

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN MARK FREUND,

Defendant-Appellant.

UNPUBLISHED

September 16, 2008

No. 278589

Isabella Circuit Court

LC No. 06-000570-FH

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of larceny in a building, MCL 750.360. We reverse and remand for a new trial. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant is a builder. Complainant Donald Weishuhn hired defendant to be the contractor for his home in on or about October 12, 2004. Weishuhn apparently resided in the home during part of the construction. In February or March of 2006, defendant was still in the process of completing the home. At the same time, Weishuhn and Eric Szafranski were installing in a dryer vent in the basement. Weishuhn had placed his eight-foot stepladder in the basement. Szafranski had placed his reciprocating saw in the basement as well. At some point, Weishuhn noticed that the tools were no longer in the basement. He noticed the saw missing first, then noticed the missing ladder a day or two later. Weishuhn asked defendant about the items, but defendant denied any knowledge of the items' whereabouts. Defendant subsequently stopped working on the home. In March of 2006, approximately two or three weeks later, defendant's neighbor, Bob Gean, contacted Weishuhn and told him that the saw and ladder were in Gean's pole barn. Weishuhn called the police, and met them at Gean's home, where the ladder and saw were subsequently recovered. Both Weishuhn and Szafranski testified that they did not give defendant permission to take the items from the site.

Gean testified that in February or March of 2006, defendant brought a stepladder and a saw to Gean's barn. Defendant told Gean that the ladder was from Weishuhn's home. A few weeks later, defendant brought over the reciprocating saw. Defendant told Gean that he had gotten the saw from someone with whom he was working on Weishuhn's home and who owed him money. Defendant allegedly acted suspiciously with respect to the ladder, and repeatedly placed it in the back of Gean's barn. Gean learned that the items had been stolen when he went to Weishuhn and asked about payment for trim that defendant had obtained from Gean. Gean

told Weishuhn that the items were in Gean's barn. Police arrived at the barn and questioned defendant. Defendant initially denied any knowledge of the saw and ladder. However, after an officer asked defendant whether he had taken the items because Weishuhn owed him money, defendant changed his answer and stated that he had taken the items as collateral.

Defendant's apparent defense was that Weishuhn had fabricated his testimony in retaliation for claims made by defendant, both involving missing personal property on the jobsite, and in relation to the parties' concurrent civil lawsuit regarding the construction. Defendant maintained that Weishuhn granted defendant permission to use the ladder after Weishuhn inadvertently destroyed defendant's ladder. Defendant denied taking the reciprocating saw from the basement of Weishuhn's home. He admitted that he might have told the police that the items were being held as collateral; however, he did not state that he personally was holding the items as collateral. Defendant thought Gean was holding them as collateral for the money Weishuhn owed Gean.

The initial information predicated the one larceny charge on the theft of both the saw and the ladder. During deliberations, the jury asked the trial court if it was to decide whether defendant stole both items, or if it could decide whether defendant was guilty of stealing one item but not the other. Defense counsel argued that, based on the information, the jury had to find that defendant stole both items in order to find him guilty. The prosecutor argued that the conviction could be prefaced on the theft of only one item. The trial court agreed, although it stated that the wording of the information was "unfortunate", and stated that it assumed defense counsel was objecting. Defense counsel stated, "I am objecting on constitutional and other grounds." The trial court subsequently told the jury, "if you find that the Defendant stole one of the items, that would be sufficient under the elements for larceny in a building to return a guilty verdict. I don't believe you need--have to find both of them." The jury subsequently found defendant guilty.

Defendant argues that the trial court erred when it instructed the jury that it could find defendant guilty if it found that he had stolen either the ladder or the saw. Defendant first maintains that the jury instruction was improper because the information was not amended to reflect the alternate grounds for finding that he stole an item from Weishuhn's home. However, he also appears to argue that the jury verdict may not have been unanimous, and thus his conviction was improper, if some of the jurors thought that he stole the ladder, while some of the jurors thought he stole the saw. See *People v Yarger*, 193 Mich App 532, 536-537; 485 NW 119 (1992). At trial, defendant only raised an objection based on the fact that the information contained both items as a predicate for the charge. Therefore, his constitutional claim is unpreserved, and is reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant's claim that the amendment of the information was improper is without merit. Under MCR 6.112(H), "[t]he court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." The result did not "surprise" defendant. He already knew that the prosecutor sought to prove that he stole the ladder and the reciprocating saw. Defendant cannot show that the trial court erroneously decided to allow the prosecutor to amend the information.

Defendant's alternate claim is more troubling, however. The Michigan Constitution guarantees criminal defendants the right to a unanimous jury verdict. Const 1963, art 1, § 14; *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998). Therefore, a trial court is required to give a proper instruction as to the unanimity requirement and in some circumstances the general unanimity instruction will not be sufficient. *Id.* at 30. In *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994), our Supreme Court held a general instruction regarding unanimity will be sufficient "unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." The *Cooks* Court held that acts are materially identical when they are "tantamount to a continuous course of conduct." *Id.* at 528.

While defendant was accused of taking both the saw and the ladder, and they were both discovered in Gean's barn, the thefts were alternative acts that were materially distinct. There was no evidence to suggest that the saw and the ladder were taken at the same time. Weishuhn noticed the absence of the items on separate occasions. Gean testified that defendant brought the ladder to his home a few weeks before defendant brought the saw. The items were taken from two persons, each of whom had a different relationship to defendant. Defendant also raised separate defenses concerning the saw and the ladder. He maintained that Weishuhn gave him permission to take the ladder to Gean's home, and that he had done so, but that he did not take the saw. His defense as to the ladder was partially validated by Weishuhn's admission that he gave defendant permission to use the ladder at one point. In addition, Gean testified that defendant acted suspiciously toward the ladder but did not act strangely regarding the saw. Gean also stated that defendant provided different reasons for his possession of the items.

In addition, this case is one in which there is reason to believe the jurors might have been confused or disagreed about the factual basis of defendant's guilt. Given their request for clarification from the trial court, it appears likely that they could not agree that defendant took both items. Therefore, it is conceivable that the jurors did not agree as a body on which item the defendant took. The evidence of the allegedly stolen saw and the allegedly stolen ladder would, if accepted as true, support two separate convictions of larceny from a building, but would not support a finding of one single crime committed by alternative means. Generally, "where either of the two separate charges could have been proved at trial, the case must be remanded to allow the prosecutor to retry the defendant on one charge, or both separately." *People v Quinn*, 219 Mich App 571, 576; 557 NW2d 151 (1996).

Given that a new trial is warranted due to plain instructional error, we need not decide defendant's remaining claims of error.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly