

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES JENKINS,

Defendant-Appellant.

UNPUBLISHED

October 12, 2006

No. 261902

Wayne Circuit Court

LC No. 04-011504-01

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of receiving and concealing a stolen motor vehicle, MCL 750.535(7), for which he was sentenced as a fourth habitual offender, MCL 769.12, to serve a term of 46 months to 25 years' imprisonment and ordered to pay restitution in the amount of \$4,569. We affirm.

Defendant first argues that the prosecution presented insufficient evidence to sustain his conviction. We disagree. When reviewing a challenge to the sufficiency of evidence to support a conviction this Court reviews the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003).

As stated by this Court in *People v Allay*, 171 Mich App 602, 608; 430 NW2d 794 (1988):

The essential elements for a conviction pursuant to the receiving and concealing statute require proof (1) that some property was stolen, (2) that the defendant bought, received, concealed, or aided in the concealment of the same, (3) that the property is identified as property previously stolen, and (4) that the defendant had knowledge of the stolen nature of the property at some time during his wrongful course of conduct.

Here, when viewed in the light most favorable to the prosecution, the evidence presented at trial showed that several days after Larry Kennedy reported to the police that his Ford pickup truck was stolen from in front of his home, Officer Edwin Julian pulled behind a truck observed by him to be blocking an alley. After running the vehicle's license plate, Julian discovered that

the truck had been reported stolen. Julian then approached the truck, at which time defendant exited the vehicle from the driver's side. No one else was within the immediate vicinity of the truck, which was found to have been "hot-wired," with a noticeably broken steering column and punched ignition. Kennedy identified the truck in which defendant was found as that reported stolen by him, and testified at trial that he did not give defendant, who initially provided Julian with a false name, permission to drive the truck. Kennedy further testified that when returned to him the truck contained sinks and other plumbing materials not present when he last parked the vehicle, and that in a letter sent to him by defendant after his arrest, defendant indicated that he was in the home remodeling and construction business.

We find this evidence to be sufficient to show that Kennedy's truck had been stolen and that defendant was in possession of the stolen truck "with knowledge of the stolen nature of the property." *Allay, supra; McKinney, supra*. This Court has found that a jury may infer that the defendant had knowledge that a vehicle was stolen from all the facts and circumstances brought out at trial. *People v Laslo*, 78 Mich App 257, 262-263; 259 NW2d 448 (1977). This Court has also found that a readily detectable, tampered-with ignition switch is sufficient evidence from which a jury could infer the element of guilty knowledge for receiving a stolen vehicle. *People v Biondo*, 89 Mich App 96, 97; 279 NW2d 330 (1979). Here, defendant's knowledge of the stolen nature of the truck could reasonably be inferred from the obviously broken steering column and punched ignition. Knowledge that the truck was stolen could also be inferred from defendant's use of a false name at the time of his arrest. Consequently, we reject defendant's claim that the prosecution presented insufficient evidence to sustain his conviction for receiving and concealing the stolen truck.

Defendant next argues that the prosecutor committed acts of misconduct that denied him a fair trial. We disagree. A claim of prosecutorial misconduct is properly preserved if the defendant specifically and timely objects. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant did not object to any of the alleged improper statements below and, therefore, did not preserve this issue for appellate review. We review unpreserved issues of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003), citing *Carines, supra*.

In challenging the conduct of the prosecutor at trial, defendant first argues that the prosecutor infringed upon his constitutional right not to testify when, during an objection to defense counsel's attempt to introduce a statement made by defendant in his letter to Kennedy, the prosecutor commented that "the defendant is more than willing – more than likely to testify." Defendant argues that the prosecutor's comment shifted the burden of proof and denied him a fair trial. We disagree.

Issues of prosecutorial misconduct are considered "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of the defendant's argument." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Because a criminal defendant has a constitutional right against compelled self-incrimination and may choose to rely on the presumption of innocence, a prosecutor may not comment upon a defendant's failure to testify. *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995). This Court has found that comments which burden the defendant's right not to testify, or shift the burden of disproving an element of the offense to the defendant, are improper. *Id.* at 112-113. However, although it is improper for the prosecution to comment regarding a defendant's exercise of the constitutional

privilege against self-incrimination, reversal is not required where such a comment is not a “studied attempt by the prosecution to place [the] matter before the jury.” *People v Truong*, 218 Mich App 325, 336; 553 NW2d 692 (1996) (Citation and internal quotation marks omitted).

Defendant has failed to show plain error affecting his substantial rights. This Court has found that “[a]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel’s argument.” *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001) (Citation and internal quotation marks omitted). This Court has also found that the “propriety of a prosecutor’s remarks depends on all the facts of the case.” *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). As noted above, the statement at issue here was made during an objection to defense counsel’s query regarding statements made by defendant in his letter to Kennedy. Defense counsel’s query regarding the letter sought to elicit from Kennedy that defendant maintained his innocence in the letter. The prosecutor properly objected to defense counsel’s query. See MRE 801. Although, in doing so, the prosecutor also commented that defendant would most likely testify regarding the contents of the letter, the record does not support that the prosecutor’s statement was an attempt to put defendant’s right not to testify before the jury. *Truong, supra*. Rather, the record indicates that the statement was merely an inadvertent response to defense counsel’s improper attempt to place defendant’s out-of-court statements before the jury. The statement was not improper in light of the circumstances nor did it infringe upon defendant’s constitutional right not to testify. Moreover, any prejudice arising from the statement was minimal and was cured by the trial court’s instructions to the jury that defendant had an “absolute right not to testify” and that it may not use defendant’s failure to testify against him. See *People v Callon*, 256 Mich App 312, 330-331; 662 NW2d 501 (2003).

Defendant’s argument that the prosecutor’s statement improperly shifted the burden of proof to him is also without merit. The prosecutor did not imply to the jury that defendant had the burden of disproving an element of the offense charged. *Fields, supra* at 112-113. Moreover, the court properly instructed the jury that the burden of proof rested with the prosecution and that defendant was not required to prove his innocence or to do anything, thereby alleviating any possible prejudice. *Callon, supra*.

Defendant also argues that the prosecutor “denigrated the defense” when he suggested during closing argument that defense counsel was trying to mislead the jury. Again, we disagree.

Although defendant is correct that it is improper for a prosecutor to personally attack or suggest that defense counsel is intentionally attempting to mislead the jury, *Watson, supra* at 592, the prosecutor’s statement that as a defense attorney “you can just throw . . . stuff out there” and hope that the jury will remember it, and that the jury should not “let [defense counsel] fool” it, cannot reasonably be construed as a personal attack on defense counsel. Moreover, the statements were not improper in light of defendant’s theory of the case. Defense counsel maintained that defendant and another unidentified person were outside of defendant’s home when they noticed that a truck had been sitting outside for awhile. According to the defense, defendant and his companion, “being responsible citizens,” went to check on the truck to find out to whom the vehicle belonged. However, while defendant was looking inside of the truck, the police arrived.

Despite this theory, which was first raised by defense counsel during opening arguments and was reasserted at the close of trial, no evidence showing that another person was with defendant at the time that he was approached by the police and eventually arrested, or that defendant even lived in the area, was presented at trial. The prosecutor was free to argue the absence of evidence to substantiate defendant's theory of the case. See *Fields, supra* at 115-116 (a prosecutor may observe that defense counsel failed to prove facts argued in his opening statement). The statements were not, therefore, improper. Moreover, as previously stated, "[a]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Watson, supra* at 593. Thus, even if the statements were improper when read alone, the statements were proper when viewed in their entirety and in light of defendant's argument. Indeed, the prosecutor's remarks were directed at the evidence; they were not aimed at shifting the jury's focus from the evidence to defense counsel's personality. See *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). Therefore, plain error has not been shown.

Lastly, defendant argues that the trial court's order of restitution in the amount of \$4,569 was erroneous. Because defendant failed to challenge the restitution award below, he must again show plain error affecting his substantial rights. *Carines, supra* at 763. We find no such error on the record before us.

MCL 780.766(2) requires that the trial court "order . . . that defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction." The term "course of conduct," as used to define the scope of a proper restitution order, has been broadly construed by our Supreme Court to require that the defendant compensate "for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction." *People v Gahan*, 456 Mich 264, 272; 571 NW2d 503 (1997).

Here, the order of restitution entered by the trial court was based on testimony and other evidence, including an itemized repair receipt, showing that the truck sustained \$4,569 worth of damage attributable to its theft from Kennedy. Although defendant correctly notes that he was not convicted of the vehicle's theft, we do not agree that the evidence presented at trial was insufficient to show that these damages arose from the "course of conduct giving rise to [his] conviction." MCL 780.766(2); *Grahan, supra*. To the contrary, there was evidence linking defendant to significant use of the vehicle during the period between its theft and having been located by the police. As noted above, defendant was found in the driver's seat of the vehicle and materials consistent with his trade were found in the truck bed. Given this evidence, and considering that no dispute as to the nature or extent of the damage sustained by the vehicle was raised before the trial court, it was not plain error to attribute the entirety of Kennedy's loss to the course of conduct that gave rise to defendant's conviction. *Grahan, supra*.

Although defendant argues that the truck is worth less than the court ordered restitution, defendant did not present this evidence during sentencing nor did he request an evidentiary hearing regarding the amount of restitution that was properly due. *Gahan, supra* at 276. "Absent a dispute, the court was not required to make express findings regarding the amount of restitution." *People v Grant*, 455 Mich 221, 235; 565 NW2d 389 (1997). Because defendant waived his opportunity for an evidentiary hearing "he cannot now argue that he was denied due process." *Gahan, supra*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio