

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS LAVELL LEWIS,

Defendant-Appellant.

UNPUBLISHED

November 29, 2005

No. 255425

Oakland Circuit Court

LC No. 2003-192418-FH

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of first-degree retail fraud, MCL 750.356c. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant and his acquaintance, Samuel Black, were involved in an attempt to shoplift an Armani suit from a Marshall Field's store at Sommerset Mall in Troy. Defendant was found guilty in a second jury trial after the first proceeding ended in a mistrial precipitated by the prosecutor's questioning during cross-examination. Defendant, who had allegedly assisted in the robbery by helping to conceal the suit in a Nordstrom shopping bag that the two men had brought into the store, maintained that he had no knowledge of the fact that Black intended to steal the suit, and did not notice that Black had the suit, until the two were leaving the store.

During cross-examination in the first trial, the following exchange occurred:

Q. Okay. And when [Black] purchases that one shirt, they give him that one shirt in one Nordstrom's bag, correct?

A. Yes.

Q. Okay. And when was the last time you shopped at Nordstrom's?

A. Regularly, I shop [sic] regularly at Nordstrom's before the incident.

Q. Un. Huh.

A. But I haven't been back.

Q. Well, why wouldn't you go back, the incident had [n]othing to do with Nordstrom's?

A. Because I felt like it [sic] you see the video tape I was the one being tackled down like I had the suit and I felt like that wasn't right, so I try to stay away from stores all together.

Q. What you're telling us under oath is the reason you haven't been back to that mall is because of the way you were treated at that time?

A. Yes, sir.

Q. Okay. Well it's not because you've been in custody since that day, that isn't the real reason you haven't shopped?

[Defense Counsel]. Objection, Your Honor. He has clearly said something that is not true.¹

Defense counsel argued that the prosecutor had deliberately introduced error by way of the above exchange, and counsel moved for a mistrial. The prosecutor responded that the question was designed to show that defendant's stated reason for avoiding Nordstrom was false. The trial court ruled that it was improper for the prosecutor to inform the jury that defendant was in custody and granted defendant's request for a mistrial. The trial court found, however, that the impropriety was not intentional and indicated that it would retry the case the next day. In his second trial, defendant moved for dismissal on double jeopardy grounds. The trial court denied the motion.

On appeal, defendant argues that the trial court erred when it refused to dismiss the charges due to the prosecutor's misconduct that led to the mistrial. Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. Generally, unless the defendant consents to the interruption of the trial or a mistrial is declared due to manifest necessity, the defendant cannot be retried. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). A mistrial granted on the defendant's own motion or with his consent waives double jeopardy protection, unless the motion or consent is prompted by prosecutorial conduct intended to goad the defendant into the mistrial request. *Oregon v Kennedy*, 456 US 667, 675-676; 102 S Ct 2083; 72 L Ed 2d 416 (1982); *People v Lett*, 466 Mich 206, 215; 644 NW2d 743 (2002); *People v Dawson*, 431 Mich 234, 236, 253; 427 NW2d 886 (1988).

A double jeopardy claim presents a question of law that we review de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). The trial court's factual findings, including the prosecutor's intent, will not be disturbed on appeal unless they are clearly erroneous. *Dawson, supra* at 257-258. "A decision is clearly erroneous if, although there is evidence to

¹ We note that, according to the record presented to this Court, defendant was in fact released on bond after his arrest.

support it, the Court is left with a definite and firm conviction that a mistake has been made.” *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1992). In determining a prosecutor’s intent, the trial court should rely on the objective facts and circumstances. *Dawson*, *supra* at 257.

We find that the trial court did not clearly err when it found that the prosecutor did not deliberately intend to cause a mistrial. There is little evidence of a calculated strategy on the part of the prosecutor to derail the trial. To the contrary, it seems clear from the record that the prosecutor intended the question to impeach the defendant’s stated reason for avoiding Nordstrom after the robbery. The prosecutor clearly, but apparently mistakenly, believed that he had caught defendant in a lie. Defense counsel objected to what he saw as the deliberate introduction of an untruth, while the trial court objected to the introduction of the defendant’s custodial status, ostensibly because it could prejudice the jury against defendant. Rather than correcting the mistakes of both the prosecutor and the trial court, or perhaps evidencing a misunderstanding of his own, defense counsel instead moved for a mistrial.

Nor do we find persuasive defendant’s allegations that the prosecutor sought to gain a tactical advantage. Defendant maintains that mistrial allowed the prosecutor to keep defendant from re-introducing testimony that he did not have a prior criminal record for stealing. However, defendant cannot show he was prejudiced by the trial court’s correct ruling that this testimony was inadmissible. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Defendant also maintains that the prosecutor gained the advantage of the lack of minority jurors on the second panel. However, because defense counsel specifically expressed his satisfaction with this second panel, we do not find this argument persuasive. We conclude that the trial court did not clearly err when it determined that the prosecutor did not deliberately intend to cause a mistrial.

Defendant also argues that the prosecutor presented insufficient evidence of his involvement in the crime to support the conviction. We disagree. In deciding whether sufficient evidence existed to support a conviction, we review the evidence *de novo*, in the light most favorable to the prosecution, to determine whether a rational fact finder 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). The videotape evidence and witness testimony persuasively show defendant’s active participation in the robbery. “Minimal circumstantial evidence is sufficient to prove an actor’s state of mind.” *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter