

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 14, 2012

v

JAMES OWEN SCADIN,

Defendant-Appellant.

No. 304526
Oakland Circuit Court
LC No. 2010-234947-FH

Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

MEMORANDUM.

Defendant was convicted by a jury of larceny of \$1,000 or more but less than \$20,000, MCL 750.356(3)(a), for which he was sentenced to a prison term of 3 to 10 years. He appeals as of right. We affirm.

Defendant's sole claim on appeal is that the trial court erred by failing to instruct the jury on the definition of "fair market value" in CJI2d 22.1 for purposes of determining the degree of the offense. The crime of larceny can be anything from a 93-day misdemeanor to a 10-year felony, depending on the value of the property stolen. MCL 750.356(2), (3), (4), and (5). The value of a stolen item is an essential element of the offense when the value is used to differentiate between the felony and misdemeanor offenses. *People v Fuzi*, 46 Mich App 204, 209; 208 NW2d 47 (1973). The trial court instructed the jury in accordance with CJI2d 23.1, which sets forth the elements of larceny. Thus, the jury was instructed that the prosecutor had to prove that "the property had a fair market value at the time it was taken of \$1,000 or more, but less than \$20,000." CJI2d 23.1(6). When a definition of "fair market value" is needed, CJI2d 22.1 should be used. The trial court did not follow CJI2d 23.1 with CJI2d 22.1. After instructing the jury, the court asked, "Are the attorneys satisfied with the instructions?" Counsel for the prosecution and the defense both expressed satisfaction with the instructions. Defense counsel's "affirmative expression of satisfaction with the trial court's jury instruction waived any error." *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009); see also *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011).

Even if this claim had not been waived, defendant has failed to establish a right to relief. Because there was no request for an instruction based on CJI2d 22.1, the issue is unpreserved and defendant therefore has the burden of demonstrating a plain error affecting his substantial rights. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003). The record shows

that, during deliberations, the jury sent out a note asking for “the definition of ‘fair market value’ in the dictionary[.]” The court responded by returning the note and writing “See Attached,” and providing a copy of CJI2d 22.1. Thus, the record shows that the jury had the benefit of the instruction defendant claims should have been given. Accordingly, there was no plain error affecting defendant’s substantial rights.

Affirmed.

/s/ Deborah A. Servitto

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood