STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED November 23, 2010
v	No. 293555 Ottawa Circuit Court
FRED HUSTON-DARNELL CHANDLER, Defendant-Appellant.	LC No. 08-032396-FH

Before: STEPHENS, P.J., AND MARKEY AND WILDER, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree retail fraud, MCL 750.356c, and was sentenced to 24 months' probation, with ninety days in jail. Defendant appeals as of right. We affirm.

Defendant first argues on appeal that the evidence was insufficient to convict him of first-degree retail fraud. We disagree.

When reviewing an insufficient evidence challenge, "an appellate court reviews de novo a claim that the evidence was insufficient to sustain a verdict." *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). This Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended in part 441 Mich 1201 (1992). It is also for the trier of fact to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The prosecution's primary witness, a loss prevention officer at a Meijer store in Grand Haven Township, testified that she observed defendant and a female companion acting suspiciously. Defendant was pushing a shopping cart in which a child was sitting. The loss prevention officer observed defendant take a car seat out of its box, put the box in the cart, and place the car seat on the shelf. The woman then placed a piece of packaging tape across the box. Defendant and the woman went to the electronics aisle, took two TVs and a telephone phone off the store shelf, and placed them at the bottom of the cart. As this point, the loss prevention

officer briefly lost sight of them. Shortly thereafter, the officer observed defendant, the woman, and the child going through the store checkout lane. The car seat box was scanned, but there were no TVs or telephone. Upon leaving the store, an alarm sounded, indicating some merchandise had not been scanned. A store employee stopped defendant, asked for his receipt, and requested to inspect the box while the woman and the child ostensibly left to use the bathroom. Defendant resisted, pushed past the employee, and fell on the box causing it to crumple. Defendant then ran to his van, put the box in the vehicle, and drove away without the woman and the child. The police were summoned and later located defendant at his home. Defendant initially denied, but later admitted, his identity to police. Defendant was brought back to the store where he was identified by employees. The store employees and police searched for the electronic items in the store and did not find them; but they did locate the car seat on the shelf where defendant was seen placing it.

Defendant's assertion that there was insufficient evidence to convict him is predicated on the facts that the store employees did not actually see him place the TVs and phone in the car seat box or take the items from the Meijer store and that the items were never located in his home or van. However, the trial court could reasonably infer that defendant commit retail fraud given his actions and the circumstances surrounding the offense. It was reasonable to infer that the car seat box contained the small TVs and telephone that defendant's female companion placed in the shopping cart given that (1) the car seat itself was discovered on the store shelf where defendant was seen placing it, (2) defendant resisted the store employee's attempt to determine what was inside the box, (3) the car seat box crumpled when defendant fell on it, which it would not have done if a car seat was still inside, (4) the TVs and telephone could not be located in the store, and (5) the security alarm sounded when defendant began to exit the store with the box, indicating that the security device(s) on the merchandise inside the box had not been de-activated. That defendant drove away in the van without the woman and child is further evidence of a guilty mind. The fact that no prosecution witness testified to directly witnessing defendant place the store items in a box and that the stolen items were never located, does not render the evidence insufficient. Direct and circumstantial evidence, along with the rational inferences drawn from that evidence, were sufficient to establish beyond a reasonable doubt the elements of first-degree retail fraud. The prosecutor was not required to disprove defendant's theory of innocence. See *Hardiman*, 466 Mich at 423-424. In viewing the evidence presented in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of first-degree retail fraud were proven beyond a reasonable doubt. *Nowack*, 462 Mich at 399.

Defendant next argues the trial court erred by relying on extrinsic evidence and specialized knowledge and experience, as well as speculation and assumption, to reach a guilty verdict. We disagree.

The trial court conducted the bench trial in accordance with the court rules. The court did not rely on evidence that was not presented by the prosecution, nor did it make any statements during the trial pointing to its experience and specialized knowledge. Instead, the court arrived at its decision based on the facts and evidence presented at trial. Moreover, the court relied on the knowledge and experience of the prosecution's witnesses as well as common sense. The store employee opined that, when defendant fell on the car seat box, it crumpled in the way that

it would not have if it had contained a car seat. That opinion was based on the employee's professional and personal experience.

Defendant next argues that his conviction was against the great weight of the evidence. We disagree. Because defendant did not move for a new trial or an evidentiary hearing on the ground that the verdict was against the great weight of the evidence, this claim is not preserved for appellate review and is review for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

A new trial may be granted if a verdict is contrary to the great weight of the evidence. MCR 2.611(A)(1)(e)**;** *People v Abraham*, 256 Mich App 265, 269; NW2d 836 (2003); *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *McCray*, 245 Mich App at 637. The evidence in the instant case, as outlined above, did not preponderate so heavily against the verdict that it would be a miscarriage of justice to let it stand. Therefore, defendant has not shown plain error that affected his substantial rights.

Defendant argues that the trial court abused its discretion in denying his motion for continuance for the purpose of allowing him to prepare the case, retain counsel of his choice, and obtain assistance from the prosecution to locate the woman who was with him at the Meijer store, who was listed by the prosecution as an endorsed, res gestae witness. We disagree.

A trial court's decision whether to grant or deny a continuance is reviewed for an abuse of discretion. *People v Pena*, 224 Mich App 650, 660; 569 NW2d 871 (1997). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006). To invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show good cause and diligence. *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003). A good cause for determination may be based on the following factors: "[W]hether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

Defendant argued that he was denied a fair trial by the court's denying his motion for continuance, yet he failed to set forth any legitimate reasons for requesting a continuance. When the court asked defendant why he needed a 30-day continuance, he stated his reasons for the motion but offered no concrete explanation as to how he was not prepared or what steps he would take to become prepared. A mere statement that defendant is not prepared for trial is not a sufficient basis for a continuance of the cause. The practice and rules of the court require such application to be supported by an affidavit showing the necessity for delay, and, in the absence of suchshowing, it is not error to overrule the motion. *People v Smith*, 334 Mich 10, 12; 53 NW2d 595 (1952).

Defendant's motion was not supported by an affidavit, or any other showing from which it might be determined that he could not have arranged to be prepared for trial to present his

defense. *Smith*, 334 Mich at18. Consequently, defendant's motion for continuance to prepare for trial is not based on good cause and diligence and should not have been granted. *Coy*, 258 Mich App at 18. Nor has defendant demonstrated any prejudice as a result of the court's action. Even with a showing of good cause and diligence, a trial court's denial of a motion for adjournment will not be reversed "unless the defendant demonstrates prejudice as a result of the abuse of discretion." *Id.* at 18-19. Therefore, the court did not abuse its discretion in denying defendant's motion for a continuance.

Defendant next asserts the trial court violated his constitutional rights by not allowing him to retain counsel of his choice. We disagree.

The United States and Michigan Constitution guarantee the right to counsel in all criminal prosecutions. US Const, Am, VI; Const 1963, art 1, § 20. The right to counsel is the right to effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The constitutional right to counsel encompasses the right of defendant to choose his owned retained counsel. US Const, Am VI; US Const Am XIV; Const 1963, art 1, §§ 13 and 20. However, the right is not absolute, and the court must balance the defendant's right to choice against the public's interest in the prompt and efficient administration of justice. *People v Krysztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988).

Defendant had adequate opportunity to secure new counsel. The case went to trial on May 21, 2009, more than a year after defendant was charged. Thus, defendant had at least a year to find legal representation. Instead, he waited until the day of the bench trial to voice his preference for new counsel. The court asked defendant to tell him the name of the attorney he had contacted to represent him. Defendant stated that he had contacted a law firm the day before the trial, but the attorneys advised him they could not take the case "given the fact the trial was scheduled today." Defendant's dilatory response in securing new counsel, coupled with his requests for adjournment and the pretrial delays, compromised the court's ability to proceed forward with the trial. *Krysztopaniec*, 170 Mich App at 598. The court determined that a year time span was sufficient time to obtain a new counsel.

Defendant requested to represent himself on the ground that he had inadequate counsel. However, defendant has failed to demonstrate that the attorney assigned to represent him was ineffective. To establish such a claim, defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the fact finder would not have convicted the defendant. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Defendant has not established that his attorney's performance was deficient, nor has he shown there is reasonable probability the fact finder would not have convicted him had it not been for some deficiency. *Pickens*, 446 Mich at 298. Defendant stated at trial that the right to a jury trial and the preliminary examination should have never been waived, and that he did so under duress. Defendant offered this as an example of ineffective assistance of counsel despite the fact that he knowingly, voluntarily, and intelligently waived his right to a jury trial on May 19, 2009. But defendant has not set forth any evidence establishing that his assigned attorney's representation was deficient. Thus, this argument must fail.

Defendant also argues that he did not obtain sufficient assistance from the prosecution to locate an endorsed, res gestae witness. We disagree.

The res gestae witness statute, MCL 76740a, no longer imposes a duty on the prosecutor to discover, endorse and produce all res gestae witnesses. *People v Perez*, 469 Mich 415, 419; 670 NW2d 655 (2003). Instead, the prosecution is obligated to produce or exercise due diligence in attempting to produce only endorsed witnesses, i.e., persons the prosecution indicated that it intended to produce at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). If the prosecution is unable to produce an endorsed witness, it may be relieved of the duty to do so by showing that the witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000); *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988).

The record shows the prosecutor exercised due diligence in trying to locate the woman who was with defendant at the Meijer store. Before the trial took place, the parties requested, and were granted, three adjournments. In at least one instance, the parties stipulated in December 2008 that the case should be adjourned for additional time to serve and locate the woman. Defendant's attorney stated at trial that, in April 2009, the trial was rescheduled so that an investigator could be hired to locate the woman and others. The investigation did not yield any results. Further, the prosecution also made several attempts to locate the woman, but was unable to find her because she was no longer in the state. Defendant stated the woman had left the state and he believed she was living in Oklahoma. The defense even acknowledged at trial that the prosecution had made an attempt to produce the woman. Accordingly, the prosecution was relieved of the duty to produce the woman because it had exercised due diligence in trying to locate her.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Jane E. Markey
/s/ Kurtis T. Wilder