STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 14, 2012
v	No. 304392 Macomb Circuit Court
DEIRDRE MARIE CRENSHAW, Defendant-Appellant.	LC No. 2009-003721-FH

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of three counts of uttering and publishing, MCL 750.249; one count of larceny by false pretenses greater than $1,000 but less than $20,000, MCL 750.218(4)(a); and one count of conducting a criminal enterprise, MCL 750.159i(1). Defendant was sentenced to 2 ½ to 14 years' imprisonment for each uttering and publishing conviction, to 2 ½ to 5 years' imprisonment for the larceny by false pretenses conviction, and to 2 ½ to 20 years' imprisonment for the conducting a criminal enterprise conviction. We reverse defendant's conviction of conducting a criminal enterprise, affirm in all other respects, and remand to the trial court for proceedings consistent with this opinion.

Defendant was charged and ultimately convicted in the instant matter for committing acts of fraud upon Marshall's stores. According to the evidence at trial, defendant would alter tags on higher priced items while in the dressing room at such stores, thereby allowing her to purchase the items for a lower price. Defendant would then re-alter the tags, and return the purchased merchandise to another store, obtaining a refund in the item's originally priced amount. Defendant also altered sales receipts to receive multiple refunds on items and to assist her in her fraudulent transactions.

On appeal, defendant argues that she was denied the right to the effective assistance of counsel. We disagree.

"Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011).

> The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance

> of counsel. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. [*People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004), citing *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).]

However, defendant failed to preserve her claims of ineffective assistance of counsel, and thus, our review is limited to errors apparent on the record. *People v Lockett*, 295 Mich App 165, 186; ___ NW2d ___ (2012).

"To establish ineffective assistance of counsel, defendant must first show that (1) [her] trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). "The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Matuszak*, 263 Mich App at 58. "In addition, trial counsel is not ineffective when failing to make objections that are lacking in merit." *Id*.

Defendant first contends that defense counsel provided ineffective assistance by failing to object to testimony regarding five allegedly fraudulent transactions conducted by defendant, on four different dates, which were not alleged in the information. The information alleged three counts of uttering and publishing occurring on August 28, 2008, May 9, 2009, and April 23, 2009. The information alleged that defendant committed larceny by false pretenses but provided no specific date for when the conduct allegedly occurred. The information also alleged that defendant engaged in a criminal enterprise between August 2008 and May 2009. Specifically, it indicated the following dates: August 28, 2008, May 9, 2009 (two transactions), April 23, 2009, and April 13, 2009. At trial, Carlo Steven Sesta, a fraud investigator for TJ Maxx and Marshall's stores, provided testimony regarding fraudulent transactions conducted by defendant on all of the dates contained in the information. He also testified that defendant conducted similar fraudulent transactions on May 18, 2009, May 23, 2009 (two transactions), May 27, 2009, and June 6, 2009. Defendant challenges this testimony as improper under MRE 404(b) and asserts that counsel was ineffective for his failure to object on such grounds.

MRE 404(b)(1) prohibits "[e]vidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime but permits such evidence for other purposes, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act . . . " MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Other acts evidence is admissible if it is: (1) offered for a proper purpose, that is, one 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[1]; and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *Knox*, 469 Mich at 509.

Sesta's testimony regarding defendant's activity and transactions on May 18, 2009, May 23, 2009, May 27, 2009, and June 6, 2009, was not improper under MRE 404(b). His testimony that, on these dates, defendant used altered receipts to obtain refunds that exceeded her original purchase amount and that, after entering and leaving the fitting room, she paid only $20 for an item with a retail price of $99.99 tends to show defendant's scheme, plan, or system to defraud the various Marshalls stores. This evidence is certainly relevant to whether defendant engaged in the fraudulent conduct during the period alleged in the information. And, the evidence is sufficiently probative to outweigh any danger of unfair prejudice. Accordingly, the testimony regarding defendant's activity and transactions on May 18, 2009, May 23, 2009, May 27, 2009, and June 6, 2009, was admitted for a proper purpose to show that defendant engaged in a "scheme, plan, or system in doing an act." MRE 404(b). Defendant has thus failed to show that defense counsel's failure to object to this testimony fell below an objective standard of reasonableness.

Defendant contends that defense counsel was ineffective for failing to object to the admission of spreadsheets prepared by Sesta which, according, to defendant, were also inadmissible under MRE 404(b). At trial, the trial court admitted two spreadsheets that contained information regarding transactions defendant conducted in several Wayne County and Oakland County Marshalls stores. Specifically, the spreadsheets summarized the fraudulent transactions defendant conducted in these two counties. During Sesta's investigation, he gathered sales receipts, refund slips, and video footage tracing and documenting defendant's activity and transactions in the Marshalls stores in the Detroit metropolitan area. He subsequently prepared three spreadsheets summarizing defendant's activity and the similar transactions she undertook in Oakland, Macomb, and Wayne counties.

Similar to Sesta's testimony concerning uncharged acts of fraud, the spreadsheets containing evidence of the uncharged acts were also admissible pursuant to MRE 404(b) to show defendant acted according to a common plan or scheme because the evidence showed "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." *People v Sabin (After Remand)*, 463 Mich 43, 64-65; 614 NW2d 888 (2000), quoting 2 Wigmore, Evidence (Chadbourn rev.), § 304, p 249; see also *People v Kahley*, 277 Mich App 182, 185; 744 NW2d 194 (2007) ("Evidence of uncharged acts may be admissible to show that the charged act occurred if the uncharged acts and the charged act are sufficiently similar to support an inference that they are manifestations of a common plan or scheme."). In any case, defendant is not entitled to relief because she has failed to show that, but for defense counsel's failure to object to the admission of

---

[1] Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008).

the spreadsheets, "the result of the proceedings would have been different." *Uphaus*, 278 Mich App at 185.

Next, defendant argues the she was denied the effective assistance of counsel because defense counsel failed to object to the admission of the Marshalls store sales receipts found in her vehicle. Specifically, defendant contends that the sales receipts were not relevant. Generally, relevant evidence is admissible. MRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Generally, if evidence is helpful in shedding light on any material point in issue, then it is admissible under this definition. *People v Murphy (On Remand)*, 282 Mich App 571, 580; 766 NW2d 303 (2009).

The police found a hat box containing "hundreds" of sales receipts, refund slips, altered receipts, scissors, price tags, a stapler, and tape inside a hat box in defendant's vehicle. The prosecution's theory was that defendant used altered sales receipts to conduct fraudulent transactions at the Marshalls stores. The prosecution also argued that, after purchasing items at one Marshalls store, defendant would alter the sales receipts in her vehicle, drive to another Marshalls store location, and use the altered sales receipt to support a fraudulent transaction. The hat box containing Marshalls sales receipts and altered receipts was evidence supporting the prosecution's theory. The receipts were relevant to show that defendant possessed several Marshall's sales receipts including several altered, cut and taped receipts. The evidence was also relevant to support the prosecution's argument that defendant altered the sales receipts in her vehicle. The sales receipts certainly have a tendency to make the fact that defendant engaged in this fraudulent conduct more probable, and thus, the sales receipts were relevant. Accordingly, the admission of the sales receipts into evidence was proper, and any objection by defense counsel would have been futile. Defense counsel is not ineffective for failing to make a futile objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Additionally, defendant argues that defense counsel was ineffective for failing to object to the admission of the hat box containing the sales receipts because a proper foundation was not established. The general rule for admitting physical evidence is that "a proper foundation be laid and that the articles be identified as that which they purport to be and that the articles are shown to be connected with the crime or with the accused." *People v Furman*, 158 Mich App 302, 331; 404 NW2d 246 (1987). An item is authenticated by evidence showing the item is what its proponent claims it is. MRE 901(a).

Here, the hat box containing the sales receipts was admitted into evidence. Police Officer John Hammer testified that the hat box was found in defendant's vehicle. Sesta also testified that he was present when the police searched defendant's vehicle and saw the hat box containing "hundreds and hundreds" of sales receipts. The hat box and the sales receipts were admitted through Officer Hammer, who testified that they were the items recovered from defendant's vehicle. In light of the testimony presented, the prosecution established a proper foundation for the admission of the hat box containing the sales receipts, and connected the evidence with the crime and with defendant. Therefore, the evidence was properly admitted, and any objection defense counsel made with respect to the admissibility of the hat box containing the Marshalls store sales receipts would have been futile.

Next, defendant argues that defense counsel was ineffective for stipulating to the admission of the physical evidence without regard to its relevance. As discussed above, the physical evidence, i.e., the hat box containing the Marshalls store sales receipts and the spreadsheets prepared by Sesta, were relevant to establishing that defendant engaged in a scheme or plan in which she used altered sales receipts and received refunds that exceeded the purchase amount. Accordingly, defendant's argument is without merit.

Finally, defendant argues that defense counsel was ineffective for failing to request a cautionary jury instruction regarding the admitted other acts evidence. If defense counsel requests a cautionary instruction, a trial court is required to give that instruction. MRE 105; *People v Ho*, 231 Mich App 178, 188-189; 585 NW2d 357 (1998).

Here, it is reasonable that defense counsel elected not to request such an instruction so as to not place unnecessary emphasis upon the other acts evidence for the jury. Defense counsel is given broad discretion regarding matters of trial strategy, and this Court will abstain from substituting its judgment for that of defense counsel on such matters. *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008). Moreover, even if defense counsel should have requested a cautionary instruction, defendant has not established prejudice. The evidence against defendant was substantial, even without the challenged evidence. Sesta clearly testified to his investigation into the charged acts and provided video tapes of defendant conducting various transactions at different Marshall's stores. Accordingly, defendant has failed to demonstrate that defense counsel's assistance fell below an objective standard of reasonableness and that, but for counsel's error, the result of the proceedings would have been different.

In a supplemental brief, defendant next argues that there was insufficient evidence to convict her of conducting a criminal enterprise. In support of her argument, defendant directs this Court to the May 22, 2012 decision of *People v Kloosterman*, ___ Mich App ___; ___ NW2d ___ (2012). In that case, a defendant was charged and convicted of conducting a criminal enterprise as a result of his conducting a series of fraudulent returns at Home Depot. The defendant asserted that he could not be convicted of that specific crime where there was insufficient evidence of his involvement in a criminal enterprise "separate and distinct from himself." *Slip op* at 2. A panel of this Court agreed. Looking at the statute under which defendant had been convicted, MCL 750.159i(1), the *Kloosterman* Court explained:

> Defendant was convicted under MCL 750.159i(1), which reads:
>
> > [a] person employed by, or associated with, an enterprise shall not knowingly conduct or participate in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity.
>
> The definition of "person" includes "individual[s]." MCL 750.159f(d). The definition of "enterprise" also includes "individual[s]." MCL 750.159f(a). But we must consider these words in the context of the provision as a whole. *Gillis*, 474 Mich at 114-115. To do this, we must define "associate" and "employ," and because the statute under which defendant was convicted does not define these terms, this Court may consult dictionary definitions to determine their plain meanings. *People v Peals*, 476 Mich 636, 641; 720 NW2d 196 (2006). The word

> "associate" means "to align or commit (oneself) as a companion, partner, or colleague," *Random House Webster's College Dictionary* (1997), and the word "employ" means "to engage the services of (a person or persons); hire." *Random House Webster's College Dictionary* (1997).
>
> There is no dispute that, as an individual, defendant could meet the definitions of both a "person" and an "enterprise." But these definitions may not be applied in a vacuum. Because of the way in which MCL 750.159i(1) is structured, a defendant, acting alone, cannot be *both* the person *and* the enterprise. To "associate," a person must necessarily align or partner with *another* person or entity. Indeed, the meaning of the word is not ordinarily interpreted to mean that a person associates with him or herself, and it would stretch the meaning of the word beyond reason to conclude that the Legislature intended such an unusual usage. Similarly, to "employ" requires that a person be engaged or hired by some other entity; an individual would not generally find him- or herself in a situation calling for hiring one's self or engaging one's own services.
>
> Consequently, we conclude that the Legislature's inclusion of the requirement that the person be *employed by or associated with* an enterprise necessarily requires *at least two distinct entities* to have been involved. [*Slip Op* at 2-3].

Just as the defendant in *Kloosterman*, there was no evidence presented that defendant in the instant matter associated with or was employed by any other person or legal entity. There was thus insufficient evidence to support her conviction for conducting a criminal enterprise under MCL 750 .159i. Her conviction on that count must therefore be reversed.

We reverse defendant's conviction of conducting a criminal enterprise and affirm in all other respects. We remand to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Deborah A. Servitto
/s/ Michael J. Kelly