

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS JOSEPH SERBICK,

Defendant-Appellant.

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UNPUBLISHED  
February 21, 2008

No. 274174  
Macomb Circuit Court  
LC No. 2006-002597-FH

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of breaking and entering a building with the intent to commit larceny, MCL 750.110, and receiving or concealing stolen property valued between \$200 and \$1,000, MCL 750.535(4)(a). He was sentenced as a fourth habitual offender, MCL 769.12, to three to ten years' imprisonment for the breaking and entering conviction, and one year in jail for the receiving or concealing stolen property conviction. He appeals as of right, and for the reasons set forth in this opinion, we affirm.

On Friday, April 28, 2006, contractor Thomas Beaver left a mobile home he was working on around 4:00 p.m., leaving his tools and several packages of new window blinds inside. When Beaver returned the following Monday, he discovered that someone had unlocked the door and turned on the lights. His tools and the window blinds were missing. Beaver then alerted the police, and Clinton Township Police Officer Steven Blasky arrived to investigate. While Blasky was speaking with the neighbor two doors down, Cynthia Kaminski, he observed the missing window blinds on Kaminski's porch. According to Blasky, Kaminski gave him permission to enter her home and look for the other stolen items. Kaminski took Blasky to the back bedroom and she opened a closet, which contained a number of toolboxes and tools, including a Kennedy toolbox that Donald Sullivan had recently reported stolen. According to Blasky, Kaminski then directed him to a storage shed at the rear of her property where Blasky opened the door and saw the other items that Beaver had reported stolen. Beaver came to the shed and recovered all the property that had been stolen, except for his small pry bar. Several other neighbors came to look in the shed to see if property they had reported as stolen was there and two neighbors recovered property belonging to them.

Blasky obtained defendant's shoes in order to compare them to the footprint left at the mobile home. Defendant's shoes were similar to the footprint insofar as they were both athletic shoes with a similar ridge line. When defendant was arrested, he had a small pry bar in his

pocket. The pry bar was the same type as the one stolen from Beaver. The only difference between Beaver's pry bar and the one found on defendant was that Beaver's pry bar was new, whereas the one defendant had was used. Defendant's fingerprint was found on the outside window of the mobile home, where entry into the home was accomplished.

Defendant testified and denied any involvement in the robbery. However, he admitted that he was at the mobile home during the time frame of the robbery. He explained that he was in the process of remodeling Kaminski's home, and that he looked in the window of the mobile home to get ideas for Kaminski's home; however, he denied ever entering the mobile home, or taking anyone else's property.

### I. Sufficiency of the Evidence

Defendant first argues that the evidence was insufficient to support his convictions. In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

There was sufficient circumstantial evidence to identify defendant as the perpetrator of the breaking and entering. Defendant's fingerprint was found on the mobile home's window, which the police determined was used to gain entry. Next to that fingerprint was a handprint smudge, and the location of the smudge supported an inference that it was placed there when lifting the window. Additionally, a shoe print that was left at the scene was consistent with defendant's shoes. When defendant was arrested, a pry bar similar to one that was stolen from the mobile home was found in his possession. Finally, the stolen items were found in a shed of the residence where defendant lived. This evidence, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to find beyond a reasonable doubt that defendant was the person who broke into and entered the mobile home.

Furthermore, the evidence linking defendant to the mobile home theft, as well as additional evidence that other stolen property was found in defendant's bedroom and in the shed of the home where defendant resided was sufficient to show that he knowingly possessed or concealed stolen property, knowing that it was stolen. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996).

### II. Kennedy Toolbox

Next, defendant argues that a new trial is required because testimony was presented at trial that a stolen Kennedy toolbox, unrelated to the theft of the mobile home, was found in the closet of defendant's bedroom. Because defendant did not object to this evidence at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Ackerman*, 257 Mich App 434, 446; 669 NW2d 818 (2003).

Defendant argues that because the stolen Kennedy toolbox was not related to the theft of the mobile home, it constituted improper character or propensity evidence, inadmissible under MRE 404(b)(1). Defendant's reliance on MRE 404(b)(1) is misplaced. In addition to being

charged with breaking and entering the mobile home, defendant was separately charged with receiving or concealing stolen property. The Kennedy toolbox, which was found in the closet of defendant's bedroom, was part of the basis for the receiving or concealing stolen property charge. Therefore, a plain error has not been shown.

Defendant also complains that his constitutional right of confrontation was violated because he did not have an opportunity to cross-examine Donald Sullivan, the owner of the Kennedy toolbox. The record does not indicate why Sullivan, who was on the prosecution's witness list, was not called at trial. However, there is no indication that defendant was prevented from calling and questioning Sullivan and, therefore, defendant has not shown that his confrontation rights were violated. *People v Cooper*, 236 Mich App 643, 659; 601 NW2d 409 (1999); *People v Lee*, 212 Mich App 228, 257; 537 NW2d 233 (1995).

### III. Defendant's Pro Se Supplemental Brief.

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

#### A. Evidence of Other Stolen Property

Defendant argues that evidence that he possessed the Kennedy toolbox and other stolen property, unrelated to the theft of the mobile home, was improper character evidence, inadmissible under MRE 404(b)(1). Again, there was no objection to this evidence at trial, so our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763.

As previously discussed, this evidence was not offered to prove defendant's character, but rather was the foundation for the receiving or concealing stolen property charge. Thus, the evidence was no improper and no plain error has been shown.

#### B. Prosecutorial Misconduct

Defendant argues that misconduct by the prosecutor denied him a fair trial. Because defendant did not object to the prosecutor's conduct at trial, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003).

Defendant argues that it was improper for the prosecutor to argue that he committed the charged crime because he was unable to afford the tools he needed for his construction work. Contrary to what defendant argues, the prosecutor's argument was supported by evidence that defendant was engaged in construction and remodeling work, that his finances were limited, and that the tools necessary for defendant's work are expensive. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Defendant also complains that it was improper for the prosecutor to comment on his financial status as a motive for the crime. Our Supreme Court has held that evidence of poverty is not ordinarily admissible to show motive. *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980). In this case, however, the prosecutor was not attempting to establish a motive based simply on defendant's financial status, but by pointing out that the items stolen were items that defendant could use in his construction and remodeling

work. Further, defendant addressed this subject on direct examination, testifying that he had all the tools he needed for his work. A prosecutor's comments must be considered in light of the evidence and defense arguments. *Watson, supra* at 593. Considered in context, we are not persuaded that the prosecutor's argument constituted plain error. Furthermore, to the extent that the prosecutor's argument improperly injected the issue of defendant's poverty, a cautionary instruction upon timely objection could have cured any prejudice. *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005). Therefore, this unpreserved issue does not warrant appellate relief.

Defendant next argues that the prosecutor improperly asked him whether prosecution witness Kaminski was lying in her testimony. It is improper for a prosecutor to ask a defendant to comment on the credibility of a prosecution witness, because a defendant's opinion on such a matter is not probative and credibility determination are to be made by the trier of fact. *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001). However, a prosecutor properly may ask a defendant whether he has a different version of the facts in an attempt to ascertain which facts are in dispute. *Ackerman, supra* at 449. Considered in this contest, we find no plain error. Furthermore, to the extent that the prosecutor's questioning could be considered improper, reversal is not required because any prejudice could have been cured with an appropriate instruction upon timely objection.

We reject defendant's argument that the prosecutor misrepresented the evidence concerning the smudge mark. The prosecutor's characterization of the smudge mark as an entire palm print was based on the evidence and reasonable inferences arising from it. *Watson, supra* at 588. Further, it was not improper for the prosecutor to argue that defendant's version of how the smudge mark got on the window was not credible. A prosecutor properly may argue from the facts that a defendant is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Lastly, the prosecutor did not engage in misconduct by presenting and referring to evidence of stolen property that was not associated with the mobile home breaking and entering. As previously discussed, the evidence was directly related to the additional charge of receiving or concealing stolen property.

### C. Suppression of Evidence

Defendant argues that evidence of the stolen property should have been suppressed because it was discovered during an illegal warrantless search.

Defendant did not challenge the validity of the search in the trial court. Therefore, this issue is not preserved and defendant must establish a plain error affecting his substantial rights. *Carines, supra* at 763.

The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11; *Illinois v McArthur*, 531 US 326; 121 S Ct 946; 148 L Ed 2d 838 (2001); *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005). Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions. *People v*

*Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999). One established exception is a search conducted pursuant to consent. *Id.* at 294.

Although defendant argues that portions of Kaminski's testimony suggest that she did not voluntarily consent to the search of her home, she never explicitly denied giving permission and the responding police officer clearly testified that the search was conducted with her permission. Accordingly, defendant has not established a plain error.

Defendant also argues that his arrest was illegal and, therefore, evidence of the pry bar found in his possession should have been suppressed as well. Defendant concedes, however, that there is nothing in the record concerning the circumstances of his arrest to support this claim, and he also fails to explain why his arrest was illegal. "A party may not announce a position on appeal and leave it to this Court to unravel or elaborate his claims." *People v Hicks*, 259 Mich App 518, 532; 675 NW2d 599 (2003). Accordingly, we consider this issue waived.

#### D. Effective Assistance of Counsel

To establish ineffective assistance of counsel, defendant must show that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment, and that counsel's deficient performance prejudiced the defense, i.e., a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

As previously explained, the record does not support defendant's claim that the stolen property was discovered during an illegal search, or that defendant's arrest was illegal. Therefore, defense counsel was not ineffective for failing to file a motion to suppress. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Further, because the evidence of the stolen Kennedy toolbox and the evidence of Piotrowski's stolen property was part of the basis for the receiving or concealing stolen property charge, counsel was not ineffective for failing to object to this evidence. *Id.* Finally, even if an objection to some of the prosecutor's conduct would have been appropriate, defendant was not prejudiced by counsel's failure to object because any improper comments by the prosecutor were relatively innocuous in comparison to the compelling evidence provided at trial against defendant. Consequently, there is no reasonable probability that the result of the proceeding would have been different had counsel objected.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ William B. Murphy  
/s/ Stephen L. Borrello