STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 25, 2004
v	No. 250730 Wayne Circuit Court
ELIZABETH LINDA SAMMUT, Defendant-Appellee.	LC No. 03-500035

Before: Wilder, P.J., and Hoekstra and Kelly, JJ.

PER CURIAM.

The prosecution appeals by leave granted the circuit court's decision to reverse defendant's conviction of attempting to obtain money by false pretenses (over $200 but less than $1000), MCL 750.218(1)(c); MCL 750.92, in district court following a jury trial. We reverse and remand for reinstatement of defendant's conviction.[1]

[1] Because this Court did not receive the entire district court record, it is unclear whether defendant was convicted of and sentenced for the offense of obtaining money by false pretenses or the offense of *attempting* to obtain money by false pretenses. The trial transcript reveals that at the conclusion of the trial, the jury foreman announced the jury's verdict finding defendant guilty of the false pretenses offense. When polled by the district court judge, each juror agreed that this verdict represented his or her verdict. The judgment of sentence signed by the trial court also reflects defendant's conviction of the false pretenses offense and makes no reference to the attempt statute, MCL 750.92. On the other hand, the trial transcript also reveals that the district court instructed the jury before its deliberations that defendant had been charged with the offense of *attempting* to obtain money by false pretenses. We cannot definitively resolve this apparent conflict because the record provided to the Court contains neither the misdemeanor complaint, the actual charging document, nor the judgment of conviction. Moreover, this issue was not raised by defendant. Accordingly, we affirm defendant's conviction of the crime reflected in the judgment of sentence, false pretenses, see *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997) (stating that a court speaks through its written orders and judgments), and remand this case to the district court for any necessary clarification and correction of the judgment of sentence, and for preparation and/or filing of the judgment of conviction.

I. Facts and Proceedings

Defendant's conviction arises out of her attempt to request a refund from Home Depot in Livonia for the amount of money she prepaid for specially ordered windows. Carl Steven Gabbard, a loss prevention associate with the Home Depot store, testified at trial that on August 14, 2002, or August 15, 2002, a sales associate who worked at the special services desk contacted him and prompted him to review a surveillance videotape recorded on August 11, 2002. The videotape showed defendant entering the store at approximately 8:00 a.m., proceeding to the special services area, loading four windows on a cart, and removing them from the store. She did not receive assistance from a sales associate at the special services desk. The area behind the special services desk, where defendant retrieved the windows, was not considered open to the public, although the public could easily access the area.

Gabbard testified that, generally, a customer who is picking up a special order presents paperwork to a special services associate who then "close[s] out the order" by entering information in the computer to reflect that the merchandise ordered has been received by the customer. The customer then signs a "customer pick-up form" and pays any outstanding balance to complete the transaction. In this instance, however, because defendant did not present paperwork to an associate when she retrieved the windows, the order was not "closed out" in the computer system and the store's records would not reflect that she received her merchandise.

Gabbard further testified that on August 19, 2002, defendant returned to the store after having unsuccessfully attempted to obtain a refund on a previous date. Gabbard expected her to return on August 19, 2002, and went to the special services desk after defendant arrived. When he reached the desk, defendant was completing a blank refund receipt provided to her by the special services associate on duty. After defendant filled in the requested information, such as her name and address, and signed the form, the special services associate fed the form into the computer, which printed information concerning the order and the price of the windows on the form. Gabbard testified that the information the computer printed on the refund receipt pertained to the four windows defendant had picked up on August 11, 2002. Because the special services associate voided the transaction before it was completed, however, defendant did not actually receive a refund. Gabbard stated that the special services associate would have located the computerized information concerning the order by entering either the order number or the customer's name and telephone number. Gabbard did not know whether defendant had provided the special services associate with a receipt reflecting the order number or had provided only her telephone number and he did not check the surveillance video from that day to resolve the issue.

At some point after defendant signed the refund receipt, Gabbard told her that he was going to call the police. When defendant then started walking toward the restroom, Gabbard followed her to the restroom and waited for her outside the door. When defendant exited the restroom, she was talking on her cellular telephone. She told Gabbard that she was talking to her attorney and that she was leaving the property. Despite Gabbard's request that she stay until the police arrived, defendant left the store.

Gabbard also testified that he later discovered that defendant had ordered one window on July 9, 2002, but that he did not have information concerning when that window arrived at the store. Gabbard also acknowledged on cross-examination that defendant ordered another window on July 24, 2002, and stated that that window had arrived at the store but had not been picked up.

Additionally, in reviewing the store's records, he learned that defendant had engaged in twenty to thirty transactions with Home Depot in July and August 2002 and had received refunds of cash or in-store credit totaling approximately $12,000 during that time period. He also testified that defendant presented several different driver's license numbers in the course of seeking refunds.

Defendant testified that she is a real estate investor and spends $5,000 to $10,000 each year on home improvement purchases at Home Depot. She stated that on the morning of August 11, 2002, she went to Home Depot to pick up her prepaid order of four windows. When she did not find an associate at the special services counter to wait on her, she called the store on her cellular telephone, as verified by her cellular telephone bill. Based on her telephone conversation, she exited the store to retrieve a cart and then returned to the special services desk, anticipating that a sales associate would meet her there. When she arrived at the special services desk and did not find a special services associate waiting for her, she spoke with a nearby associate and, based on that conversation, believed that she could take the windows without further assistance.

Subsequently, defendant received a telephone call informing her that another window she had ordered had arrived at the store. When she went to the store to pick up the window, however, the order was not ready. In her anger, defendant requested a refund for her order. The sales person informed her that the store would first try to locate the window and, if it could not be located, she would get a new window. Later, a Home Depot employee called defendant and asked her to come in on August 19, 2002, to resolve the issue of the missing window.

Defendant testified that on August 19, 2002, when she returned to the store, she provided her telephone number to the special sales associate and did not provide a receipt or order number. When defendant asked for a refund, she did not specify to the sales associate that she wanted a refund for the one-window order because she believed that it was the only order pending. Because she had previously informed an associate by telephone that she was taking the four-window order, she did not believe that the information concerning the four-window order would still be in the computer.

Defendant testified that she called her attorney after Gabbard told her he was calling the police because she wanted to make sure that she was not doing anything improper. She decided to leave the store instead of staying to settle the dispute because, while she was in the restroom, she contacted the police and learned that they did not receive a call to come to the store. Defendant also stated that she left because she had already unsuccessfully demanded a refund and felt that she should end the heated discussion that had developed.

Defendant also testified that she has only one driver's license number and did not provide any fraudulent driver's license numbers to Home Depot. She supposed that the other driver's license numbers Gabbard mentioned were associated with the gift cards she frequently used to purchase materials from the store. Defendant explained that when contractors return merchandise to Home Depot and receive gift cards for in-store credit rather than cash, they often sell the gift cards for a reduced price in the Home Depot parking lot.

The jury convicted defendant.[2] Thereafter, the district court sentenced defendant to serve two years' probation and pay a fine of $400, plus costs. However, the district court granted defendant's motion for a stay of execution of the sentence, and defendant appealed her conviction to the circuit court. On appeal, defendant argued that the district court erred by admitting the refund receipt under the business records exception to the hearsay rule, MRE 803(6), and by admitting evidence of other acts, including defendant's presentation of numerous driver's license numbers, despite the prosecution's failure to provide the pre-trial notice MRE 404(b)(2) requires.

The circuit court set aside defendant's conviction and granted a new trial. It concluded that the district court erred by admitting the refund receipt as a business record and that, although the district court did not abuse its discretion by admitting testimony regarding defendant's previous returns to Home Depot, it did abuse its discretion by admitting testimony that defendant used different driver's license numbers in the course of completing various transactions. The circuit court concluded that these errors were not harmless and, therefore, set aside defendant's conviction.

We granted the prosecution's delayed application for leave to appeal.

II. Standard of Review

This Court reviews for abuse of discretion whether the trial court erroneously admitted evidence. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003).

We review unpreserved claims of error to determine whether a plain error occurred that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

> To avoid forfeiture of review of [an] issue under the plain error rule, the defendant must demonstrate that: (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected the defendant's substantial rights. . . . The third factor requires a showing of prejudice, meaning that the error must have affected the outcome of the lower court proceedings. . . . If the defendant satisfies these three requirements, this Court must then exercise discretion in deciding whether to reverse. *Id.* Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. [*People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003) (citations omitted).]

III. Analysis

The prosecution first asserts that the district court properly admitted the refund receipt under the business records exception to the hearsay rule, MRE 803(6). We agree.

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[2] See n 1, *supra*.

MRE 803 provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> * * *
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> (6) A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

This Court articulated the evidentiary foundation required to admit business records pursuant to MRE 803(6) in *People v Vargo*, 139 Mich App 573, 580; 362 NW2d 840 (1984):

> For a proper foundation to be established for the admission of a document as a business record, a qualified witness must establish that the record was kept in the course of a regularly conducted business activity and that it was the regular practice of such business activity to make that record. MRE 803(6). Knowledge of the business involved and its regular practices are necessary.

In its opinion reversing defendant's conviction, the circuit court concluded that the district court admitted the refund receipt for an improper purpose because it was not offered to prove an act, transaction, occurrence, or event by Home Depot, and was intended to substitute for the special service associate's testimony regarding the transaction at issue. We disagree with the circuit court's conclusion. Specifically, we find that the refund receipt was offered to document the August 19, 2002, transaction involving defendant's request for a refund. According to Gabbard, Home Depot keeps refund receipts in the normal course of business. He also testified that he is aware of the process the business uses to make refunds.

The circuit court also identified concerns regarding whether the refund receipt accurately reflected defendant's request for a refund, given that defendant testified that she signed a blank form and the prosecution did not present the special services associate as a witness. Although we recognize that MRE 803(6) conditions admission of business records on the trustworthiness of the method or circumstances surrounding preparation of the record, we believe that the circuit court's concerns pertain to the weight of the evidence, not its admissibility. Weighing evidence rests within the province of the jury. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Accordingly, we conclude that the district court did not abuse its discretion by admitting the refund receipt under MRE 803(6).

The prosecution next argues that the district court properly admitted evidence of defendant's prior use of multiple driver's license numbers when returning merchandise to Home

Depot. Although we disagree, we conclude that reversal of defendant's conviction is not necessary.

MRE 404(b)(1) provides that evidence of other acts is not admissible "to prove the character of a person in order to show action in conformity therewith," but that such evidence may be admissible for other purposes. MRE 404(b)(1); *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003). The prosecution, however, must provide pre-trial notice of "the general nature of any such evidence it intends to introduce and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence." MRE 404(b)(2). In the instant case, it is undisputed that the prosecution did not provide pre-trial notice of its intent to introduce evidence of defendant's prior use of numerous driver's license numbers when returning merchandise to Home Depot.

As a preliminary matter, we disagree with the circuit court's conclusion that defendant properly preserved this issue for appellate review. Although defendant objected to this evidence, she did not specifically object on the basis that the prosecution failed to provide the pre-trial notice required by MRE 404(b)(2). Consequently, we apply the plain error rule to this issue. See *People v Houston*, ___ Mich App ___; ___ NW2d ___ (Docket No. 245889, issued 4/1/04), slip op at 1-2; *Carines*, *supra*.

Because the prosecution did not comply with the procedural prerequisite to introducing this evidence, the district court erred by admitting it. *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001). This plain error does not require reversal, however, because we are not persuaded that the error affected defendant's substantial rights. In light of the other evidence presented against defendant, we do not believe that the admission of the evidence regarding driver's license numbers affected the outcome of the trial. *McLaughlin, supra.* Moreover, we are not persuaded that defendant is actually innocent or that the admission of this evidence "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.*

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly