STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 17, 2007
V	No. 267082 Wayne Circuit Court
CLIFFORD CHARLES DISNEY, Defendant-Appellant.	LC No. 05-008047-01

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant was convicted of first-degree retail fraud, MCL 750.356c, and was sentenced to 23 months to 5 years' imprisonment. Defendant appeals as of right. We affirm.

I. FACTS

In August 2003, defendant was convicted, for the first time, of first-degree retail fraud. On March 22, 2005, Rodney Jordan, a loss prevention detective employed by Sears, was working undercover when a colleague, David Ezekiel, notified him that there was a white male in the Levi's department who started pulling jeans down off the display and putting them in a Sears bag that he had pulled out of his coat pocket. Jordan saw the man, from between 75 to 80 feet away, stuff one or two pairs of jeans in the bag and then exit the store. Jordan followed him out, with Ezekiel watching via an outdoor security camera. Once Jordan informed the shoplifter that he was with Sears's loss prevention, the man jumped into a burgundy Ford Contour. Jordan noted the license plate number and recovered the merchandise because the bag broke and the jeans fell out into the parking lot. The bag contained nine pairs of jeans, worth a total of $372, but no receipt.

Officer Dean Langley received a description of the suspect and the vehicle, as well as the vehicle license plate number, which was registered in the name of Phyllis Disney, the owner of the vehicle. Langley ran a LIEN check on the name of the person given to him by Phyllis Disney, obtained a driver's license photograph of defendant, and took it to the Sears store to compare it to the closed-circuit videotape from March 22, 2005. Langley showed Ezekiel the driver's license photograph of defendant, and defendant was arrested. At trial, Ezekiel testified that he identified defendant in the courtroom based on having viewed defendant on the store monitors, and not based on the driver's license photograph.

Jordan and Ezekiel both testified at trial that defendant was the man they saw stealing the jeans and that at the time of the theft, defendant wore a goatee, not the beard he wore at trial. On cross-examination, defendant, representing himself, questioned whether Jordan would have been able to see the man stuffing jeans into the bag, since displays may have blocked Jordan's view. But Jordan responded that the displays are staggered in such a way that he was able to see the man.

On cross-examination of Langley, defendant asked him if Phyllis Disney told him that defendant was driving her vehicle at the time of the theft. Langley answered yes. Defendant then asked, "In your report you state that you asked who was driving the car and then Mrs. Disney just said that the Defendant had the car for most of the day, she did not say that he had the car at the time?" Langley answered, "Yes, she did. Had the car yesterday."

Defendant objected on the record to Ezekiel's identification of him, asserting that the identification was tainted because Langley showed Ezekiel a photograph of defendant. The trial court stated that Ezekiel's in-court identification was allowed because Ezekiel testified that his identification of defendant was based on seeing him on the monitors at Sears and then seeing him in court.

Defendant was originally charged with second-degree retail fraud under MCL 750.356d. However, since this was defendant's second offense, the charge was elevated to first-degree retail fraud under MCL 750.356c(2).

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues on appeal that there was insufficient identification evidence to convict him of first-degree retail fraud. We disagree.

A. Standard of Review

We review a claim of insufficient evidence in the light most favorable to the prosecutor to determine if a rational fact-finder could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

B. Analysis

Retail fraud in the second degree is established when plaintiff shows that defendant, "[w]hile a store is open to the public, alters, transfers, removes and replaces, conceals, or otherwise misrepresents the price at which property is offered for sale with the intent not to pay for the property or to pay less than the price at which the property is offered for sale if the resulting difference in price is $200.00 or more but less than $1,000.00." MCL 750.356d(1)(a). "A person who violates section 356d(1) and who has 1 or more prior convictions for committing or attempting to commit an offense under this section or section 218, 356, 356d(1), or 360 is guilty of retail fraud in the first degree." MCL 750.356c(2).

Defendant claims that the Sears employees' identification of him as the shoplifter was unreliable. He argues that the loss prevention employees gave a "somewhat" incorrect description of him. In addition, he argues that the employees had an obstructed and distant view

of the shoplifter and had no contact with defendant until the preliminary examination on August 4, 2005, five months after the crime.

When determining if a witness's identification is reliable, the trial court should examine a number of factors, including the following: whether the witness had a prior relationship with or knew the suspect beforehand; whether the witness had an opportunity to witness the crime; the length of time the witness was able to view the suspect; how far away the witness was from the suspect; whether the area was well-lit; the witness's state of mind; how much time passed between the crime and the identification of the suspect, and "the accuracy of description compared to the defendant's actual appearance." *People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000), citing *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998).

Here, both Jordan and Ezekiel had an opportunity to see the defendant, via an unobstructed view, during commission of the crime. Ezekiel was able to view defendant on television monitors and Jordan was able to view defendant both in the store and outside in the parking lot. There is nothing in the record to indicate that the employees' description of the suspect did not match defendant.

Defendant contends that since five months passed between the crime and when the employees' identified him at the preliminary examination, the identification was invalid. However, "delays as long as eighteen months after a crime do not invalidate an eyewitness identification." *People v Kurylczyk*, 443 Mich 289, 307-308; 505 NW2d 528 (1993). Defendant also argues that police improperly showed Ezekiel a photograph of him before the trial, which may have tainted Ezekiel's identification. However, the Court in *Kurylczyk* held that the in-court identification by a witness is admissible if "an independent basis for incourt identification can be established that is untainted by the suggestive pretrial procedure." *Kurylczyk*, *supra* at 302. Ezekiel testified that his identification of defendant at trial was based on his observation of defendant committing the crime, and not on the photograph. Thus, Ezekiel's identification of defendant was reliable.

In addition, defendant argues that the prosecution failed to eliminate "equally plausible" theories of the crime. However, the prosecution does not need to "negate every reasonable theory consistent with the defendant's innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide." *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Therefore, viewing the evidence in the light most favorable to the prosecution, we conclude there was sufficient evidence for a rational fact-finder to find defendant guilty beyond a reasonable doubt of first-degree retail fraud.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues on appeal that he was denied effective assistance of counsel. We disagree.

A. Standard of Review

We review an unpreserved claim of ineffective assistance of counsel for mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). We review the trial court's factual findings for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that this performance was so prejudicial that it denied the defendant a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant must show a reasonable probability that, but for counsel's error, the outcome would have been different. *Id*. A defendant must overcome the strong presumption that his counsel was effective and engaged in sound trial strategy. *Id*.

First, defendant argues that his pretrial counsel did not conduct a proper investigation, because counsel should have requested the appointment of an expert witness on eyewitness identification. However, there is nothing in the record to suggest that defendant's pretrial counsel failed to make an adequate investigation. Further, the cases that defendant cites to support of his claim that the outcome of the trial would have been different had he been provided an expert witness hold that expert testimony on eyewitness identification is helpful to the trier of fact and therefore admissible. *United States v Lester*, 254 F Supp 2d 602 (ED VA, 2003); *Brodes v State*, 250 Ga App 323; 551 SE2d 757 (2002). However, defendant does not provide any Michigan case law with a similar holding. And in *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999), this Court held that whether to call an eyewitness identification expert to testify is "presumed to be a permissible exercise of trial strategy." Here, there is nothing in the record to rebut the presumption that pretrial counsel practiced sound strategy by choosing *not* to have an expert testify.

Second, defendant argues that he was denied the effective assistance of counsel when "his attorney" failed to object to the admission of highly prejudicial statements and "defendant" failed to immediately move for a mistrial.[1] Specifically, defendant claims that it was prejudicial for Officer Langley to testify that defendant's mother said she was the owner of the vehicle in question. Defendant in propria persona objected to the line of questioning as hearsay, but the trial court allowed the testimony.

Defendant argues that although he represented himself at trial, he is still entitled to have counsel's conduct evaluated under the *Strickland* standard. However, a defendant who decides to represent himself cannot thereafter complain that he received ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 419; 639 NW2d 291 (2001). Furthermore, a defendant in propria persona generally cannot assign blame for his conviction to his stand-by counsel. *Id*. at 426-427. So long as a defendant's stand-by counsel did not interfere with the defendant's

[1] Defendant does not specify whether "defendant" refers to himself or to his stand-by counsel.

right to control the case, and did not "alter the jury's perception that [the] defendant was representing himself," then stand-by counsel "was not acting as counsel within the meaning of the Sixth Amendment." *Id*. Here, stand-by counsel did not speak on the trial record except to affirm that defendant wanted to represent himself. There is nothing in the record to suggest that stand-by counsel interfered with defendant's case or altered the jury's perception that defendant was defending himself. Therefore, because defendant chose to represent himself, and stand-by counsel did not act as primary counsel, defendant cannot claim he was denied the effective assistance of counsel.

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Bill Schuette