STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 7, 2012
v	No. 302671 Kalkaska Circuit Court
JAMES EDWARD SCHMIDT, Defendant-Appellant.	LC No. 10-003224-FH

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant of false pretenses of $20,000 or more, MCL 750.218(5)(a). The trial court sentenced defendant to 16 to 120 months in prison, and ordered him to pay $34,959.61 to the victim. For the reasons set forth below, we affirm.

I. TRIAL ACCOMMODATION

Defendant argues that the trial court denied him visual accommodations at trial, as required under the Americans with Disabilities Act.[1] Defendant asserts that, to read the documents presented at trial, they needed to be typed in 22-point font size or he needed to be provided with Optilux or Aladdin magnifier. "Whether an accused is accorded due process depends on the facts of each case." *People v McGee*, 258 Mich App 683, 700; 672 NW2d 191 (2003). "The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant . . . the right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Tennessee v Lane*, 541 US 509, 523; 124 S Ct 1978; 158 L Ed 2d 820 (2004) (internal quotation marks and citation omitted).

The record reflects that reasonable attempts were made to provide defendant with accommodations to help him with his visual difficulties. The court administrator stated before proofs were entered that the particular reader defendant requested would not operate in the manner he was suggesting, i.e., through the use of a flash drive. In its place, defendant was

[1] 42 USC 12101 *et seq.*

provided with another magnifier, which he refused. Defendant fails to show that the device provided would not have allowed him to read the relevant documents. The court also made efforts to ensure the correspondence sent to defendant was in 22-point font, as defendant requested. That defendant was due "reasonable" assistance does not mean that he was due the particular device he requested. Defendant's claim on this issue is without merit.

II. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the prosecutor presented insufficient evidence to convict him. We review sufficiency of the evidence claims de novo, *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), with an eye toward determining whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt, *People v Wolfe*, 440 Mich 508, 515-514; 489 NW2d 748 (1992).[2] In doing so, all evidence must be viewed in a light most favorable to the prosecution. *People v Railer*, 288 Mich App 213, 216; 792 NW2d 776 (2010). We defer to the fact-finder's weighing of the evidence and assessment of the credibility of the witnesses. *Wolfe*, 440 Mich at 514.

Under MCL 750.218(5)(a), the elements of larceny by false pretenses over $20,000 are the following:

> (1) the defendant must have used a pretense or made a false statement relating to either past or then existing facts and circumstances, (2) at the time the pretense was used the defendant must have known it to be false, (3) at the time the pretense was used the defendant must have intended to defraud someone, (4) the accuser must have relied on the false pretense made by the defendant, (5) because of this reliance that person must have suffered the loss of some money or other valuable thing, and (6) the property obtained by the defendant must have had a fair market value of over [$20,000] at the time of the crime. [*People v Lueth*, 253 Mich App 670, 680-681; 660 NW2d 322 (2002).]

Defendant's main argument on appeal focuses on whether he made a false statement and had the intent to defraud at the time of closing. Defendant's knowledge of the false statement and intent to defraud can be inferred from the evidence. *People v Reigle*, 223 Mich App 34, 39; 566 NW2d 21 (1997). "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citation omitted).

As the trial court observed, this case depended on the credibility of the witnesses and whether the jury believed defendant's testimony. Evidence showed that, from the beginning of the transaction, defendant seemed to be rushing the sale. He was adamant about making an offer immediately, and declined his realtor's offer to go through the house with him. Defendant was encouraged to obtain an inspection before closing, but he refused. Further, the realtor informed

[2] Amended on other grounds 441 Mich 1201 (1992).

defendant that he had to bring a cashier's check to closing, and specified the amount of the check. Instead, defendant brought a personal check to closing from his nonprofit organization. A personal check does not carry the same guarantee and finality of funding as a cashier's check. After closing, defendant stopped payment on the check, knowing that the title company was relying on it. Although defendant claims that a leak under the house was the reason he stopped payment on the check, evidence showed that he was aware of the leak before closing, but did not investigate it. Deferring to the jury's credibility assessments, and viewing the evidence presented in a light most favorable to the prosecution, we hold that it is reasonable to infer from the evidence that defendant did not intend to follow through on his promises of payment. It is reasonable to conclude that his presentation of himself as a good faith purchaser of the property was knowingly false at its inception. Nonetheless, defendant gained title to property worth over $20,000.

In addition, the owner of the title company involved in the transaction relied on defendant's personal check when she paid the others involved in the transaction. When she was informed the check would not be honored, she had to personally fund the escrow account so the checks she wrote to the others would not bounce. Accordingly, the prosecutor presented sufficient evidence to support defendant's conviction.

III. GREAT WEIGHT OF THE EVIDENCE

Defendant also argues that the verdict was against the great weight of the evidence. For the reasons set forth above, we hold that the evidence presented does not preponderate so heavily against the verdict that it would be an injustice to allow the verdict to stand. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

IV. ADMISSIBILITY OF EVIDENCE OF GUILTY STATE OF MIND

Defendant argues that the trial court abused its discretion by admitting evidence that he avoided the police. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW 2d 797 (2007).

A Michigan State Police Trooper assigned to investigate the matter testified that when he went to defendant's residence to speak with him, defendant bolted from the kitchen table, turned the lights off, and refused to answer the door. To be admissible, evidence must be relevant. MRE 402. Relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable. MRE 401. Evidence will be inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

This Court has consistently recognized that evidence of flight is admissible to show consciousness of guilt. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). Similarly, concealment or hiding from the authorities is also evidence of a guilty mind. CJI2d 4.4. Evidence of defendant leaving the kitchen, turning the lights off, and refusing to answer the door is relevant because it shows a "consciousness of guilt." Further, the risk that the evidence creates a danger of unfair prejudice was eliminated by the instruction the trial court gave to the

jury. The trial court instructed the jury that defendant had an "absolute right not to talk to the police." It also told the jury, "When you decide the case, you must not consider the fact that he did not talk to the police. It must not affect your verdict in any way." Jurors are presumed to follow the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

V. SCORING OF OFFENSE VARIABLES 16 AND 19

Defendant claims that the trial court improperly scored offense variables OV 16 and OV 19. "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres* (*On Remand*), 269 Mich App 414, 417; 711 NW2d 398 (2006).

Generally, sentencing decisions are reviewed for an abuse of discretion. *People v Conley*, 270 Mich App 301, 384; 715 NW2d 377 (2006). However, because defendant failed to preserve this issue, we will review the sentencing decision for plain error affecting defendant's substantial rights. *Id.* at 385. A defendant trying to sustain a plain error challenge must show the following: (1) an error occurred; (2) the error is obvious; and (3) the obvious error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. If a defendant establishes these requirements, this Court must use its discretion when deciding whether to reverse the conviction.

Under OV 16, a trial court must score 10 points if the property defendant obtained had a value of more than $20,000. MCL 777.46(1)(a). Defendant argues that the trial court erred in scoring 10 points under OV 16 because the property was returned. However, the plain language of the statute states that the variable is scored based on the value of the property defendant obtained. Here, evidence showed that the deed to the house was recorded and defendant obtained title to the house, which was worth over $20,000. This is sufficient to support a score of 10 points for OV 16.

We hold that defendant has abandoned his challenge to the scoring of OV 19. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority."). Defendant's entire argument consists of a statement that it is unclear why the trial court scored 10 points for OV 19. The time to clarify the reasoning was at sentencing, not on appeal.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

We disagree with defendant's argument that his counsel was ineffective. Our review of this claim is "limited to mistakes apparent from the record" because defendant did not raise the issue of ineffective assistance of counsel in a motion for a new trial or request an evidentiary as required by *People v Ginther*, 390 Mich 436, 442-43; 212 NW2d 922 (1973). *People v Brown*, 279 Mich App 116, 140; 755 NW2d 664 (2008). To prove defendant received ineffective assistance of trial counsel, he must show: (1) "that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness," and (2) that there is a reasonable probability the outcome of the trial would have been different but for counsel's

performance. *People v Jordan*, 275 Mich App 659; 739 NW2d 706 (2007). There is a presumption of effective assistance of counsel and the burden is on defendant to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant claims counsel was ineffective for not objecting to the denial of adaptive accommodations and evidence that defendant avoided police. To the contrary, in both instances, defense counsel raised the issues. Further, defense counsel was not ineffective for not moving for a directed verdict.

> In assessing a motion for a directed verdict of acquittal, a trial court must consider the evidence presented by the prosecution to the time the motion is made and in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. [*People v Riley* (*After Remand*), 468 Mich 135, 139-140; 659 NW2d 611 (2003).]

Given the standard the trial court must follow when reviewing a motion for directed verdict, the evidence viewed in prosecution's favor sufficiently established the elements of the crime. Therefore, a motion for directed verdict would have been futile and defense counsel was not ineffective. See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Jane M. Beckering