

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MARK JAMES SCOTT,

Defendant-Appellant.

UNPUBLISHED

November 27, 2001

No. 224745

Oakland Circuit Court

LC No. 1998-162764-FH

Before: Saad, P.J., Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

A jury convicted defendant Mark Scott, following a one-day trial, of embezzlement.¹ The trial court sentenced Scott to 2 to 10 years' imprisonment. Scott now appeals as of right. We affirm.

I. Basic Facts And Procedural History

Deborah Brown testified that on March 17, 1998, she was working at the Pontiac Home Depot store, as a loss prevention supervisor. At the time of the incident, Brown was observing cashier Andrea Friend through the store's closed circuit camera system. Brown noticed that Scott was at the register with fifteen to twenty items, but that Friend had not rung up all the items.

Brown, along with an assistant manager, approached Scott who by that time was outside loading the items into his truck. Brown asked to see Scott's receipt and he made an attempt to look for it in his coat pocket. Scott then told Brown that his friend in the store had paid for the items. Brown and the assistant manager began taking the merchandise out of the truck and told Scott to go inside so that they could talk to his friend. Scott then got into his truck and drove off, while the passenger side door was still open, and while the employees were still removing merchandise. Brown observed Scott's license plate number and reported it to the police.

Brown returned to the register and recovered the journal roll in order to determine whether there had been payment for all of the items. Brown determined that Scott had paid \$37,

¹ MCL 750.174.

but the items he took were worth \$1,001. After examining Friend's employee file, Brown discovered that Friend had listed Scott as an emergency contact.

City of Pontiac Police Detective Sergeant Terry Healy testified that on March 17, 1998, he responded to a complaint from Home Depot. Healy contacted Scott and told him to go to the police station, which Scott did voluntarily. Scott then told Detective Healy that he had paid for some of the items and that he had picked up the rest for a friend, Tony Price. Scott initially denied knowing Friend, but later told Detective Healy that he had dated Friend for a while. Detective Healy contacted Price, but Price was unable to produce a receipt for the items taken.

Scott testified at trial that he was picking up some of the items for a friend. He testified that he knew the items were not his and that he had stolen them. Scott also stated at trial, "[s]o, in fact, I was shop lifting taking the additional items." Not surprisingly, given this testimony, the jury convicted Scott of the charged offense.

II. The Trial Court's Comments

A. Standard Of Review

Scott asserts that the trial court erred when it made comments to the jury concerning how quickly the trial would be over, and that such statements prejudiced his case. Scott failed to properly preserve this issue at trial. Therefore, we review the issue to determine whether (1) an error occurred; (2) the error was plain (clear and obvious); and (3) the plain error affected substantial rights.² We conclude that there was no error, plain or otherwise, resulting from the trial court's comments about the likely length of the trial.

B. Trial Court Bias

This Court has observed that a "judge's comments and conduct can indicate a possible bias."³ Here, the trial court made the comments in question at the time it was instructing the jury on what the procedures would be for the case. The trial court stated that the jury would be required to return for another day if the trial were not completed on that initial day. The trial court further gave its opinion that because the case should proceed quickly, none of the jurors should experience "substantial hardship." Rather clearly, these statements were made in reference to how long the jurors would be required to participate and not to suggest the possible shortcomings of Scott's case. Read in context, it is clear that the trial court made these statements as a way of easing the minds of the jurors as to how long they would be required to participate in jury duty. Scott does not assert, nor is there any additional indication in the record, that the trial court expressed a bias against him in the presence of the jury. The trial court's comments did not indicate any bias and therefore, there was no error.

² *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), citing to *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1992).

³ *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 153; 486 NW2d 326 (1993).

III. Evidence Of Flight

A. Standard Of Review

Scott asserts that the trial court should not have allowed evidence of his flight from the store. We note that Scott has again failed to properly preserve this issue for appeal. We therefore again review for plain error affecting substantial rights. We conclude there was also no error, plain or otherwise, in allowing evidence at trial of Scott's act of flight.

B. The Evidence

The fact that there was no error is, rather obviously and in itself, enough to fail the *Carines* test. Further, there is simply no indication that, even if allowing the evidence was in error, it would have had any impact on the outcome. Although otherwise relevant evidence can be excluded where its prejudicial effect outweighs its probative value, “[i]t is well established in Michigan law that evidence of flight is admissible” and probative as to showing “consciousness of guilt.”⁴ In this case, Brown testified that when she asked Scott to produce the receipt for the merchandise he had just left the store with, he got into his truck and drove away, while the employees were still trying to recover the merchandise. Such evidence was relevant and highly probative of defendant's consciousness of guilt. Further, although evidence of flight alone is not sufficient to establish guilt or support a conviction,⁵ the evidence of flight was not the sole evidence of Scott's guilt. Scott admitted to taking the items while he knew he had not paid for them, and he knew they did not belong to him. Given the probative value of the evidence in light of the lack of prejudice to Scott, there was no reason for the trial court to preclude such evidence.

IV. Ineffective Assistance Of Counsel

A. Standard Of Review

Scott argues that his trial counsel was ineffective for failing to object to the court's comments, regarding the probable length of the trial, to the evidence of flight and for failing to request a “claim of right” instruction. To establish that defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, this Court must find that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced defendant as to deny him a fair trial.⁶ We conclude that because Scott's counsel made no error, Scott's assertion of ineffective assistance of counsel is without merit. Counsel is not ineffective for failing to make meritless objections.⁷

⁴ *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

⁵ *Id.*

⁶ *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

⁷ *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997), citing to *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

B. Counsel's Performance

We conclude that there is no indication that the actions or inactions of Scott's counsel fell below a standard of reasonableness or that, but for counsel's actions or inactions, the result would have been different.⁸

C. Jury Instructions

We also find Scott's assertion that his trial counsel was ineffective for not requesting a claim of right jury instruction to be without merit. A defendant is not entitled to an instruction on a defense where he has not offered some evidence of the defense.⁹ Because Scott admitted his guilt on the stand, there is simply no way that a jury instruction asserting that he thought he had a right to the items would be proper. Therefore, his trial counsel could not have been ineffective for failing to request such an instruction. Simply put, Scott received effective assistance of counsel at trial.

Affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

⁸ *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), on remand 839 F2d 1401 (CA 10, 1988), after remand 900 F2d 1511 (CA 10, 1990); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), citing to *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) and *Pickens*, *supra*.

⁹ See *People v Lemons*, 454 Mich 234, 252; 562 NW2d 447 (1997).