

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOREN JAMES TOMPKINS, JR.,

Defendant-Appellant.

UNPUBLISHED

August 25, 2005

No. 253249

Livingston Circuit Court

LC No. 03-013543-FH

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant Loren Tompkins, Jr., appeals by right his jury conviction for first-degree retail fraud, MCL 750.356c. We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

This case arose from the theft of a computer and three monitors from a Wal-Mart store in Howell. At trial, jurors saw a security video of Tompkins placing four boxed items from the store electronics department in a cart inside the Wal-Mart store. About a half-hour later, fairly close to the same store, Tompkins was lawfully stopped in a pickup truck he was driving and was later arrested for a traffic offense. Police found four boxes with Wal-Mart shipping and inventory identification on them in the bed of the pickup truck. Tompkins told the state troopers that he had no idea where the boxes had come from. Police could not find receipts for the computer equipment in the truck.

A Wal-Mart security employee testified, over a hearsay objection, that none of the computer inventory records that he had examined showed that the stolen items had been sold at the Howell Wal-Mart. The computerized inventory records were not produced at trial. The circuit judge ruled that the security agent's testimony was admissible, notwithstanding the prosecutor's failure to produce the inventory data, as a business record exception to the general prohibition against hearsay evidence under MCR 803(6).

II. Inventory Records

A. Standard Of Review

We review the trial court's decision to admit or exclude evidence for an abuse of discretion.¹

B. Discovery Violation

Tompkins argues that reversal is required because the prosecutor did not furnish written inventory records, despite a proper pre-trial request.² However, because no record was ever prepared before trial, the prosecutor had no obligation to produce it.³ Therefore, this argument is without merit.

C. Right To Confront

Tompkins also claims that he was deprived of his constitutional right to confrontation⁴ by the admission of hearsay pursuant to the exception found in MRE 803(6). This argument is also without merit. There is no confrontation clause violation if the evidence offered under MRE 803(6) is properly admitted.⁵

D. Failure To Produce The Inventory Records

Tompkins argues that it was error to admit testimony about the computerized inventory records without producing the record itself. MRE 803(6) permits evidence that would otherwise be inadmissible hearsay. The rule provides, in pertinent part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

* * *

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that

¹ *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

² See MCR 6.201(A)(2).

³ See *People v Phillips*, 468 Mich 583, 590; 663 NW2d 463 (2003); *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997).

⁴ US Const, Am VI; Const 1963, art I, § 20.

⁵ See *People v Kirtdoll*, 391 Mich 370, 389-390; 217 NW2d 37 (1974); *People v Safiedine*, 152 Mich App 208, 218; 394 NW2d 22 (1986).

business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The reason for the hearsay exception found in MRE 803(6) is the inherent trustworthiness of the records themselves. To be an “other qualified witness” it is not necessary that the witness laying a foundation for the introduction of a business record have personal knowledge of its preparation.⁶ However, we have found no cases that allow testimony about the contents of a business record without the production of the business record itself as proof of its trustworthiness.⁷ Thus, we conclude that, without the production of the inventory records, the testimony about their content was erroneously admitted.

We will only set aside a verdict in a criminal case on the basis of improper admission of evidence if it appears that the error resulted in a miscarriage of justice.⁸ In this case, the jurors saw a videotape of Tompkins loading a computer and monitors from the electronics department of the Howell Wal-Mart; he was stopped a short distance from that store just half an hour later; and he denied knowing where the electronics found in the truck that he was driving came from. From this uncontested evidence, the jury could reasonably have concluded that the items taken from the Wal-Mart store had been stolen, and that it was Tompkins who stole them. Because it does not appear more likely than not that the error was outcome determinative, we conclude that the admission of testimony regarding the inventory records, though erroneous, does not warrant reversal.⁹ In light of this conclusion, we need not reach the claim that the challenged testimony was inadmissible because the inventory records were prepared in anticipation of litigation.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

⁶ See *Kirtdoll*, *supra* at 388.

⁷ See, e.g., *United States v Wells*, 262 F3d 455, 461-463 (CA 5, 2001); *United States v Marshall*, 762 F2d 419, 423-426 (CA 5, 1985).

⁸ See MCL 769.26; *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001).

⁹ See *id.* at 426-427.