requirements.

Defendant next argues that he was denied a fair trial as the result of prosecutorial misconduct. We disagree. Defendant did not object to the prosecutor's conduct at trial, and unless a timely instruction could not have cured the error, we review defendant's allegations only for a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant argues that the prosecutor improperly vouched for the credibility of his own witness by saying "he is telling the truth as he knows it about what happened." A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge concerning a witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, prosecutorial misconduct must be determined on a case by case basis, reviewing the prosecutor's comments in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). We find that, taken in context, the above statement was not improper.

Initially, we note that the challenged remark and the surrounding statements by the prosecutor came in response to defendant's argument in closing that the witness was not believable and should have been criminally charged himself. The prosecutor responded by noting that the issue was not whether the witness should have been charged; it was whether the witness was believable. Further, it is not improper for a prosecutor to argue from the facts that a witness should be believed. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). We conclude that such was the case here. When reviewing the prosecutor's statement in context, it is clear that the prosecutor was merely explaining that the issue of the witness' credibility was the jury's decision; the prosecutor merely offered facts in evidence to support the witness' credibility. Moreover, although the remark appears in the transcript to be an affirmative statement, it is clear in context that it was intended as a question for the jury. Therefore, we conclude that the prosecutor's actions did not constitute misconduct and no miscarriage of justice would result in affirming the lower court decision.

Defendant's conviction and sentence are affirmed. We remand for reconsideration of the order of restitution. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh