

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLOYSIUS CROSS,

Defendant-Appellant.

UNPUBLISHED

August 15, 2013

No. 307374

Kalamazoo Circuit Court

LC No. 2011-000108-FH

Before: WHITBECK, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

Defendant Alloysius Cross appeals by right his jury convictions of three counts of using a computer to commit a crime, MCL 752.796, five counts of stealing or retaining a financial device, MCL 750.157n(1), and one count of receiving and concealing stolen property, MCL 750.535(3)(a). Because we conclude there were no errors warranting relief, we affirm.

Testimony and evidence established that someone broke into Barbara Kotrba's home while she was in the hospital in December 2010. In addition to televisions and other electronic items, Kotrba was missing a credit card, two Macy's gift cards (one for \$100 and one for \$150), and two Gander Mountain gift cards (one for \$50 and one for \$150).

Melanie Oetman testified that she worked for Kotrba at least eight hours a week as a nursing assistant. She also worked full time at a nursing home. Oetman dated Cross for about six years before the events at issue. They lived next door to Kotrba for about three years, until March 2010. Although she no longer lived with Cross after March 2010, they continued to have contact.

Evidence established that someone used the stolen Gander Mountain gift cards online a few days after the break-in; they were used to purchase a jacket and gloves, which were ordered from and sent to the place where Cross lived. There was also video evidence that showed Cross purchasing a pressure cooker with the stolen Macy's gift cards. Someone also made a call from Cross' phone to the Macy's gift card hotline shortly before the purchases with the stolen Macy's cards. Testimony also established that Cross gave Oetman boots, a robe, and slippers, which matched the items purchased with the stolen Macy's gift cards. Finally, someone used Kotrba's stolen credit card online to purchase an X-Box. The order was made under Kotrba's name, but was made using the IP address for Cross' home and was to be shipped there.

In February 2011, Oetman left work and discovered two televisions and two DVD players in her van. She called 911. Cross had earlier called 911 and reported that the items from the break in would be sold that morning from a van in the parking lot where Oetman worked.

In interviews with officers, Cross denied that he was in Portage on the days at issue—a claim that was refuted by his cellular telephone records. He also denied that he had anything to do with the home invasion or that he ordered the X-Box. Cross admitted that he made purchases with the Gander Mountain gift cards, but testified that Oetman gave him the cards. He also testified that Oetman was with him at Macy’s when he used the cards, which Oetman denied. Finally, Cross admitted that he placed the 911 call implicating Oetman, but said he only did so after she asked him how to get rid of the stolen items.

During cross-examination, the prosecutor asked Cross about a recorded telephone conversation that he had with his girlfriend, Cerece Bell, in which he called Oetman “stupid” and other names. The prosecutor had not provided this recording to Cross’ lawyer before referring to it at trial. Cross’ lawyer argued that the failure to turn over the recording constituted a discovery violation and moved for a mistrial. The trial court denied the motion, but instructed the jury to disregard any questions or answers about the conversations.

At the close of proofs, the jury rejected Cross’ theory of the case and found him guilty as already noted.

On appeal, Cross argues that the trial court erred when it denied his motion for a mistrial and that the prosecutor interfered with his right to a fair trial by questioning him about his recorded telephone conversation with Bell. This Court reviews a trial court’s decision regarding the appropriate remedy for a discovery violation for an abuse of discretion. MCR 6.201(J); *People v Rose*, 289 Mich App 499, 524; 808 NW2d 301 (2010). “A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes.” *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

Not every irregularity during trial will warrant a mistrial. *People v Watson*, 307 Mich 596, 606; 12 NW2d 476 (1943). Rather, the trial court should only grant a motion for mistrial when the irregularity deprived the defendant of a fair and impartial trial. *Id.* With regard to discovery violations, the trial court has broad discretion to fashion an appropriate remedy. *People v Merritt*, 396 Mich 67, 79; 238 NW2d 31 (1976). In crafting a remedy, the trial court must examine the facts and weigh the competing interests involved. *Id.* at 82. The trial court must inquire “into all the relevant circumstances, including ‘the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice.’” *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997) (citation omitted).

Cross’ lawyer requested copies of all Cross’ statements under MCR 6.201(B)(3). Despite this request, the prosecutor did not disclose the existence of the recording at issue and did not provide Cross’ lawyer with a copy. Although the prosecutor only received a copy of the recording just before trial, the trial court nevertheless determined that the prosecutor could have provided discovery earlier. The trial court, however, did not agree that the violation warranted a mistrial. It noted that the prosecutor’s failure to provide a copy was inadvertent and its use was

not particularly prejudicial. As such, it determined that any error could be corrected with a curative instruction, which it gave.

On this record, we conclude that the trial court's remedy fell within the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 353. As the trial court noted, the prosecutor's failure to disclose the recording was not willful. Moreover, the recording did not involve exculpatory evidence or evidence that strongly implicated guilt. Instead, the recording was, at most, useful to show that Cross was angry with Oetman. And we conclude that the evidence concerning this conversation would have been relevant to show Cross' anger and to impeach his version of Oetman's role in the events at issue. MRE 401; MRE 402. Despite the fact that the recording was relevant and admissible, the trial court resorted to the extreme remedy of precluding the evidence and testimony. See *id.* at 379 (noting that the sanction of preclusion is "extreme" and should be limited to only the most "egregious" discovery violations). The trial court also instructed the jury to ignore the testimony about the phone conversation. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Thus, the trial court actually fashioned a strong remedy for the prosecutor's discovery violation and that remedy more than sufficed to cure any prejudice occasioned by the violation.

Additionally, we note there was overwhelming untainted evidence implicating Cross: there was evidence that he redeemed the stolen gift certificates, made purchases with the stolen credit card and had them sent to his address, that he was present in the area during the events at issue, and that he reported the location of the stolen items. Given the evidence adduced at trial, we conclude that any error occasioned by the discovery violation and the admission of this evidence at trial was harmless. *People v Elston*, 462 Mich 751, 765-766; 614 NW2d 595 (2000).

There were no errors warranting relief.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Michael J. Kelly