STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v	No. 214799 Oakland Circuit Court
WILLIAM LOTTA, Defendant-Appellant.	LC No. 98-158187-FH

Before: Bandstra, C.J., and Saad and Meter, JJ

PER CURIAM.

Defendant appeals by right from his conviction by a jury of first-degree retail fraud, MCL 750.356c; MSA 28.588(3). The trial court, applying a fourth-offense habitual offender enhancement under MCL 769.12; MSA 28.1084, sentenced defendant to two to fifteen years' imprisonment. We affirm.

Defendant first argues that reversal is required because the judge who received the jury's verdict and polled the jury (1) was not the same judge who presided over the trial, and (2) did not certify that he was familiar with the case, in accordance with MCR 6.440. However, defendant did not object at trial to a replacement judge receiving the jury's verdict. Generally, issues must be raised before and addressed by the trial court in order to be properly preserved for appeal. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Therefore, we will review this issue only if necessary to avoid manifest injustice. *People v Green*, 228 Mich App 684, 690-691; 580 NW2d 444 (1998).

Defendant cannot establish manifest injustice. The failure of a substitute judge to comply with the requirements of MCR 6.440(A) is not a ground for reversal if the defendant fails to prove that he or she was prejudiced by the substitution. *People v Bell*, 209 Mich App 273, 274-277; 530 NW2d 167 (1995). In this case, the second judge's participation in defendant's trial was minimal. The first judge presided over jury selection, opening statements, the presentation of evidence, closing arguments, and jury instructions. When the proceedings resumed, for receipt of the jury's verdict, the second judge presided. The second judge received the guilty verdict, polled the jury at the request of the defense, revoked defendant's bond with no objection from defense counsel, and set a date for sentencing. These duties did not involve the exercise of judgment and the application of legal knowledge to, and judicial deliberation of, facts known

only to the first judge. See *People v McCline*, 442 Mich 127, 133; 499 NW2d 341 (1993). Accordingly, the substitution of judges in this case did not fall within the general rule that a judge cannot complete another judge's duty, see *id.*, and defendant has failed to prove that the substitution caused prejudice or that a failure to review this issue will result in manifest injustice. *Bell, supra* at 274-277. Accordingly, we decline to review this issue. *Green, supra* at 690-691.

Next, defendant argues that the trial court committed error requiring reversal when it denied defendant's motion to suppress certain evidence allegedly obtained in violation of defendant's Fourth Amendment rights to be free from illegal searches and seizures.[1] We review a trial court's ruling on a motion to suppress evidence de novo. *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997). We review findings of fact made in conjunction with the ruling for clear error. *Id.* Clear error exists when the reviewing court has a firm conviction that a mistake occurred. *People v Connolly*, 232 Mich App 425, 429; 591 NW2d 340 (1998).

A search and seizure can violate a defendant's Fourth Amendment rights only if it involved government actors. Indeed, the Fourth Amendment is inapplicable to a search or seizure carried out by a private individual not acting as an agent of the government or with the participation or knowledge of the government. *People v Perlos*, 436 Mich 305, 314; 462 NW2d 310 (1990). Here, the search about which defendant complains was carried out by a department store asset protection officer, and defendant did not present the trial court with any evidence indicating that the officer acted under governmental authority. Accordingly, the trial court correctly determined that the search involved no governmental action and that defendant's constitutional rights therefore were not violated. See *People v Holloway*, 82 Mich App 629; 267 NW2d 454 (1978).[2]

Even assuming, arguendo, that the asset protection officer essentially functioned as a government agent, we would nonetheless find no basis for reversal because defendant did not have a reasonable expectation of privacy in the fitting room where the allegedly illegal observation of his activities occurred. As stated in *People v Parker*, 230 Mich App 337, 339-340; 584 NW2d 336 (1998), whether a defendant had an expectation of privacy protected by the Fourth Amendment is determined by considering the totality of the circumstances. In this case, testimony established the existence of notices posted on the mirrors in the fitting rooms stating that the area might be monitored by a loss prevention agent. Given this notice, defendant cannot establish that he had a reasonable expectation of privacy in the fitting room or that MCL

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[1] The "search" about which defendant complains was the observation of defendant in a department store fitting room by an asset protection investigator.

[2] Defendant's citation of *People v Eastway*, 67 Mich App 464, 467; 241 NW2d 249 (1976), in support of his argument that the asset protection officer in the instant was acting as a government agent is unavailing. First, unlike in *Eastway*, there was no evidence that the loss protection officer here was a security officer licensed by the state and given the authority to arrest. See *id.* at 467. Second, the discussion regarding the application of the Fourth Amendment to private security guards in *Eastway* was *obiter dicta*. *Id.* Third, the relevant discussion in *Eastway* was rejected by *Holloway, supra* at 634.

750.539d; MSA 28.807(4), a statue prohibiting the installation of observing devices in "private places," applied here. See, *e.g.*, *Lewis v Dayton-Hudson Corp*, 128 Mich App 165, 170-173; 339 NW2d 857 (1983).

Finally, defendant's argues that the trial court's pretrial decision to admit evidence of defendant's criminal history, if defendant should testify, was erroneous and essentially precluded defendant from testifying on his own behalf. However, the record does not support defendant's contention that the trial court ruled on the admissibility of defendant's prior criminal record. During a hearing involving several defense motions, the defense argued that it believed that the prosecution might attempt to introduce defendant's prior criminal record (the prosecution, at that time, had not yet sought a ruling on the admissibility of defendant's criminal record but merely on the admissibility of an uncharged bad act). The prosecution stated that it would not attempt to introduce defendant's prior criminal record unless defendant testified. The defense then stated that an argument regarding the admissibility of defendant's prior criminal record would be raised if defendant testified and the prosecution attempted to introduce the record. Subsequently, the trial court admitted the evidence of the uncharged bad act but did not address the admissibility of defendant's prior criminal record. A fair reading of the motion transcript reveals that the trial court did not rule on the admissibility of defendant's prior criminal history. Accordingly, defendant's contention that the trial court admitted his prior criminal history, thereby depriving him of his right to testify, is without merit.

Affirmed.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Patrick M. Meter