STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WOODROW GREGORY MOORE,

Defendant-Appellant.

UNPUBLISHED
March 3, 1998

No. 193982
Recorder's Court
LC No. 95-001306

Before: O'Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree retail fraud, MCL 750.356c; MSA 28.588(3), and was sentenced to nine to twenty-four months' imprisonment. Defendant now appeals as of right. We affirm.

Defendant first contends that the trial court's questions and comments deprived him of a fair and impartial trial. Specifically, defendant argues that the trial court's attempts to correct his testimony in front of the jury and clarify his testimony on the record gave the jury the impression that the judge was biased. Defendant failed to properly preserve this issue by objecting at trial. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). In the absence of an objection, this Court may review the matter if manifest injustice would result from the failure to review. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Based on our review of the record, we do not find that defendant has established manifest injustice.[1]

A trial court judge has great power and discretion in directing the course of trial and controlling the conduct of witnesses and attorneys. *People v Cole*, 349 Mich 175, 199; 84 NW2d 711 (1957); MCL 768.29; MRE 611(a). This discretion allows the judge to participate in the questioning of witnesses where necessary to "clarify testimony or to elicit additional relevant information." *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986). The judge should, however, refrain from displaying discourteous behavior and from making pert remarks from the bench. *People v Neal*, 290 Mich 123, 129; 287 NW2d 403 (1939). Questions should not be intimidating, argumentative, prejudicial, unfair, or biased. *People v Smith*, 64 Mich App 263, 267; 235 NW2d 754 (1975).

After reviewing the record, we do not find that defendant was denied a fair trial. While defendant argues that the trial judge appeared biased when he corrected defendant's testimony, the record indicates that the judge was merely responding to defendant's claims that the court was to blame for his inability to produce a witness. Similarly, the judge's attempts to clarify defendant's testimony did not appear to invade the role of the prosecutor or to harass defendant. While we agree with defendant that these matters could have been handled in a better fashion, "it does not follow that every deviation from the ideal requires a new trial." *People v McIntosh*, 62 Mich App 422, 438; 234 NW2d 157 (1975), rev'd in part on other grounds 400 Mich 1 (1977). When the remarks are reviewed in the context of the trial as a whole, we find no manifest injustice.

Defendant next contends that the trial court erred in allowing evidence of his prior second-degree retail fraud (misdemeanor) conviction under MRE 404(b). Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is (1) offered for a proper purpose other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to prevail under the balancing test of MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). MRE 404(b) is an inclusionary rule of admissibility. Id. at 64-65.

In the present case, the trial court apparently felt that the evidence was relevant to whether defendant's testimony should be believed on the issue of good faith. The court noted that MRE 404(b) is a rule that is inclusive rather than exclusive, and that the "good faith" defense is similar to the knowledge and intent factors.[2] While we agree that the evidence should not have been admitted, we find the error to be harmless.

The rationale behind the "good faith" defense for a larceny offense such as retail fraud is that one who takes the property of another by the authority of a third person who he believes in good faith to be the owner or the individual entitled to possession is not guilty of larceny. *People v Karasek*, 63 Mich App 706, 711-712; 234 NW2d 761 (1975). In the present case, defendant raised the "good faith" defense when he testified that an acquaintance handed him a bag which contained the property underlying the charged offense, and that he had no knowledge about the status of the property contained therein. However, the mere fact that defendant had a prior conviction for retail fraud does not make it more probable that he did not act in good faith on the occasion underlying the current charge. See *VanderVliet, supra* at 75 (relevancy and materiality are determined in relationship to the elements of the charge, the theories of admissibility and the defenses). Hence, the trial court abused its discretion in allowing the prosecution to introduce evidence of the prior conviction under MRE 404(b).[3]

Nonetheless, the trial court's error does not require reversal. When the error is considered in the context of the trial as a whole, it does not appear to have affected defendant's substantial rights or to have resulted in a miscarriage of justice. MRE 103(a); MCL 769.26; MSA 28.1096. See also *People v Huyser*, 221 Mich App 293, 299; 561 NW2d 481 (1997) (harmless error standard). In this regard, we note that the key issue presented at trial was not whether defendant acted in good faith, but whether he acted alone. We also believe that defense counsel was able to mitigate the prejudicial effect of the evidence by eliciting defendant's testimony concerning the prior conviction. Finally, we note that the prosecution did not question defendant about his prior conviction or rely on this evidence during closing

argument when presenting its theory that defendant acted alone. Under these circumstances, we find no basis for reversal.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael R. Smolenski

[1] Had a proper objection been raised to the trial court's comments on the estimated length of the trial, the prosecution could have, as proposed by defendant on appeal, confronted defendant with evidence of the final conference order, which contained the same information related by the trial court as well as defendant's signature, to confirm that he knew about the estimated length of the trial.

[2] MRE404(b)(1) allows proof of prior convictions to show "motive, opportunity, intent, preparation, scheme, plan or system of doing an act, knowledge, identity, or absence of mistake or accident where the same is material . . . ."

[3] In this respect, we would caution courts in merely relying on the fact that MRE404(b) is a rule of "inclusion." All prior convictions are not admissible evidence; rather, they must meet the strict requirements set forth in *VanderVliet*, *supra*.