STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 3, 2008
v	No. 277814 Wayne Circuit Court
ANANIAS SPRATT, JR., Defendant-Appellant.	LC No. 06-013476-01

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and sentenced to a prison term of 8-1/2 to 15 years. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Sharde Leverett, a loss prevention investigator for Home Depot, observed defendant place a drill set in a cart, take it to the return desk, and attempt to return it. The cashier, Catherina Taylor, informed him that he needed identification to return an item without a receipt. He said that he would call someone to bring identification and stood by a wall near the exit. He went, either partially or completely, out of the store. He turned around, came back inside, and stood by the cart. Defendant left the cart and approached Leverett, with his hand in his pocket. He took his hand out of his pocket "[m]aybe a second or two before he spoke." According to Leverett, defendant leaned over her shoulder and said, "If you or the white boy attempt to stop me when I leave with my merchandise, I'm going to put two in your head and two in his." Leverett walked away. Taylor heard a man's voice "like, don't stop me." Defendant took the cart, with the drill set, and left the store. The police apprehended him on a subsequent visit to the store. The incident was recorded on videotape, which was played at trial. Defense counsel acknowledged that defendant was a shoplifter, but argued that Leverett was lying with respect to portions of her account, including what defendant said, and that defendant was not guilty of armed robbery. The jury disagreed and convicted him as charged.

Defendant argues that the evidence was insufficient to support the conviction because the testimony was inadequate to show that he was armed with a weapon or article used or fashioned in a manner to lead Leverett to believe that it was a dangerous weapon.

When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of

fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

Defendant's argument is premised on MCL 750.529, before it was amended in 2004,[1] and cases interpreting that pre-amendment version, including *People v Banks*, 454 Mich 469, 475; 563 NW2d 200 (1997), *People v Jolly*, 442 Mich 458, 470; 502 NW2d 177 (1993), and *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983). The offense in this case occurred on October 30, 2006. The amended statute states, in pertinent part:

> A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, *or who represents orally or otherwise that he or she is in possession of a dangerous weapon*, is guilty of a felony punishable by imprisonment for life or for any term of years. [MCL 750.529 (emphasis added).]

A conviction under this version requires a prosecutor to prove "(1) the defendant, in the course of committing a larceny of any money or other property that may be the subject of a larceny, used force or violence against any person who was present or assaulted or put the person in fear, and (2) the defendant, in the course of committing the larceny, either possessed a dangerous weapon, possessed an article used or fashioned in a manner to lead any person present to reasonably believe that the article was a dangerous weapon, *or represented orally or otherwise that he or she was in possession of a dangerous weapon*." *People v Chambers*, 277 Mich App 1, 7; 742 NW2d 610 (2007) (emphasis added; footnote omitted). Viewed in a light most favorable to the prosecution, Leverett's testimony that defendant approached her with his hand in his pocket and said that he would "put two" in her and her colleague's heads was an oral representation that he was in possession of a dangerous weapon and therefore constitutes sufficient evidence to support his armed robbery conviction.

Defendant argues that he was denied a fair trial by the prosecutor eliciting evidence that defendant's movement in the store was being monitored because of prior incidents at the store and that counsel was ineffective for failing to object. After Leverett testified that she observed defendant walk in through the center doors pushing an empty cart between 8:30 and 9:00 a.m., the following colloquy occurred:

> *Q*. What was unusual about the defendant entering the store with an empty cart?
>
> *A*. Nothing really unusual but I had recognized him, from seeing him in the store before that date.
>
> *Q*. Okay. Have you had any problems --
>
> *THE COURT:* Hold on. Approach, please.

[1] 2004 PA 128, effective July 1, 2004.

After a sidebar conference, the prosecutor's questioning continued:

> *Q.* All right. So you observed the defendant walk into the store because you made observations on other dates; right?
>
> *A.* Yes.

Defendant contends that in this colloquy, the prosecutor improperly elicited information that defendant was a known shoplifter, deliberately injecting impermissible similar acts testimony.

Because defendant did not object, the alleged error is unpreserved, and it is subject to the plain error analysis in *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. [*Id*., p 763 (citations omitted).]

The record does not establish "plain error" or that defendant's substantial rights were affected. Leverett's testimony did not indicate that defendant had committed "other crimes, wrongs, or acts". MRE 404(b)(1). Moreover, even if the implication of the testimony was that Leverett had observed defendant acting suspiciously in the past, the evidence was not unduly prejudicial in light of the defense strategy to concede that defendant was a shoplifter. MRE 403. In fact, defense counsel asked Leverett about her preliminary examination testimony that she "recognized" defendant when she saw him. He stated in his closing argument, "He's a shoplifter. She says she recognizes him. And I'm sure this is going to come up in the jury room. His age, shoplifting, she recognized him. When you connect the dots you figure out what kind of a lifestyle he leads that doesn't make him guilty either of armed robbery." The alleged error did not affect the outcome of the proceedings.

Although defendant also argues that trial counsel was ineffective for failing to object, the objection would have been futile because the testimony was not improper. See *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001). Moreover, the concession that defendant was a shoplifter was a matter of trial strategy, which this Court will not second-guess. *Id*., pp 386-387 n 7.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette