

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JEFFREY ARNOLD,

Defendant-Appellant.

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UNPUBLISHED  
November 13, 2003

No. 239643  
Tuscola Circuit Court  
LC No. 00-007770-FH

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant Michael Jeffrey Arnold appeals as of right his jury conviction of larceny by conversion<sup>1</sup> for failing to either pay for or return a used car he agreed to buy from Moore Motors, Incorporated. The trial court sentenced Arnold as a fourth habitual offender<sup>2</sup> to 3 to 10 years' imprisonment. We affirm.

I. Basic Facts And Procedural History

On February 17, 2000, Arnold went to Moore Motors and spoke with salesman Todd Legere about buying a used car. After a test drive, Arnold agreed to pay \$6,500 in cash for a 1996 Dodge Neon, but told Legere that he would need a day or two to obtain the money from his aunt. Because Legere had previously sold a car to Arnold's then-girlfriend under similar circumstances, Legere agreed to let Arnold take the car that day with no down payment or deposit. Legere put a dealer's license plate on the car and gave Arnold a temporary driving permit. Legere testified that he did not fill in the portion of the permit stating when Arnold was expected to return the car because he believed Arnold would pay for it within two days.

On February 21, Arnold left a message on Legere's voice mail explaining that his aunt had died and that he would be unable to pay for the car until her estate was settled. In the following days, by Legere's account, Arnold left between 11 and 15 voice mail messages, always before business hours, giving various reasons why he could not come in that day and

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<sup>1</sup> MCL 750.362.

<sup>2</sup> MCL 769.12.

assuring Legere that he intended to pay for the car. At some point, Moore Motors received an insurance binder from AAA after Arnold signed up for an insurance policy for the vehicle. Legere testified that he attempted to call Arnold three or four times a day at various telephone numbers, including his work number and the number of his ex-girlfriend, but was unable to reach him. Arnold lived at various places during this time, including a motel.

On March 27, 2000, Moore Motors sent Arnold a certified letter demanding full payment or return of the car “within two days of receiving this letter,” and notified Arnold that if he did not return the car “by noon of the second day after receiving this letter—or, in any event, after April 10, 2000,” that the matter would be reported to the county prosecutor. Arnold received this letter on April 3. Arnold called Legere the next day and asked if he was “in trouble,” and Legere told him “not right now.” Arnold told Legere that he had the money and would come to Moore Motors first thing in the morning to consummate the deal; however, Arnold did not come to Moore Motors or call again after that conversation. Arnold admitted at trial that he did not, in fact, have \$6,500 in cash when he talked to Legere; however, Arnold testified that he believed the letter meant that he had until April 10 to return or pay for the car.

Shortly thereafter, Moore Motors filed a complaint with the sheriff’s department, and on April 7, Arnold was arrested and the car was towed back to Moore Motors. According to Legere, when the car was returned, it had a regular blue license plate instead of the dealer plate Legere had installed, the front fender was damaged, and it had been driven several thousand miles since Arnold took it from the lot. Arnold claimed that he never removed the dealer plate, and that the final odometer reading submitted into evidence registered more miles than it did when he was arrested. According to the investigating officer, the dealer plate was found in the back seat of the car.

At the close of the prosecutor’s proofs, defense counsel moved for a directed verdict of acquittal on the basis that the prosecutor had not proved that Arnold intended to permanently deprive Moore Motors of the car; however, the trial court ruled that this was a question of fact for the jury, and that a reasonable juror could conclude that Arnold did have the requisite intent. After hearing Arnold’s testimony, the jury convicted Arnold of larceny by conversion.

## II. Sufficiency Of The Evidence

### A. Standard Of Review

We review de novo challenges to the sufficiency of the evidence, taking the evidence in the light most favorable to the prosecutor and determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.<sup>3</sup>

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<sup>3</sup> *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

## B. Intent To Permanently Deprive The Owner Of The Property

The jury found Arnold guilty of larceny by conversion. The larceny by conversion statute states:

Any person to whom any money, goods or other property, which may be the subject of larceny, shall have been delivered, who shall embezzle or fraudulently convert to his own use, or shall secrete with the intent to embezzle, or fraudulently use such goods, money or other property, or any part thereof, shall be deemed by so doing to have committed the crime of larceny and shall be punished as provided in the first section of this chapter.<sup>[4]</sup>

The elements of larceny by conversion are:

(1) the property at issue has some value, (2) the property belonged to someone other than the defendant, (3) someone delivered the property to the defendant, irrespective of whether that delivery was by legal or illegal means, (4) the defendant embezzled, converted to his own use, or hid the property “with the intent to embezzle or fraudulently use” it, and (5) at the time the property was embezzled, converted, or hidden, the defendant “intended to defraud or cheat the owner permanently of that property.”<sup>[5]</sup>

Arnold argues that there was insufficient evidence of his intent to deprive Moore Motors of the car permanently because no return date was specified on the driving permit Legere gave him, he frequently called Moore Motors expressing his continued desire to buy the car, he insured the car, and he thought he had until April 10 to return the car or pay for it. However, the evidence indicated that Arnold initially had agreed to pay Legere for the car within one or two days, and there is no evidence that Legere agreed to an extension. Legere tried to call Arnold three or four times a day at various telephone numbers, including his work number and the number of his ex-girlfriend, but was unable to reach him. According to Legere, Arnold did not call him during business hours until after Arnold received the letter. Arnold told Legere at that time that he had the money to pay for the car and would be in the following day to pay for the car. However, Arnold did not do so, and he admitted that he did not have \$6,500 in cash at any time between the day he received the letter and his arrest.

Even if the evidence is largely circumstantial, the prosecutor does not have the burden to disprove all theories supporting the defendant’s possible innocence.<sup>6</sup> Moreover, because it is difficult to prove a defendant’s state of mind, minimal circumstantial evidence is sufficient.<sup>7</sup>

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<sup>4</sup> MCL 750.362.

<sup>5</sup> *People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001), quoting *People v Scott*, 72 Mich App 16, 19; 248 NW2d 693 (1976) (internal citations omitted).

<sup>6</sup> See *People v McIntosh*, 103 Mich App 11, 19; 302 NW2d 321 (1981).

<sup>7</sup> See *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Viewing the evidence in the light most favorable to the prosecutor, we conclude that it was sufficient to allow a rational trier of fact to find beyond a reasonable doubt that Arnold intended to permanently deprive Moore Motors of the car.<sup>8</sup>

### III. Prosecutorial Misconduct

#### A. Standard Of Review

We review de novo allegations of prosecutorial misconduct while reviewing the trial court's factual findings for clear error.<sup>9</sup> Because no objection was made to the challenged remarks, we will reverse only for plain error, placing the burden on the defendant to show that error occurred, that the error was clear or obvious, and that the plain error affected his substantial rights.<sup>10</sup> Moreover, if a curative instruction could have alleviated the prejudicial effect of the challenged remarks, error requiring reversal did not occur.<sup>11</sup>

#### B. Shifting Burden Of Proof

During closing arguments, the prosecutor observed that although Arnold claimed that his aunt had died, Arnold referred to her in the present tense, and he pointed out that Arnold did not submit an obituary establishing when or if the aunt had died. Arnold argues that this was an impermissible shifting of the burden of proof to himself. We disagree.

Although a prosecutor may not shift the burden of proof,<sup>12</sup> a prosecutor may comment on a defendant's failure to produce evidence supporting the defense theory of the case,<sup>13</sup> and may also argue from the facts and evidence that the defendant is not worthy of belief.<sup>14</sup> Because the prosecutor's comments fell within these permissible categories, we find no misconduct. Moreover, because a curative instruction could have alleviated any prejudicial effect of the challenged remarks, even if they had been improper, error requiring reversal did not occur.<sup>15</sup>

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<sup>8</sup> *Johnson, supra* at 723; *Herndon, supra* at 415.

<sup>9</sup> *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

<sup>10</sup> *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999).

<sup>11</sup> *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

<sup>12</sup> *People v Fields*, 450 Mich 94, 113; 538 NW2d 356 (1995).

<sup>13</sup> *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999).

<sup>14</sup> *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

<sup>15</sup> See *Callon, supra* at 329-330.

### C. Interjecting Claims Unsupported By The Evidence

Arnold also objects to the prosecutor's observations relating to the insurance policy:

And in fact the truth came out on the stand, he's never paid for that insurance. There's no intent that he was going to buy the vehicle. Insurance only indicates that I guess he flim-flammed the insurance company too. Got them to make coverage on a car that he wasn't going to buy.

As with the comment regarding the aunt's obituary, the prosecutor did not raise the issue of the insurance policy. Rather, the prosecutor's remark was made in response to the defense theory that Arnold would not have insured the vehicle if he did not intend to buy it, and the remark was therefore permissible.<sup>16</sup> Also, a curative instruction could have alleviated any prejudicial effect of the challenged remark; therefore, even if it had been improper, error requiring reversal did not occur.<sup>17</sup>

### IV. Jury Instructions

Arnold argues that the trial court erred in instructing the jury that the prosecutor was required to prove "that the defendant intended to defraud, or permanently deprive Moore Motor Sales of a Dodge Neon automobile," because the use of the disjunctive "or" indicated that the jury could find him guilty if he intended to defraud Moore Motors, even if he did not intend to permanently deprive Moore Motors of the car. The parties state that, because Arnold did not object to the instructions, the issue should be reviewed for clear error. However, our review of the record indicates that the trial court, after reading the instructions, gave counsel an opportunity to place any objections to the instructions on the record, and defense counsel affirmatively stated that there were no objections. Because defense counsel expressly approved the instructions, this issue is waived, and any error was extinguished.<sup>18</sup>

### V. Arnold's Brief

Arnold raises three further issues in a brief submitted in propria persona. We address each in turn.

#### A. Constitutional Violations

Arnold argues that his conviction violated his constitutional rights in six ways: first, there was insufficient evidence to support his conviction; second, the arrest warrant was predicated on a different larceny statute than that under which he was tried; third, that Moore Motors' sole remedy was civil action, not criminal prosecution; fourth, that the trial court addressed only one

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<sup>16</sup> See *Fields, supra* at 115.

<sup>17</sup> See *Callon, supra* at 329-330.

<sup>18</sup> *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

element of the crime when ruling on his motion for directed verdict, resulting in “procedural default” and “double jeopardy.” We address his remaining two arguments respecting right to counsel and ineffective assistance separately below.

We conclude that none of Arnold’s first four arguments supports reversal of his conviction. First, we have already rejected the insufficient evidence argument. Second, Arnold offers no authority to support his argument respecting the arrest warrant, and therefore we decline to address it.<sup>19</sup> Third, the fact that Moore Motors could have chosen to pursue civil remedies to recover the vehicle has no bearing on whether Arnold could also be criminally prosecuted.<sup>20</sup> Despite Arnold’s argument to the contrary, his telephone calls to Moore Motors expressing an intent to pay for the car in the future were not a substitute for payment or return of the car, nor did they insulate him from criminal liability when he did not act on his repeated promises to pay.

Fourth, while it is not clear what Arnold means by “procedural default” and “double jeopardy” in this context, it is clear that the trial court did not err in refusing to direct a verdict in Arnold’s favor. A directed verdict of acquittal is appropriate “only if, considering all the evidence in the light most favorable to the prosecution, no rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt.”<sup>21</sup> In this case, in the motion for directed verdict, defense counsel raised, and the trial court ruled on, only those elements relating to Arnold’s intent because those were the only elements in dispute. The trial court correctly ruled that the jury could find, through circumstantial evidence, that Arnold had the requisite intent. We find no error requiring reversal.

#### B. Denial Of Counsel At Motion For New Trial

Arnold argues that his conviction must be reversed because he was not appointed replacement counsel at the motion for new trial after having requested that his trial counsel withdraw, and argues further that he did not have counsel at the time his first appeal of right was filed, violating his constitutional right to counsel. However, with respect to the motion for new trial, there is no constitutional right to an attorney in post-conviction proceedings.<sup>22</sup> By contrast, there is a right to counsel for a first appeal of right;<sup>23</sup> but, as required, Arnold was appointed counsel for this appeal. The fact that the appeal of right was initially dismissed for lack of jurisdiction while Arnold was without counsel does not mean that Arnold was denied counsel for his “first appeal of right.” This issue is without merit.

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<sup>19</sup> See *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

<sup>20</sup> See *People v Moore*, 43 Mich App 693, 697; 204 NW2d 737 (1972).

<sup>21</sup> *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

<sup>22</sup> See *People v Walters*, 463 Mich 717, 720; 624 NW2d 922 (2001).

<sup>23</sup> See *People v Bulger*, 462 Mich 495, 552; 614 NW2d 103 (2000).

## C. Ineffective Assistance Of Counsel

### 1. Standard Of Review

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law.<sup>24</sup> This determination requires a judge first to find the facts, then determine “whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.”<sup>25</sup> We review the trial court’s factual findings for clear error and review de novo its constitutional determination.<sup>26</sup> Because there was no *Ginther*<sup>27</sup> hearing, our review is limited to the record.<sup>28</sup>

### 2. Counsel’s Performance

To establish ineffective assistance of counsel, the defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel’s error, it is reasonably probable that the outcome would have been different.<sup>29</sup> Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.<sup>30</sup> To show an objectively unreasonable performance, the defendant must prove that counsel made “errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”<sup>31</sup> In so doing, the defendant must overcome a strong presumption that the challenged conduct might be considered sound trial strategy.<sup>32</sup> The defendant must also show that the proceedings were “fundamentally unfair or unreliable.”<sup>33</sup>

Arnold argues that his counsel was ineffective for failing to impeach Legere for instances in which his trial testimony differed from his preliminary examination testimony; failing to raise the “defense” that the matter was civil rather than criminal in nature; failing to object to instances of prosecutorial misconduct; and failure to object to an erroneous jury instruction.

Arnold’s first argument is unsupported by the record, which indicates that counsel twice pointed out discrepancies between Legere’s testimony at the preliminary examination and at

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<sup>24</sup> *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

<sup>25</sup> *Id.* at 579.

<sup>26</sup> *Id.*

<sup>27</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>28</sup> *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

<sup>29</sup> *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 314, 318; 521 NW2d 797 (1994).

<sup>30</sup> *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

<sup>31</sup> *LeBlanc*, *supra* at 578, quoting *Strickland*, *supra* at 687.

<sup>32</sup> *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

<sup>33</sup> *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

trial, including Legere's prior statement that he had more than one telephone conversation with Arnold. Although counsel did not impeach Legere regarding his statement that there was a large amount of clothing in the car when it was recovered, whereas the evidence sheet showed only one complete set of clothing, we are not convinced that this failure would have changed the outcome of the trial. The failure to impeach Legere on every conflict between his preliminary examination testimony and trial testimony was not a serious error but was rather a matter of trial strategy that we will not second-guess.<sup>34</sup>

Second, counsel was not ineffective for failing to defend on the ground that the matter was civil rather than criminal in nature. As noted, the existence of civil remedies to recover the vehicle does not absolve Arnold of criminal liability.<sup>35</sup> In any event, the record shows that defense counsel told the trial court she believed that a civil rather than criminal proceeding would have been more appropriate.

Third, counsel was not ineffective for failing to object to the prosecutor's remarks because, as discussed, they were proper commentary on the defense theory of the case. Counsel is not ineffective for refusing to make futile objections.<sup>36</sup>

Finally, we agree that defense counsel should have objected to the jury instruction indicating that the prosecutor had to prove "that the defendant intended to defraud, or permanently deprive Moore Motor Sales of a Dodge Neon automobile" because, given the disjunctive "or," the jury could, in theory, have found him guilty even if he did not intend to permanently deprive Moore Motors of the car. However, Arnold has not carried his burden of showing that, but for counsel's error, it is reasonably probable that the outcome would have been different.<sup>37</sup> As discussed, there was sufficient evidence to conclude that Arnold intended to permanently deprive Moore Motors of the car, and it is not reasonably probable that Arnold would have been acquitted but for the erroneous instruction.

Affirmed.

/s/ William C. Whitbeck  
/s/ Brian K. Zahra  
/s/ Pat M. Donofrio

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<sup>34</sup> See *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987).

<sup>35</sup> See *People v Moore*, 43 Mich App 693, 697; 204 NW2d 737 (1972).

<sup>36</sup> See *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

<sup>37</sup> *Pickens*, *supra* at 314.