

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 15, 2013

v

JAMES ROW MCINTYRE, JR. a/k/a JAMES
ROWE MCINTYRE, JR.,

No. 310849
Livingston Circuit Court
LC No. 11-020055-FH

Defendant-Appellant.

Before: HOEKSTRA, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of larceny (motor vehicles or trailers), MCL 750.356a(3), and possession of burglar's tools, MCL 750.116. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of four to thirty years' imprisonment. For the reasons stated below, we affirm.

I. FACTS

On the morning of May 10, 2011, Michael Hugler arrived at a construction site at which his company was working and observed that a trailer filled with tools and equipment had been broken into and emptied out. Police subsequently observed that the locking mechanism on the trailer was cut off, and that footprints were left in the mud surrounding the trailer. Gary Kulhanek, who was walking his dog near the site that morning, informed the police that he saw a silver Chrysler Pacifica parked outside the trailer earlier that morning, and that he observed a man going back and forth from the trailer to the Pacifica.

Later that same day, after obtaining an address for a possible suspect, a police sergeant observed a man loading and unloading a silver Chrysler Pacifica into a residential storage shed at that location. After the man finished unloading the vehicle, he left in the vehicle and the sergeant requested that another officer conduct a traffic stop on the vehicle. During the stop, they identified defendant as the driver and discovered a bag containing burglary tools, as well as large bolt cutters that had been reported stolen from the trailer, in the vehicle. They also observed that defendant was wearing shoes consistent with the footprints left outside the trailer. They then went back to the residence, which was owned by a female, and searched the storage shed wherein they recovered the remaining items that had been reported stolen from the trailer.

II. JURY INSTRUCTIONS

Defendant first argues that the trial court erred by failing to instruct the jury on MCL 750.356a(2), which he maintains is a necessarily included lesser offense of MCL 750.356a(3).¹

¹ MCL 750.356a provides in relevant part:

(1) A person who commits larceny by stealing or unlawfully removing or taking any wheel, tire, air bag, catalytic converter, radio, stereo, clock, telephone, computer, or other electronic device in or on any motor vehicle, house trailer, trailer, or semitrailer is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$10,000.00, or both.

(2) Except as provided in subsection (3), a person who enters or breaks into a motor vehicle, house trailer, trailer, or semitrailer to steal or unlawfully remove property from it is guilty of a crime as follows:

(a) If the value of the property is less than \$200.00, the person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00 or 3 times the value of the property, whichever is greater, or both imprisonment and a fine.

(b) 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, whichever is greater, or both imprisonment and a fine:

(i) The value of the property is \$200.00 or more but less than \$1,000.00.

(ii) The person violates subdivision (a) and has 1 or more prior convictions for committing or attempting to commit an offense under this section or a local ordinance substantially corresponding to this section.

(c) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$10,000.00 or 3 times the value of the property, whichever is greater, or both imprisonment and a fine:

(i) The value of the property is \$1,000.00 or more but less than \$20,000.00.

(ii) The person violates subdivision (b)(i) and has 1 or more prior convictions for violating or attempting to violate this section. For purposes of this subparagraph, however, a prior conviction does not include a conviction for a violation or attempted violation of subdivision (a) or (b)(ii).

We review de novo the applicability of jury instructions. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). Further, whether one offense is a necessarily included offense of another is a question of law that is reviewed de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010). However, a trial court's determination regarding whether the facts of a case support a requested jury instruction is reviewed for an abuse of discretion. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

A necessarily included lesser offense is one which must be committed as part of the greater offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

We conclude that an offense governed by MCL 750.356a(2) must be committed as part of an offense described by MCL 750.356a(3), and is therefore a necessarily included lesser offense of MCL 750.356a(3). See *Bearss*, 463 Mich at 627. However, in the instant case the element distinguishing the greater offense from the lesser, the damaging of the trailer, was not a disputed factual element at trial. Further, because the damage done to the trailer was established and uncontroverted, no rational view of the evidence could lead to the conclusion that defendant was guilty of the lesser offense, but not the greater offense. Given the facts at trial, defendant was either guilty of the greater offense or not guilty. Because no rational view of the evidence would support a finding that defendant was guilty of the requested lesser offense and not the greater charged offense, the trial court did not err by declining to instruct the jury on the requested lesser offense.

(d) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$15,000.00 or 3 times the value of the property, whichever is greater, or both imprisonment and a fine:

(i) The property has a value of \$20,000.00 or more.

(ii) The person violates subdivision (c)(i) and has 2 or more prior convictions for committing or attempting to commit an offense under this section. For purposes of this subparagraph, however, a prior conviction does not include a conviction for a violation or attempted violation of subdivision (a) or (b)(ii).

(3) A person who violates subsection (2)(a) or (b) and who breaks, tears, cuts, or otherwise damages any part of the motor vehicle, house trailer, trailer, or semitrailer is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$10,000.00, or both, regardless of the value of the property.

III. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues that the prosecution failed to submit sufficient evidence to support his conviction under MCL 750.356a(3). We disagree.

We review sufficiency of the evidence issues de novo, examining the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that every essential element was proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). We “draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

In this case, the evidence presented showed that the construction trailer at issue was broken into, damaged, and that several pieces of equipment were stolen from inside the trailer. The evidence also showed that a witness placed a silver Chrysler Pacifica at the scene of the crime, and that defendant was later pulled over in a silver Chrysler Pacifica that contained burglary tools and items that had been removed from the trailer. The evidence also showed that defendant had been observed driving the vehicle to and from a storage shed, which was later found to contain the remainder of the items that were stolen from the trailer.

While none of the above evidence is direct evidence of guilt, it is all circumstantial evidence that could lead to a reasonable inference of defendant’s guilt. Such inferences from circumstantial evidence are permitted by law. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). Therefore, a reasonable jury could have concluded that defendant was guilty beyond a reasonable doubt.

IV. ISSUES RAISED IN DEFENDANT’S STANDARD 4 BRIEF

In a Standard 4 brief, defendant also argues that the prosecution committed numerous acts of misconduct during trial. We disagree. We generally review allegations of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, since defendant failed to raise a timely objection, review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). “Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant’s innocence.” *Id.* (internal quotations omitted). We must review the prosecutor’s comments “in context to determine whether they denied defendant a fair trial.” *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

First, defendant claims that the prosecution engaged in misconduct by mischaracterizing the method by which the trailer was entered. During opening remarks the prosecutor stated that the evidence would show that the lock for the trailer had been “pried, cut, or broken” off the trailer. During trial, the evidence actually showed that the entire locking mechanism itself had been cut off of the trailer. Given these facts, the prosecution’s statement was not inaccurate or misleading.

Defendant also argues that this alleged mischaracterization was used to secure a conviction on the charged offense of possession of burglar's tools, despite the fact that the tools recovered by the police were not consistent with the actual damage done to the trailer. We find defendant's argument unavailing because the offense of possession of burglar's tools does not require that the tools actually be used in a burglary. The statute provides:

Any person who shall knowingly have in his possession any nitroglycerine, or other explosive, thermite, engine, machine, tool or implement, device, chemical or substance, adapted and designed for cutting or burning through, forcing or breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ the same for the purpose aforesaid, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years. [MCL 750.116.]

In this case, the record showed that defendant possessed tools "adapted and designed for cutting or burning through, forcing or breaking open any building, room, vault, safe or other depository," and the circumstances surrounding defendant's apprehension provided ample basis for the jury to infer that defendant had the intent to employ those tools for that purpose, had the circumstances at the trailer required it. Accordingly, defendant is not entitled to any relief on appeal.

Next, defendant argues that the prosecutor improperly vouched for the testimony of Kulhanek during opening statements. Contrary to defendant's argument, the record in this case demonstrates that the prosecutor's summary of Kulhanek's expected testimony conformed with the actual content of that testimony. Thus, the statements cannot be considered inaccurate or misleading.

Finally, defendant argues that the prosecution engaged in misconduct during closing argument by urging the jury to use its common sense and find defendant guilty because he was guilty of the charged offenses. We conclude that there is nothing improper about a prosecutor asking for a guilty verdict based on the evidence. Accordingly, we reject defendant's argument.

Defendant next argues that he was denied effective assistance of both trial and appellate counsel. We disagree. Under both federal and state constitutional law, a criminal defendant has a right to the assistance of adequate and effective counsel. US Const, Am VI; Const 1963, art 1, § 20. To prevail under a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below professional norms, that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the resultant proceedings were fundamentally unfair or unreliable. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Here, defendant asserts that his trial counsel was ineffective for failing to object to the instances of alleged prosecutorial misconduct discussed above. As noted above, however, the actions complained of were not improper, and any objection by defendant's trial counsel would have been meritless. Counsel is not required to raise meritless objections. *People v Gooden*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Further, given the overwhelming circumstantial

evidence of defendant's guilt in this case, there is no reasonable probability that trial counsel's failure to object to the prosecution's actions would have resulted in an acquittal for defendant. Accordingly, defendant is not entitled to relief.

Defendant argues that appellate counsel failed to adequately communicate with him, and that appellate counsel failed to advance the meritorious issues of prosecutorial misconduct and ineffective assistance of trial counsel. However, as established in the analysis above, defendant's claims of ineffective assistance and prosecutorial misconduct are meritless. Moreover, defendant has raised the subject issues in his Standard 4 brief and therefore cannot establish any prejudice resulting from the alleged incompetence of his appellate counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra