STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2011
v	No. 298061 Macomb Circuit Court
CHARLES WILLIAM MALONE, Defendant-Appellant.	LC No. 2009-005649-FH

Before: BORRELLO, P.J., and JANSEN and SAAD, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of first-degree retail fraud, MCL 750.356c(2), for which he was sentenced as a fourth habitual offender, MCL 769.12, to 3 to 15 years in prison. We affirm.

Defendant first argues that his trial attorney rendered ineffective assistance of counsel by advising him not to seek a mistrial after the prosecutor mentioned defendant's prior retail fraud conviction during his opening statement. Defendant maintains that the prosecutor intentionally mentioned this prior retail fraud conviction despite a stipulation that he would not do so. Defendant contends that any retrial would have been barred by principles of double jeopardy and that defense counsel therefore should have advised him to seek a mistrial.

Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). A defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The fact that a strategy does not work does not render its use ineffective. *People v Petri*, 279 Mich App 407, 412-413; 760 NW2d 882 (2008).

Defendant cites *People v Dawson*, 154 Mich App 260, 272-273; 397 NW2d 277 (1986), aff'd 431 Mich 234 (1988), for the proposition that a defendant cannot be retried after a mistrial is declared on the basis of intentional prosecutorial misconduct. While the *Dawson* Court specifically held that retrial is barred when a mistrial results from intentional prosecutorial conduct causing prejudice, our Supreme Court, in affirming, declined to specifically adopt such a broad rule and found that the issue was whether "the prosecutor intended to goad the defendant into moving for a mistrial." *Dawson*, 431 Mich at 236.

The facts and circumstances of this case do not support defendant's contention that the prosecutor intended to "goad defendant into a mistrial." Before the jury was empanelled, the prosecutor indicated that he believed defendant's prior conviction of second-degree retail fraud was an element of the offense of first-degree retail fraud. Defense counsel feared that reference to the prior conviction, though necessary for an enhancement under the first-degree retail fraud statute, would be unduly prejudicial to defendant. Accordingly, after a brief recess, the parties stipulated that the prosecutor would provide the jury with a certified copy of the prior conviction, but that no additional information would be presented concerning the circumstances of the prior crime. During opening statements, the prosecutor stated:

> Retail fraud in the first degree requires that the People [prove] that while CVS was open to the public and offering property for sale to the public, that the Defendant did, in fact, steal goods valued at at least $200. So that's why those—those numbers are important. In addition to that the People will have to prove and will do so with a certified record of conviction that the Defendant has previously been convicted of retail fraud in the second degree.
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> In fact, we have a record of conviction from August 26, 2009, approximately four months—excuse me, less than—just over three months before this incident, the Defendant being convicted of exactly that in the Forty-sixth District Court, Southfield.

Defense counsel made no objection. The matter was adjourned after opening statements until the following day.

At the start of the second day of trial, the prosecutor brought his concerns to the court's attention, acknowledging that he should not have referred to the prior conviction, although "it was an unintentional error." The prosecutor suggested one of two options: a consensual mistrial without prejudice, or to simply continue with trial as though nothing had happened. Defense counsel believed the latter position was advisable, and defendant indicated on the record his desire to continue with trial. Defense counsel specifically waived a limiting or cautionary instruction regarding the prosecutor's mention of defendant's prior conviction because he did not want to draw additional attention to it. The jury was instructed that the lawyers' statements and arguments were not evidence.

It is clear from the record that the prosecutor did not intentionally seek to "goad defendant" into moving for a mistrial. In fact, just the opposite was true. The prosecutor, himself, brought his error to the court's attention after realizing that he had been incorrect and that proof of defendant's prior conviction was not an essential element of first-degree retail fraud. Defendant's brief on appeal misstates what occurred. There was no stipulation that the prosecutor would not mention defendant's conviction. Instead, the prosecutor stipulated to introduce a certified record of the conviction but not to mention any additional facts concerning the prior conviction. That is exactly what happened during the prosecutor's opening statement. It was only after the prosecutor consulted with his colleagues that he realized he should not have mentioned defendant's prior conviction before the jury. Upon realizing the error, the prosecutor immediately brought it to the court's attention. There is simply no support for defendant's contention that the prosecutor engaged in intentional misconduct which would have barred a

second prosecution. Accordingly, defense counsel was not ineffective for failing to advise defendant to seek a mistrial.

We further note that defense counsel's strategy of contesting the value of the items stolen was perfectly reasonable in light of the overwhelming evidence that defendant took the items from the CVS Pharmacy. Shift manager Siressa Jackson observed defendant taking the items on the security cameras. She confronted defendant as he attempted to leave the store, all the while in contact by telephone with police. Police officers arrived in time to see defendant pulling out of the parking lot in a white car. When they ultimately stopped defendant's vehicle, numerous items marked with CVS price stickers fell from the sleeves of defendant's jacket. In light of this evidence, defense counsel admitted to the jury that defendant had stolen the items, but argued that the prosecutor could not prove that the total value of the items exceeded $200 as required by the retail fraud statutes. Counsel also argued that the products may have come from some other CVS Pharmacy and that, absent a store inventory, there was no way of knowing whether defendant had taken all of the items from the same CVS store. The fact that this trial strategy was unsuccessful did not render counsel's representation of defendant ineffective. *Petri*, 279 Mich App at 412-413.

Defendant next argues that there was insufficient evidence to convict him of first-degree retail fraud because the prosecution failed to prove beyond a reasonable doubt that the value of the stolen goods exceeded $200. We disagree. In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). We do not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). It is for the trier of fact to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

In order to convict defendant of first-degree retail fraud, the prosecution was required to prove that (1) defendant had a prior conviction under the retail fraud statute or another enumerated statutory provision, (2) defendant stole property that a store offered for sale, and (3) the property was worth more than $200 but less than $1,000. MCL 750.356c(2); MCL 750.356d(1)(b).

At trial, defendant did not dispute that he stole items from the CVS Pharmacy. However, he maintained that the prosecutor failed to prove the value of the goods stolen. On appeal, defendant argues that second set of items that were recovered from his possession were not valued until the first day of trial and that the prices on the day of valuation may not have reflected the prices of the goods on the day they were stolen. He asserts that if any of the items had been on sale at the time of the theft, this could have caused the total value of the stolen goods to fall below $200 and would have rendered the crime a misdemeanor under MCL 750.356d(4)(b).

Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of first-degree retail fraud. *People v Reddick*, 187 Mich App 547,

551; 468 NW2d 278 (1991). Given the evidence presented at trial, a reasonable jury could have concluded beyond a reasonable doubt that the total value of the items stolen exceeded $200. Shift manager Jackson admitted that while she saw defendant shoplifting on the surveillance camera, she did not see which specific items he was taking. Nevertheless, Jackson noticed that defendant was stealing items from Aisle 9, which contained pain relievers and children's cough medicine, and Aisle 10, which contained stomach, antacid, and eye care products. Immediately after police officers arrested defendant, they recovered a number of items, including Alka Seltzer, Tylenol, Visine, and Advil. The retail prices of these items added up to $160.41. The officers then transported defendant to the police station for booking. At that time, additional items were recovered from the sleeves of defendant's jacket. These additional items had CVS price stickers and included Advil, Excedrin, Children's Tylenol, and Visine. The day before trial, the police officers showed Jackson these additional items and she scanned the products for prices. The prices of the additional items totaled $47. Jackson did not believe that any of the items that defendant took had been on sale at the time of the theft. She admitted that there were thousands of items in the store and she could not keep track of each sale price. However, she was "pretty positive" that none of the items had been on sale. All of the items recovered from defendant were products that were stocked in Aisles 9 and 10, and the grand total of the prices of all the recovered items was $207.

Defendant, realizing that a matter of a few dollars would have changed the crime from a felony to a misdemeanor, made the impassioned argument that the value of the goods was not properly established. The jury disagreed. The prosecutor did not have to negate every reasonable theory of innocence; instead, the prosecutor was merely required to prove his own theory beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Counsel admitted that defendant stole the items from the CVS Pharmacy. Moreover, each item had a CVS price sticker. The first set of items fell from defendant's sleeves during his arrest, and the second set of items was recovered when defendant was taken to the police station. Given the evidence presented in this case, a rational jury could have found beyond a reasonable doubt that all of the items bearing CVS price stickers had been taken from the same CVS Pharmacy and that the total value of the stolen items exceeded $200. We conclude that there was sufficient evidence presented at trial to support defendant's conviction of first-degree retail fraud.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Henry William Saad