STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 26, 2011
v	No. 296160 Kalkaska Circuit Court
JOSHUA ANTHONY KOWALEWSKI, Defendant-Appellant.	LC No. 09-003113-FH

Before: METER, P.J., and SAAD and WILDER, JJ.

PER CURIAM.

Defendant appeals by right his conviction following a jury trial of larceny from a motor vehicle, MCL 750.356a(1), and breaking and entering a motor vehicle with intent to steal property between $200 and $1,000, MCL 750.356a(2)(b)(*i*). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 46 to 240 months for the larceny from a motor vehicle and 12 months for the breaking and entering. We affirm.

Defendant's conviction stems from the theft of an XM radio receiver, a Bluetooth headset, and an iPod from a motor vehicle. The only item recovered was the XM radio receiver. On June 2, 2009, police found and seized the receiver, along with other items, from defendant's apartment. At trial, defendant claimed that he did not steal the property, but rather, a friend gave it to him.

Defendant first argues that the trial court erred in its finding regarding the location of the XM radio receiver. We disagree.

Appellate courts "review a trial court's factual findings in a ruling on a motion to suppress for clear error. To the extent that a . . . ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, . . . review is de novo." *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Swirles*, 218 Mich App 133, 136; 553 NW2d 357 (1996). This Court reviews de novo the trial court's ultimate decision on a motion to suppress. *People v Wilkens*, 267 Mich App 728, 732; 705 NW2d 728 (2005).

One of defendant's two roommates testified at the hearing on defendant's motion to suppress evidence that she saw the receiver for the first time about two weeks before the officers

searched the apartment. She said that it sat on an armoire that was in a common area "right when you walk into the door" to the apartment. A police officer testified that he asked this roommate if there was anything else in this apartment that belonged to defendant, and she identified the XM radio receiver. The officer testified that the XM radio receiver was on a small wooden desk or table.[1] Although defendant testified that the XM radio receiver was inside a zipped snowmobile helmet bag in the closet, the trial court apparently did not find defendant's testimony credible. Based on this testimony, and given that this Court is bound to defer to the trial court on the issue of credibility, we cannot conclude that the trial court's finding regarding the location of the XM radio receiver was clearly erroneous. See *People v Sexton* (*After Remand*), 461 Mich 746, 752; 609 NW2d 822 (2000) (where resolution of a disputed fact turns on the credibility of witnesses, deference should be given to the trial court).

In a related argument, defendant contends that the trial court erred when it denied his motion to suppress the XM radio receiver. Defendant argues that the prosecution failed to demonstrate that defendant's roommates had common or apparent authority over a dresser in the laundry room that one had loaned defendant, or the bags in defendant's part of the closet. Defendant also argues that his roommates were acting as agents of the police when they started searching through the areas where he stored his belongings. Finally, defendant argues the prosecutor failed to establish that the XM radio was found by one of his roommates in a common area, rather than in defendant's private space. We disagree.

"The right against unreasonable searches and seizures is guaranteed by both the state and federal constitutions." *Wilkens*, 267 Mich App at 733, citing US Const, Am IV; Const 1963, art 1, § 11. Further, "[t]he constitutions do not forbid all searches and seizures, only unreasonable ones. Reasonableness depends upon the facts and circumstances of each case." *Id.* "In order to show that a search was legal, the police must show either that they had a warrant or that their conduct fell under one of the narrow, specific exceptions to the warrant requirement." *People v Eaton*, 241 Mich App 459, 461; 617 NW2d 363 (2000). "Among the recognized exceptions to the warrant requirement are exigent circumstance[sic], searches incident to a lawful arrest, stop and frisk, consent, and plain view. Each of these exceptions, while not requiring a warrant, still requires reasonableness and probable cause." *People v Brzezinski*, 243 Mich App 431, 433-434; 622 NW2d 528 (2000) (internal citations omitted).

We first note that defendant does not contest his roommates' ability to consent to a search of the apartment in general. See *People v Lapworth*, 273 Mich App 424, 427; 730 NW2d 258 (2006) ("[T]he consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.") Nevertheless, it is not necessary to determine whether defendant's roommates had common or apparent authority to consent to a search of defendant's personal space because, as discussed, the trial

[1] We note that the witnesses referred to the piece of furniture immediately inside the doorway as an "armoire" or a "desk," and the trial court later called it a "hutch." Although it was described differently, we conclude that everyone was referring to the same piece of furniture.

court specifically found that the XM radio receiver was "out in open view on the hutch." Thus, the plain view exception to the warrant requirement applies: "A police officer is authorized to seize without a warrant an item in plain view if the officer is lawfully in the position to observe the item and the item's incriminating nature is immediately apparent." *Id*. at 430. Moreover, the items that the police found in the dresser and in the closet, although not in plain view, were never brought up during trial because they were apparently not the same items that had been stolen from the automobile. According to the victim of the crime, the only item ever recovered was the XM radio receiver at issue here.

Defendant next argues that the trial court erred in denying his motion for a directed verdict because MCL 750.356a(1)[2] applies only to items that are attached to a vehicle. We disagree.

Defendant's argument is essentially one of statutory interpretation, which we review de novo. *People v Osantowski*, 481 Mich 103, 107; 748 NW2d 799 (2008). This Court, however, has already explicitly rejected this same argument in *People v Miller*, 288 Mich App 207, 211; ___ NW2d ___ (2010), lv den 488 Mich 992 (2010), finding that "[n]othing in the language of MCL 750.356a(1) expresses the legislative intent to limit the statute's application to items that are permanently attached to the vehicle."

Defendant also argues that the XM radio receiver, Bluetooth headset, and iPod were not electronic devices because they ran on batteries. However, a battery-powered device is an electronic device because it requires electric energy to function. See *Random House Webster's College Dictionary* (1997) (defining battery as "a combination of two or more cells connected to produce electric energy"). Further, even though the battery argument was not raised in *Miller*, the stolen item at issue in *Miller* was a cellular phone, which runs on a rechargeable battery. *Id.* at 208. As such, defendant cannot show that the trial court erred in denying his motion for a directed verdict.

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Kurtis T. Wilder

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[2] MCL 750.356a(1) states:

> 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.