

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONNIE BENNIS EZELL,

Defendant-Appellant.

UNPUBLISHED
September 16, 2003

No. 241086
Saginaw Circuit Court
LC No. 01-020432-FH

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant was convicted of first-degree retail fraud, MCL 750.356c, and conspiracy, MCL 750.157a, and sentenced as a habitual offender to two concurrent sentences of 15 months' to 10 years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction. We disagree. A claim of insufficient evidence is reviewed de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), and evidence is viewed “in a light most favorable to the prosecution” to 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 Wolfe*, 440 Mich 508, 515; 489 NW 748 (1992). All conflicts must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Sufficient evidence was presented to convict defendant of first-degree retail fraud and conspiracy. The prosecution proved that defendant took and moved property that a store offered for sale in the store or in the immediate area of the store while it was open for business with the intent to steal property, and the property was worth \$1,000 or more. MCL 750.356c; CJI2d 23.13. Any movement of the goods—even within the store—will suffice if the defendant possessed the requisite specific intent at the time he moved the goods. *People v McFarland*, 165 Mich App 779, 782; 419 NW2d 68 (1988).

Defendant admitted moving the goods within the store, and his intent to commit first-degree retail fraud may be inferred from all the facts and circumstances. See *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Even “minimal circumstantial evidence” is adequate to meet this element. See *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Here, defendant and his wife left the store and defendant physically resisted a store employee's attempt to get him back inside the store. Flight can be considered circumstantial

evidence of consciousness of guilt. See *People v Cutchall*, 200 Mich App 396, 400; 504 NW2d 666 (1993). Moreover, defendant facilitated his flight by using threatening language, implying he had a gun. While defendant and his wife both denied that defendant threatened the employees, all conflicts are resolved in favor of the prosecution. *Terry, supra* at 452.

The prosecution also presented sufficient evidence that defendant committed the crime of conspiracy—i.e., that the defendant and another person knowingly agreed to commit a crime with the specific intent to commit that crime. See MCL 750.157a; CJI2d 10.1. While the essence of the crime of conspiracy is the agreement, direct evidence of an agreement is not required. *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991). “It is sufficient if the circumstances, acts, and conduct of the parties establish an agreement.” *Id.*, citing *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974). In this case, circumstantial evidence came in the form of testimony from a store employee, who testified that defendant’s wife appeared to be acting as a “lookout” while defendant positioned the couple’s shopping cart toward the door. *Cotton, supra* at 393.

Defendant next argues that he should have been granted a new trial because his conviction was against the great weight of the evidence. We disagree. A trial court’s decision to deny a motion for a new trial is reviewed for an abuse of discretion. *Lueth, supra* at 680, citing *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995); *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993).

This case was based *entirely* on witness testimony, and reversal would require second-guessing the jury’s assessment of the witnesses’ credibility. This Court does not sit as a “thirteenth juror” unless a miscarriage of justice would result from letting the jury’s decision stand. *People v Lemmon*, 456 Mich 625, 627, 638-639; 576 NW2d 129 (1998). This case presents no such danger.

Defendant next argues that the prosecution acted discriminatorily in using a peremptory challenge to strike the last black jury panelist. We disagree. A trial court’s ruling on a challenge raised under *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), is reviewed for an abuse of discretion. *Harville v State Plumbing and Heating*, 218 Mich App 302, 320; 553 NW2d 377 (1996), citing *People v Hart (After Remand)*, 170 Mich App 111, 112; 427 NW2d 557 (1988).

A prosecutor is typically allowed to exercise peremptory challenges for any reason, but “the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.” *Batson, supra* at 89. To challenge a prosecutor’s allegedly discriminatory use of peremptory challenges, a defendant must show (1) the prosecution used its peremptory challenges to exclude members of defendant’s “cognizable” racial group; (2) the jury selection practice used permits discrimination by those who are prone to discriminate; and (3) any other relevant circumstances raising an inference that the prosecution excluded prospective jurors on the basis of race. *Id.* at 96. Once a defendant makes this prima facie showing, the burden shifts to the prosecution to provide a race-neutral explanation for its challenges. *Purkett v Elem*, 514 US 765, 767; 115 S Ct 1769; 131 L Ed 2d 834 (1995). The court then decides whether the peremptory challenge was used in a “purposefully discriminatory manner.” *Id.*, citing *Batson, supra* at 98.

Here, defendant failed to make a prima facie showing that the prosecution discriminated against members of defendant's race in its use of peremptory challenges. "The mere fact that the prosecutor used one or more peremptory challenges to excuse blacks from the jury venire is insufficient to make a prima facie showing of discrimination," as is the fact that the impaneled jury did not include any members of defendant's race. *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989).

Defendant next argues that the prosecution engaged in misconduct that denied him a fair trial and due process. We disagree.

An allegation of prosecutorial misconduct raised for the first time on appeal is reviewed for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To establish plain error, a defendant must show (1) an error occurred, (2) the error was plain—i.e., "clear or obvious," and (3) the plain error affected the defendant's substantial rights by prejudicing the outcome of the trial. *Carines*, *supra* at 763, citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

This Court does not find error where the prejudice *allegedly* caused by the prosecutor's conduct could have been reversed by a curative instruction. *People v Watson*, 245 Mich 572, 586; 629 NW2d 411 (2001), citing *Schutte*, *supra* at 721. We also reject defendant's alternative argument that the prosecutorial remarks at issue here amount to cumulative error. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). There is no error found here; therefore, reversal is not warranted. See *id.* at 592.

Defendant next argues that his right to due process was violated when an armed, uniformed Michigan Department of Corrections officer, who apparently had defendant in his custody, was allowed to sit near him at trial. We disagree. This issue is reviewed for an abuse of discretion. See *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

There is no evidence that the presence of a single corrections officer was regarded by the jury as an "unmistakable mark of guilt." *Holbrook v Flynn*, 475 US 560, 571; 106 S Ct 1340; 89 L Ed 2d 525 (1986), quoting *Estelle v Williams*, 425 US 501, 518; 96 S Ct 1691; 48 L Ed 2d 126 (1976). Indeed, the officer's presence is "unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings." *Id.* at 571.

Affirmed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray