

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 13, 2012

v

JAMES DAVID MARKHAM,

Defendant-Appellant.

No. 306326
Wayne Circuit Court
LC No. 10-013544-FH

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant James Markham appeals by right his jury convictions of improper use of a registration plate, MCL 257.256, and possessing a stolen, false or counterfeit registration plate, MCL 257.257. The trial court sentenced Markham to serve one year of probation for his convictions. Because we conclude there were no errors warranting relief, we affirm.

I. BASIC FACTS

Markham's convictions arise from a complaint that he was driving a black Dodge Charger with tinted windows and police lights. Officer Timothy Ewald investigated the complaint and, when he ran Markham's license plate, he learned that the plate was registered to William McGraw.

In February 2010, Detroit Police Officers Blackburn and O'Keefe pulled over McGraw for having a broken light and expired license plate on his vehicle. As a result, the officers had McGraw's vehicle towed and seized his license plate. Although McGraw later retrieved his vehicle, he did not get his plate from police custody.

At trial, Markham testified that he took McGraw's license plate from the back of O'Keefe's patrol car and had one of his officer friends run the plate through the police LEIN system to see if McGraw had a record. After verifying that McGraw's record was clear, Markham placed the license plate on his car; he explained that he did so because he thought someone was following him. Markham further testified that he was fearful for his safety because he and his wife received a death threat through a YouTube Video, found a Molotov cocktail on their porch, and learned that a neighborhood police officer recently was shot.

During direct examination, Markham's father, James Markham Sr., testified that the license plate tab belonged to him and that he placed the tab on the license plate. Because Markham Sr.'s statement was self-incriminating, the trial judge asked the jury to leave and advised that Markham Sr. should receive independent counsel. The next day, Markham Sr. invoked his Fifth Amendment right and refused to testify during cross-examination. For that reason, the trial judge struck Markham's Sr.'s earlier testimony and instructed the jurors accordingly.

II. DUE PROCESS

A. STANDARD OF REVIEW

Markham first argues that the trial court deprived him of his constitutional right to a fair trial through several errors. We review de novo questions of constitutional law. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006). However, because he failed to raise these issues at the trial level, we must review the errors for plain error. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). For unpreserved claims of error, the defendant "is not entitled to relief unless he can establish (1) that the error occurred, (2) that the error was 'plain,' (3) the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012).

B. INABILITY TO PRESENT DEFENSE

First, Markham argues that the trial court erroneously deprived him of the ability to present his defense when it improperly struck his father's testimony. A criminal defendant has the right to "a meaningful opportunity to present a complete defense." *People v Unger*, 278 Mich App 210, 249; 749 NW2d 272, 300 (2008) (quotation marks and citation omitted). "Although the right to present a defense is a fundamental element of due process, it is not an absolute right." *People v Hayes*, 421 Mich 271, 279; 264 NW2d 635 (1984). "[T]he accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008) (quotation marks and citations omitted).

James Markham Sr. had the constitutional right to not incriminate himself. When a witness invokes his or her Fifth Amendment right against self-incrimination and the invocation "precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because the [opposing side] is deprived of the right to test the truth of [the witness'] direct testimony" *People v Guy*, 121 Mich App 592, 611; 329 NW2d 435 (1982), quoting *United States v Cardillo*, 316 F2d 606, 611 (CA 2, 1963). In such a situation, the trial court should strike the witness' direct testimony. *Id.* Therefore, even though James Markham Sr. testified during direct examination that he had placed an invalid registration tab on Markham's license plate, the trial court could properly strike that testimony because Markham Sr. invoked his right against self-incrimination and could not be properly cross-examined about his testimony. Therefore, the trial court did not violate Markham's right to present a defense when it

struck Markham Sr.'s testimony after Markham Sr. precluded the prosecution from testing his testimony by invoking his right against self-incrimination.

C. WITNESS MISCONDUCT

Second, Markham argues that the trial court failed to effectively deal with Markham Sr.'s act of nodding at two jurors. A criminal defendant "has a right to a fair and impartial jury." *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). Jurors must only consider the evidence presented to them in open court. *Id.* "Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel" *Id.*

In order to prove that the extraneous influence constitutes an error warranting relief, the defendant must prove that the jury was exposed to an extraneous influence and that the influence "created a real and substantial possibility that [it] could have affected the jury's verdict." *Id.* at 88-89. Without a showing that a witness's improper conduct influenced any member of the jury who heard it, an improper remark or gesture does not constitute sufficient grounds for granting a new trial. See *People v Pizzino*, 313 Mich 97, 108; 20 NW2d 824 (1945).

Markham failed to introduce any evidence that his father's nods improperly influenced any member of the jury or even how the nods might have influenced the jury in theory. Additionally, the record indicates that the trial court attempted to cure any error by removing Markham Sr. from the front row of the courtroom and instructing the jury that Markham Sr.'s conduct was improper. On this record, Markham has not established an error warranting relief. *Budzyn*, 456 Mich at 88-89.

Similarly, defendant also argues that the trial court failed to effectively deal with the court officer's comment regarding the jury's attitude toward the prosecutor. Outside of the presence of the jury, the court officer stated, "[t]hey told me they were mad at the prosecutor." Because the court officer made the statement outside of the presence of the jury, the comment could not have improperly influenced the jury or affected Markham's substantial rights. See *Vaughn*, 491 Mich at 654.

III. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Markham also argues there was insufficient evidence to convict him of knowingly possessing a stolen, false or counterfeit registration plate. "In challenges to the sufficiency of the evidence, this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were prove[n] beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). Circumstantial evidence and reasonable inferences from that evidence may be sufficient to prove the elements of a crime. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999). "Even in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but merely introduce evidence sufficient to convince a jury in the face of whatever contradictory evidence the defendant may provide." *Id.* at 623 (quotation marks and citation omitted).

Markham argues that there is insufficient evidence to conclude he was guilty of possession a stolen, false, or counterfeit license plate under MCL 257.257 because he did not steal the license plate. In order to convict Markham of violating MCL 257.257, the prosecution had to prove—in relevant part—that Markham knowingly possessed a stolen, false, or counterfeit license or registration plate, registration decal, or registration tab. MCL 257.257. Because the term “stolen” is not statutorily defined, we “may turn to dictionary definitions to aid our goal of constraining those terms in accordance with their ordinary and generally accepted meanings.” *People v Morley*, 461 Mich 325, 330; 603 NW2d 250 (1999). “*Random House Webster’s College Dictionary* (2000), defines ‘steal’ as ‘to take (the property of another or others) without permission or right, esp. secretly or by force,’ and ‘to appropriate . . . without right or acknowledgement.’” *People v Pratt*, 254 Mich App 425, 428; 656 NW2d 866 (2002). Thus, goods can be considered stolen when they are taken without permission or right. *Id.*

Markham argues that William McGraw, the original owner, abandoned the license plate when he failed to ask the police for its return. However, regardless of whether McGraw failed to ask the police for its return, the evidence showed that Markham took the license plate from O’Keefe’s patrol car without permission or right. Therefore, this evidence was sufficient to support the jury’s verdict.

Additionally, under MCL 257.256, “[a] person shall not carry or display upon a vehicle any registration certificate or registration plate not issued for the vehicle” Given that Markham is a police officer and has knowledge of the LEIN system, a reasonable jury could conclude that he knew that he had no legal right to use the license plate. Further, when asked by another officer whether he knew that the license tab did not belong on the license plate, Markham answered yes. Considering the evidence in the light most favorable to the prosecutor, there was sufficient evidence to support the jury’s verdicts.

There were no errors warranting relief.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Michael J. Kelly