STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 16, 2013
v	No. 307360 Calhoun Circuit Court
MATTHEW CHARLES MCKINLEY a/k/a JEFFREY ALAN NEWBOLD, Defendant-Appellant.	LC No. 2011-002060-FH

Before: FORT HOOD, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of malicious destruction of property over $20,000, MCL 750.377a(1)(a)(*i*), larceny over $20,000, MCL 750.356(2)(a), and inducing a minor to commit a felony, MCL 750.157c.[1] He was sentenced, as a habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 12 to 25 years on each count and also ordered to pay restitution in the amount of $158,188.44. Defendant appeals by right. Because we conclude that the prosecutor presented insufficient evidence to establish that the fair market value of the property stolen was $20,000 or more, we vacate defendant's larceny conviction and remand to the trial court for resentencing. On remand, the court shall correct the judgment of sentence to reflect 150 days of jail credit. In all other respects, we affirm.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

In January 2011, the Battle Creek Police Department (BCPD) began investigating the theft of several commercial air conditioning units. Officer Robert Cipcic and Detective Michael Wood were separately investigating the case. At one point, Cipcic informed Wood that he had a female suspect, but he had been unable to locate an address for her. Using a different spelling of her last name, Wood searched the BCPD database and discovered that she had been arrested for driving with a suspended license. The address associated with the offense was 81 North Union Street, Battle Creek, Michigan. That was defendant's residence.

[1] The jury found defendant not guilty of receiving and concealing stolen property over $20,000, MCL 750.535(2)(a).

Wood went to 81 North Union Street with Officer James Tuyls and approached the home's back door, which appeared to be the primary entrance. As he was walking, Wood observed some condensers and casings that appeared to be from commercial air conditioners. The condensers and casing were lying in the vicinity of defendant's pickup truck and were in plain view as Wood walked to the back door. Wood knocked on the door and was greeted by the female suspect. Wood identified himself and explained that he was investigating some larcenies of air conditioning units. Wood then asked the woman if he and Tuyls could come inside. She agreed.

Once inside, Wood asked the woman if she lived at the address. She said that she did and explained that she was defendant's girlfriend. The woman denied that defendant was at home. Shortly thereafter, an officer outside the home yelled that he saw movement coming from a second floor window. Wood asked the woman if defendant was upstairs, and she nodded her head and pointed upstairs. At this point, Wood asked the woman for permission to search the house, and she gave her consent. While searching the main floor, Wood noticed two bolt cutters next to the stairwell leading to the basement. In the basement, Wood observed bags of copper pipe and "covered wires and motors and condensers and other parts which . . . appeared to be from the inside of . . . several different air conditioning units and other machinery."

Wood determined that there was nobody else in the house and there was no other way for defendant to get downstairs. The officers then went upstairs and took defendant into custody. After defendant was apprehended, Wood went back to the police station and obtained a search warrant for defendant's house. Wood included the items he observed both inside and outside the house in the warrant affidavit.

II. SUFFICIENCY OF EVIDENCE

A. STANDARD OF REVIEW

Defendant first argues that the prosecutor presented insufficient evidence to support his conviction of larceny over $20,000 and malicious destruction of personal property over $20,000. Sufficiency of evidence is a constitutional issue that is reviewed de novo by this Court. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

> When reviewing a claim that the evidence presented was insufficient to support defendant's conviction, this Court must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime. [*People v Kissner*, 292 Mich App 526, 533-534; 808 NW2d 522 (2011).]

B. LARCENY OVER $20,000

The elements of larceny are: (1) an actual or constructive taking of goods or property; (2) a carrying away of the goods; (3) the carrying away must be with felonious intent; (4) the goods or property must belong to another; and (5) the taking of the goods or property must be without

the consent and against the will of the owner. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999). Additionally, the value of the property alleged to have been stolen must meet the statutory requirement. See *People v Pratt*, 254 Mich App 425, 427; 656 NW2d 866 (2002). Depending on the value of the property stolen, the crime of larceny can be anything from a 93-day misdemeanor to a 10-year felony. MCL 750.356(2), (3), (4), and (5).

The only element defendant is challenging on appeal is the value of the stolen property. Defendant raised this same argument to the trial court in a motion for a directed verdict. The trial court denied defendant's motion and stated:

> I'm satisfied . . . from the record, circumstantially, and using common sense and every day experience, the jury could infer that the owner's would not have sold, would have had no incentive to sell the air conditioners for any less than it would have cost to replace them. Whether the jury accepts that argument is up to the jury.

The testimony established that defendant stole six air conditioning compressors from the Maranatha Original Church of God, three from the Seventh Day Adventist Church, two from Kellogg Community College, and two cooler condensers from Rokay Floral. The Maranatha Original Church of God incurred $16,380 to replace their units. The Seventh Day Adventist Church incurred $7,890 to replace their units. Kellogg Community College incurred $21,447 to replace their units. And Rokay Floral incurred $13,809.44 to replace their units.

For larceny, CJI2d 22.1 instructs on how to value the stolen property:

> (1) The test for the value of property is the reasonable and fair market value of the property at the time and in the area of the [state crime].
>
> (2) Fair market value is defined as the price the property would have sold for in the open market at that time and in that place [if the following things were true: the owner wanted to sell but did not have to, the buyer wanted to buy but did not have to, the owner had a reasonable time to find a buyer, and the buyer knew what the property was worth and what it could be used for].

In *People v Johnson*, 133 Mich App 150, 153; 348 NW2d 716 (1984), this Court stated:

> While the larceny statute itself does not provide a guide for determining the value of property which is the subject of a theft, case law supports the use of fair market value as the relevant standard when such a value exists. *People v Hanenberg*, 274 Mich 698; 265 NW 506 (1936); *People v Gilbert*, 163 Mich 511; 128 NW 756 (1910). Generally, proof of value is determined by reference to the time and place of the offense. *People v Cole*, 54 Mich 238; 19 NW 968 (1884); *Gilbert, supra*. Value has been interpreted to mean the price that the item will bring on an open market between a willing buyer and seller. *People v Otler*, 51 Mich App 256; 214 NW2d 727 (1974); *People v Tillman*, 59 Mich App 768; 229 NW2d 922 (1975).

On appeal, defendant argues that the prosecutor presented insufficient evidence of value because the witnesses did not testify concerning the fair market value of the stolen units; rather, they testified concerning the costs the victims incurred to replace the stolen units. Caselaw supports defendant's argument. *Johnson*, 133 Mich App at 153; see also *Pratt*, 254 Mich App at 428. The cost of a new air conditioning condenser could be a relevant factor in determining the fair market value of an old air conditioning unit, but plaintiff presented almost no evidence concerning the cost of each new air conditioning unit. Rather, plaintiff presented evidence concerning the total costs incurred by the victims, which included the cost of labor and materials.

Only one witness was able to give a cost breakdown. He testified that of the total cost of $13,809.44 to replace Rokay Floral's two cooler condensers, the cost of two coolers was $2,749 and $3,572 respectively (a total of $6,321), while the labor was approximately $2,200 and the cost of materials was $2,057. $6,321 represents the total cost incurred by the owner to purchase replacements units, but it does not represent the fair market value of the units stolen. As noted above, the cost to replace could be a relevant factor in determining fair market value, but it is not dispositive. Several other factors would need to be accounted for, such as the age, condition, and rate of depreciation. The cooler condensers at Rokay Floral were at least two years old. Thus, it is reasonable to assume that their fair market value was not equal to the cost of two brand new units.

Therefore, because the evidence of the fair market value of the stolen items was insufficient, defendant's larceny over $20,000 conviction is vacated.

C. MALICIOUS DESTRUCTION OF PERSONAL PROPERTY

Defendant next argues that there was insufficient evidence to support his conviction for malicious destruction of personal property over $20,000. He argues that air conditioning units and cooler condensers were fixtures and therefore real property. By its plain language, MCL 750.377a only applies to personal property. This Court addressed a similar issue in *People v Fox (After Remand)*, 232 Mich App 541, 553; 591 NW2d 384 (1998).

Defendant is correct that prior to the theft the air conditioning units and cooler condensers were fixtures and therefore considered items of real property, and plaintiff concedes as much in his brief. However, once defendant severed the air conditioning units and cooler condensers from the property they were annexed to, they resumed their character as personal property. See 1 Cameron, Michigan Real Property Law, § 4.8, p 140 (3d ed) ("[T]here can be what is called severance, or the removal of an article that was once attached to the land for disposal or use elsewhere. When an item is severed, it ceases to be a fixture and resumes its character as an item of personal property."). By severing the air conditioning units and cooler condensers from the realty they were attached to, defendant changed the character of the items. Defendant's conviction of malicious destruction of personal property over $20,000 is affirmed.

III. RIGHT TO SUBSTITUTE COUNSEL

Defendant next argues that the trial court deprived him of his right to counsel when it denied defense counsel's motion to withdraw. A trial court's denial of a motion to withdraw as counsel is reviewed for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 369;

592 NW2d 737 (1999). An abuse of discretion occurs when the decision is outside the range of reasonable and principled outcomes. *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011). When reviewing a trial court's decision to deny a defense attorney's motion to withdraw, this Court considers the following factors:

> (1) [W]hether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*Echavarria*, 233 Mich App at 369.]

The right to counsel requires the state to provide appointed counsel to indigent defendants who request legal counsel. *People v Jackson*, 483 Mich 271, 278; 769 NW2d 630 (2009). However, an indigent person entitled to appointed counsel is not entitled to choose his own lawyer. *US v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006); *People v Russell*, 471 Mich 182, 192 n 25; 684 NW2d 745 (2004). Appointment of substitute counsel is warranted only upon a showing of good cause and if substitution will not unreasonably disrupt the judicial process. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

Upon review of the record, we are not convinced that good cause existed. In his motion to withdraw, defense counsel stated that there was a breakdown in the attorney-client relationship. However, the breakdown appears to have been caused by defendant. Defendant insisted on pursuing an objective that defense counsel found "imprudent or repugnant." Further, defendant threatened to "create lies against counsel." Thus, it appears that defendant was the precipitating cause of any substantial breakdown in communication. "'A defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel.'" *Traylor*, 245 Mich App at 462-463, quoting *People v Meyers (On Remand)*, 124 Mich App 148, 166-167; 335 NW2d 189 (1983).

Further, assuming good cause existed, defendant still has the burden of demonstrating prejudice resulting from the trial court's denial of the motion to withdraw. *Echavarria*, 233 Mich App at 369. Defendant has not done so. Defendant does not argue that defense counsel rendered deficient representation, nor does he argue that the breakdown in the attorney-client relationship affected the fairness or integrity of the proceedings. Indeed, a review of the record demonstrates that defense counsel provided defendant with competent and zealous representation.

IV. WARRANTLESS SEARCH AND SEIZURE

Defendant next argues that the trial court erred when it denied his motion to suppress evidence uncovered during the warrantless search of his house. This Court reviews de novo a trial court's ultimate decision on a motion to suppress, but reviews a trial court's factual findings for clear error. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000). "A finding is clearly erroneous if, after reviewing the entire record, an appellate court is left with a definite

and firm conviction that a mistake has been made." *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001).

"It is well settled that both the United States Constitution and the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009) (internal quotation marks and citations omitted); see US Const, Am IV; Const 1963, art 1, § 11.[2]

Defendant first argues that the trial court erred in denying his motion to suppress the condensers and casings that Wood observed in the driveway next to his pickup truck. We disagree. The mere act of walking down defendant's driveway to approach the back door does not in itself implicate the Fourth Amendment. See *People v Shankle*, 227 Mich App 690, 694; 577 NW2d 471 (1998) ("Merely entering the private property of another is not an offense unless one has been forbidden to do so or refuses to depart after having been told to do so by a proper person."). A driveway is a public place and there is no reasonable expectation of privacy in an open driveway. *Id.* at 693-694; *United States v Smith*, 783 F2d 648, 651-652 (CA 6, 1986). In the present case, there were no obstructions indicating an attempt to limit access to the driveway or the area behind defendant's house. Further Wood's discovery of these items was the product of a proper plain view search. *People v Wilkens*, 267 Mich App 728, 733; 705 NW2d 728 (2005). Police were at defendant's home to investigate the theft of several air conditioning units. Their decision to proceed to the back door was based on their conclusion that it was the primary entrance. Their perception was reasonable in light of the conditions they observed.

Defendant also argues that the trial court erred in denying his motion to suppress evidence found inside his house. We disagree. Generally, searches or seizures conducted without a warrant are unreasonable per se, and evidence thereby seized must be excluded from trial. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). However, there are a number of recognized exceptions to the warrant requirement, including searches pursuant to consent. *Id.* "Generally, that consent must come from the person whose property is being searched or from a third party who possesses common authority over the property." *People v Brown*, 279 Mich App 116, 131; 755 NW2d 664 (2008), citing *Illinois v Rodriguez*, 497 US 177, 181; 110 S Ct 2793; 111 L Ed 2d 148 (1990). However, where a third party without actual authority consents to a search, the search may be valid if the police reasonably believed the party had the authority to consent. *Rodriguez*, 497 US at 186; *Brown*, 279 Mich App at 131.

In the present case, the police's reliance on the consent from the woman they encountered at the home was reasonable. The BCPD database associated defendant's address with the woman.[3] Further, when the woman answered the door, she was dressed in "night clothes," and it

[2] The Michigan Constitution in this regard is generally construed to provide the same protection as the Fourth Amendment to the United States Constitution. *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011).

[3] The woman had been arrested while driving defendant's pickup truck, which was registered at the address.

appeared that she had been there through the night. When Wood asked her if she lived there, she responded "Yes." Under these circumstances, it was reasonable for the police to rely on the woman's apparent authority to consent to the search.

In a Standard 4 brief, defendant also argues that the trial court erred when it refused to hear testimony at the suppression hearing related to his warrantless arrest. We disagree. Defendant's motion to suppress was not predicated on his warrantless arrest. Rather, defendant challenged the search of his home and asked the trial court to "suppress evidence seized during both a warrantless search of his residence and during the subsequent execution of a search warrant on the grounds that the searches were illegal and violated his Fourth Amendment Rights." Because defendant only challenged the legality of the search, the trial court did not abuse its discretion when it excluded testimony concerning the circumstances surrounding defendant's arrest, which were not relevant to defendant's motion. See MRE 401.

Defendant also challenges the legality of his warrantless arrest in his Standard 4 brief. "In order to lawfully arrest a person without a warrant, a police officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it." *People v Reese*, 281 Mich App 290, 294-295; 761 NW2d 405 (2008) (internal quotation marks and citation omitted). "'Probable cause to arrest exists if the facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence to believe that the suspected person has committed a felony.'" *People v Richardson*, 204 Mich App 71, 79; 514 NW2d 503 (1994), quoting *People v Thomas*, 191 Mich App 576, 579; 478 NW2d 712 (1991). Probable cause "is a practical, nontechnical conception" judged by the totality of the circumstances. *Maryland v Pringle*, 540 US 366, 370; 124 S Ct 795; 157 L Ed 2d 769 (2003).

The record supports a finding that the officers had probable cause to arrest defendant. Police were investigating the theft of several commercial air conditioning units in the area. Wood obtained a surveillance video from the Emmet Township Police Department that depicted two male subjects stealing air conditioning units from Crane Land Surveying. The footage showed a small two-door GM sedan and an older two-toned GM pickup truck. When police went to defendant's home, they observed a GM sedan and a pickup truck that appeared to match the vehicles shown in the surveillance footage. Additionally, Wood observed several condensers and casings that appeared to be from commercial air conditioners near the pickup truck. Also, Wood discovered bolt cutters on the main floor and bags of copper pipe and "wires and motors and condensers and other parts which . . . appeared to be from the inside of . . . several different air conditioning units and other machinery" in the basement. Under these circumstances, the police had probable cause to believe that an offense had occurred and that defendant committed it.

V. RESTITUTION

Defendant next argues that the restitution order is unconstitutional because it includes restitution for uncharged conduct. This Court review constitutional issues de novo, *People v Golba*, 273 Mich App 603, 615; 729 NW2d 916 (2007), as well as issues concerning the proper interpretation and application of statutes, such as those governing restitution, *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

Article 1, § 24 of the Michigan Constitution provides that crime victims have the "right to restitution." Const 1963, art 1, § 24. Additionally, the Crime Victim's Rights Act (CVRA), MCL 780.751 *et seq.*, requires that trial courts order convicted defendants to pay restitution. Specifically, MCL 780.766(2) provides that

> . . . when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's *course of conduct* that gives rise to the conviction or to the victim's estate. [Emphasis added.]

In *People v Gahan*, 456 Mich 264, 271; 571 NW2d 503 (1997), our Supreme Court held that the phrase "course of conduct" must be given broad construction to effectuate the intent of the Legislature. The Court stated:

> Because there was no indication from the Legislature that the common-law meaning was not being incorporated, this phrase "course of conduct" should be given the broad meaning the courts had earlier stated. Thus, the defendant should 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.
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> * * *
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> Pursuant to MCL 780.766(2); MSA 28.1287(766)(2), the court had the statutory authority to order restitution to compensate any victim of defendant's illegal scheme. [*Id.* at 272-273 (footnote omitted).]

On appeal, defendant argues that Michigan's restitution scheme is unconstitutional because it permits the trial court to impose restitution on the basis of facts that were not proven beyond a reasonable doubt. The *Gahan* Court addressed this argument and rejected it, stating that the CVRA affords criminal defendants adequate process because it "requires that the prosecution must establish the appropriate amount of restitution by a preponderance of the evidence. Thus, the statute affords defendant an evidentiary hearing when the amount of restitution is contested and further provides that the prosecution bears the burden of establishing the proper amount." *Id.* at 276.

On appeal, defendant argues that Michigan's restitution scheme is unconstitutional because it permits the trial court to impose restitution on the basis of facts that were not proven beyond a reasonable doubt. In support, defendant cites *Southern Union Co v United States*, __ US __; 132 S Ct 2344, 2350-2351; 183 L Ed 2d 318 (2012). In *Southern Union*, 132 S Ct at 2350-2351, the United States Supreme Court extended its holding in *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000) to criminal fines. The Supreme Court concluded that there is "no principled basis under *Apprendi* for treating criminal fines differently" than sentences of imprisonment or death. *Id.* at 2350.

Defendant acknowledges *Gahan*, but he argues that restitution is a criminal penalty; therefore, according to defendant, any act that increases the amount of restitution must be proven

beyond a reasonable doubt. Defendant's reliance on *Southern Union* is misplaced because the decision merely reemphasized *Apprendi's* holding that if a factual finding is used to elevate a sentence above the statutory maximum, due process requires proof of that fact beyond a reasonable doubt. There is no prescribed statutory maximum under Michigan's restitution scheme. The purpose of restitution is to make victims whole for the losses they have suffered as a result of a defendant's criminal course of conduct. MCL 780.766(2); *People v Gubachy*, 272 Mich App 706, 713; 728 NW2d 891 (2006). And the amount of restitution a court may order varies based on the damage cause by defendant's course of conduct. Therefore, *Apprendi* is inapplicable to Michigan's restitution scheme. See *United States v Day*, 700 F3d 713, 732 (CA 4, 2012).

Defendant also argues that the restitution order is erroneous because it fails to reflect that defendant's two co-defendants are jointly and severally liable for the restitution amount. Defendant did not raise this issue below; therefore, it is unpreserved. Unpreserved sentencing errors are reviewed for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 332; 662 NW2d 501 (2003).

There is no authority mandating that the trial court order that restitution be joint and several among codefendants. MCL 780.766(2) provides that

> . . . when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate.

The trial court's order requires defendant to make full restitution to the victims of his course of conduct; therefore, it is in compliance with the statute.

Defendant's reliance on *People v Slotkowski*, 480 Mich 852; 737 NW2d 699 (2007), is misplaced. In *Slotkowski*, our Supreme Court, in lieu of granting leave to appeal, remanded to the trial court "for correction of the judgments of sentence to reflect that the restitution ordered shall be joint and several with the codefendant." We note that the trial court had ordered that restitution was joint and several, which was not reflected on the judgments of sentence. Such is not the case here. Moreover, this ruling was rendered in an order, not an opinion, and an order of the Supreme Court is binding precedent when the rationale can be understood. *People v Edgett*, 220 Mich App 686, 693 n 6; 560 NW2d 360 (1996). The Supreme Court did not present a rationale in statutory or caselaw for imposing joint and several responsibility, but indicated that it was a procedural correction.

VI. TIME SERVED CALCULATION

Defendant's final argument is that the judgment of sentence should be amended to reflect credit for an additional two days served, for a total of 150 days credit. The prosecutor concedes that the judgment of sentence should be amended to reflect an additional two days served.

VII. CONCLUSION

In sum, we hold that plaintiff presented insufficient evidence to establish that the fair market value of the property stolen was $20,000 or more. Therefore, we vacate defendant's conviction under MCL 750.356(2)(a) and remand for resentencing. Additionally, we remand for a correction of the judgment of sentence to reflect 150 days of jail credit. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell