STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2008
v	No. 278537 Lapeer Circuit Court
MALIK HANNA DABABNEH, Defendant-Appellant.	LC No. 06-008958-FH

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of larceny in a building, MCL 750.360. We affirm.

Complainant Misty Johnson used a powered cart, known as an Amigo and provided by the store, to shop at Meijer. After Johnson left the store, she realized that she did not have her change purse. Johnson returned to the store and looked for the purse in the area in which she had parked the Amigo, but could not locate the purse. Store security videos depicted defendant in a checkout lane next to Johnson, walking to the area in which Johnson parked the Amigo, and then bending over and apparently retrieving something from that area. Defendant was still visible in the area when Johnson returned to the store to look for her purse. The video showed that defendant made no attempt to give anything to Johnson at that time.

The next day, Johnson's purse appeared at a high school basketball tournament. Defendant's daughter was at the tournament and turned in the purse at the direction of her mother. The purse eventually made its way back to Johnson, who reported that cash and documents were missing from the purse. She soon discovered that the cash had been taken by her husband, but she did not immediately reveal this fact to the police or prosecutors.

Defendant first argues that there was insufficient evidence to support his conviction or, alternatively, that his conviction was against the great weight of the evidence. We disagree. To determine whether there was sufficient evidence to support a conviction, we review the evidence de novo, "in a light most favorable to the prosecution[,] and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (internal citation and quotation marks omitted). We review a trial court's decision on a motion for a directed verdict de novo to determine whether the evidence presented by the prosecution, viewed

in the light most favorable to the prosecution, could convince a rational trier of fact that the essential elements of the charged offense were proven beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

> The elements of larceny in a building are (1) the actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the goods or property must be the personal property of another, (5) the taking must be without the consent and against the will of the owner, and (6) the taking must occur within the confines of the building. [*People v Randolph*, 242 Mich App 417, 421-422; 619 NW2d 168 (2000), rev'd in part on other grounds 466 Mich 532 (2002).]

Johnson testified that she had the change purse on her lap and that she stood up from the Amigo before exiting the building. It would be a reasonable inference that the purse fell out of her lap onto the floor. The video showed defendant leaning over as if to pick something up from the floor right next to the Amigo Johnson had just vacated before exiting the building. It is a reasonable inference that defendant picked up Johnson's change purse. The video showed that defendant stayed in the area when Johnson returned and began looking for the purse. It is reasonable to infer that defendant saw this and, given the area where Johnson was looking, that he would conclude that the purse he just picked up probably belonged to her. The fact that defendant did not offer the purse to Johnson or turn it in to anyone at Meijer supports a reasonable inference that he did not intend to return it to her. Thus, there was sufficient evidence to establish that defendant committed larceny in a building. Likewise, viewing the facts in the light most favorable to the prosecution, the verdict was not against the great weight of the evidence, see *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), and, contrary to defendant's argument, it would not be "manifestly unjust" to allow the verdict to stand.

Next, defendant argues that he was denied the effective assistance of counsel because counsel's decision to call defendant's daughter as a witness provided the only direct link between defendant and Johnson's purse. We disagree. Where, as here, there was no evidentiary hearing below concerning the issue, appellate review of a defendant's claim of ineffective assistance of counsel is limited to the existing record. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).[1]

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. A defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different, and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). There is a strong presumption of effective counsel when it comes to issues of trial

[1] We decline defendant's suggestion that we remand this case for an evidentiary hearing.

strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). An appellate court will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant claims that counsel's decision to call defendant's daughter to testify that defendant's wife gave her the change purse to turn in the next day established the only definite link between the change purse and defendant, and destroyed any defense that depended on a claim that defendant did not take the purse. However, this assertion ignores the fact that during opening argument, defense counsel clearly indicated that defendant would be arguing that he acted as a Good Samaritan. Then during closing argument, defense counsel argued that defendant did not intend to keep the purse. Given this theory of defense, it was not ineffective for counsel to call defendant's daughter to establish that the turning in of the wallet the next day was intentional. That this strategy did not result in defendant's acquittal does not make defense counsel ineffective. Counsel is not ineffective for pursuing a strategy that ultimately fails. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Next, defendant argues that he was denied his due process right to present a defense by the trial court's refusal to allow defendant's wife to testify after defendant failed to include her on his witness list before trial. However, with no offer of proof regarding how defendant's wife would have testified, appellate review of this issue is precluded. *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 94; 697 NW2d 558 (2005); MRE 103(a)(2).

Next, defendant argues that the prosecutor committed misconduct requiring reversal by inviting the jurors to put themselves in defendant's shoes and ask what they would do in the same situation, by accusing defendant of putting Johnson on trial simply by cross-examining her, and by alluding to defendant's failure to testify in closing argument. We disagree.

Defendant did not object to the alleged prosecutorial misconduct, and thus we review this issue using the plain-error standard. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). To warrant reversal, any error must have been outcome-determinative. See *id*. Also, "[r]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*.

First, defendant claims that it was misconduct for the prosecutor, during his opening statement, to ask the jurors:

> what would you have done if you found a purse . . . and then compare what a reasonable person you as jurors as a reasonable person would have done and compare it to the actions of the Defendant, because . . . there will be no evidence in this case introduced to show that he took any effort whatsoever to get this purse back to Misty Johnson.

Defendant claims that this comment impermissibly put the jurors in defendant's shoes. However, the prosecutor was simply asking the jurors to use their common sense and experience. See *People v Lawton*, 196 Mich App 341, 355; 492 NW2d 810 (1992), and CJI2d 3.6(2). No misconduct occurred in this instance.

Second, the prosecutor, on redirect examination of Johnson, asked Johnson leading questions that suggested that defense counsel's cross-examination had made her feel as if she were the person on trial. However, defense counsel did no more than subject Johnson to a vigorous cross-examination, emphasizing her initial concealment of the fact that her husband had taken the money from the purse. Such cross-examination was perfectly proper, because it questioned Johnson's credibility on an issue of central significance to this case. This was certainly not putting Johnson "on trial," and we believe that characterizing it as such constituted an impermissible attempt to garner sympathy for Johnson. See *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Nevertheless, the strongest evidence against defendant was the store video and his daughter's testimony. Therefore, this misconduct did not rise to the level of plain error resulting "in the conviction of an actually innocent defendant" and did not "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *Callon*, *supra* at 329.

Finally, we do not agree with the claim that the prosecutor's statement during closing argument that he "believe[d] . . . [d]efendant is going to get up here and testify he didn't see Misty Johnson" and that he thought "that's going to be one of the defenses here" was misconduct because it constituted improper comment on defendant's right to remain silent. The prosecutor made the comment during closing argument, when it was clear there would be no more testimony. It seems more likely that the comment was an inartful way of saying that defendant's closing argument would be that defendant did not see Johnson, and that it had nothing to do with defendant's testimony or lack thereof. Furthermore, the jury was instructed that it was not to hold defendant's lack of testimony against him. A jury is presumed to follow its instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and reversal is not required where an instruction alleviates any prejudicial effect, *Callon*, *supra* at 329-330. Thus, there was no prosecutorial misconduct requiring reversal.

Next, defendant argues that the trial court erred by admitting into evidence a DVD copy of videos recorded from the Meijer security cameras because this was not the original recording and was not complete because it was edited for time. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

MRE 1003 provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." The trial court found that the DVD was admissible because it was authenticated by the Meijer employee who compiled it as an accurate representation of the footage from the security cameras. There was no evidence introduced that suggested that the DVD images did not represent what was recorded from the cameras at Meijer. Also, there was nothing unfair about using the duplicate file rather than the original. As the trial court noted, it would have been unduly cumbersome to bring the recording hardware from Meijer into the courtroom. With regard to the edits for time, defendant does not sufficiently indicate the relevance of showing video that did not cover the time when he and Johnson were paying and exiting the store.

Finally, defendant argues that the trial court erred by dismissing a juror without proper cause or justification, denying defendant his right to have his case decided by the jury that was

selected. We disagree. We review a trial court's decision to remove a juror for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

MCL 768.18 provides, in part, that "[s]hould any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12." This does not give a judge the "arbitrary power to excuse the extra jurors according to his own inclinations." *People v Van Camp*, 356 Mich 593, 604-605; 97 NW2d 726 (1959). Rather, "[t]here must be factual justification under the statute similar in character to that which would authorize excusal of a member of a jury panel." *Id.*

During jury voir dire, the prospective jurors were asked if any of them had "ever been accused or prosecuted as a result of any criminal charges." Juror number 2 did not raise his hand. Subsequently, in mid-trial, the prosecutor discovered that juror number 2 had a number of misdemeanor convictions and that the juror had failed to reveal that his son had been charged with and acquitted of second-degree murder. Notwithstanding that juror number 2 stated that nothing from his past would prevent him from rendering a fair and impartial verdict, the trial court granted the prosecution's request and removed juror number 2 from the jury.

Defendant claims that the trial court acted improperly because, as the trial court admitted, the juror would not have been excluded for cause during voir dire. However, it is clear that the prosecutor would have used a peremptory challenge had the juror been candid. Under the circumstances, the trial court did not abuse its discretion by dismissing the juror.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray