UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2000

September Term, 2014

MICHAEL VANDERHOEVEN

v.

STATE OF MARYLAND

Krauser, C.J.,
Berger,
Reed,

JJ.

Opinion by Berger, J.

Filed: January 13, 2016

Following a waiver of his right to a jury trial, appellant Michael Vanderhoeven ("Vanderhoeven") proceeded by way of a not guilty plea on an agreed statement of facts before the Circuit Court for Caroline County, Judge Karen A. Murphy Jensen presiding. The court convicted Vanderhoeven of theft by deception of property with a value less than $1000.00 and sentenced him to a prison term of 18 months, suspending all but 12 months, and imposed a restitution order in the amount of $540.00 in favor of Walmart, the victim of the theft.[1] Vanderhoeven thereafter timely noted this appeal.

Vanderhoeven presents the following questions for our consideration:

1. Did the trial court err by basing the verdict on facts outside of the record of this case?

2. Is the evidence legally sufficient to sustain Vanderhoeven's conviction of theft by deception?

For the reasons that follow, we shall affirm the judgment of the trial court.

FACTS AND LEGAL PROCEEDINGS

At trial, the prosecutor recited the agreed statement of facts, as follows:

> Had this matter proceeded to trial, the State would have shown that on February 21st, 2014, at 1:45 p.m., Officer Charity Peris of the Denton Police Department was at Wal-Mart in Denton, Maryland, Caroline County, when she was approached by Alyssa Smith, the Loss Prevention Officer about a theft in progress. Officer approached the Defendant, who she would identify as seated next to Defense table, next to Counsel, Michael Vanderhoeven and asked him if he had used any coupons to check out. The Defendant stated he hadn't, but a check of his receipt showed several coupon entries of Ten Dollars ($10.00) from a Fisher Price coupon. The Defendant stated a friend had taught him how to use the coupons. Records showed that the Defendant made nine separate purchases at a

[1] The State *nolle prossed* the remaining three theft charges.

> self checkout aisle on February 21st and used Four Hundred Fifty Dollars ($450.00) worth of coupons without ever having purchased a Fisher Price item. Each of the purchases included four candy bars and a Fifty Dollar ($50.00) gift card, which totaled Fifty Dollars, Fifty-six Dollars and Sixty-Six Cents ($56.66), of which the Defendant paid Six Dollars and Sixty-six Cents ($6.66) after the coupon use. Search of the register found only one copy of the Ten Dollar ($10.00) gift card (sic), a copy of which would be placed into evidence and surveillance showed the Defendant scanning the same coupon 45 times. Additional investigation showed that the Defendant made three similar purchases at a self checkout aisle on January 9th, 2014, and used Ninety Dollars ($90.00) worth of Fisher Price coupons without buying any of the qualified items from the coupon first. Each of those purchases again included three candy bars and a Twenty-five Dollar ($25.00) gift card, totaling Thirty Dollars and Forty-eight cents ($30.48), of which the Defendant paid Three Dollars and Forty-eight Cents ($3.48) after the coupon's use. Search incident to arrest on February 21st revealed that two Ten Dollar ($10.00) Fisher Price coupons were in the Defendant's pocket. Uh, Alyssa Smith would testify that there is a flaw in the Wal-Mart system that allowed the coupon to be used without first, first purchasing one of the required items and the coupon itself states that it expires on December 31st, 2013. Total restitution would be Five Hundred Forty Dollars ($540.00). All events occurred in Caroline County.

The court requested that the single Fisher Price coupon Vanderhoeven had used during the 45 transactions on February 21, 2014 be marked as an exhibit. The prosecutor then noted "there are copies of the transactions from the register that show that they were marked off for Ten Dollars ($10.00)," to which the court remarked, "I would suggest, if Mr. Vanderhoeven intends to appeal this, I haven't given my guilty pronouncement yet, but having had a similar [case] with [defense counsel]. . . [w]here we had testimony, um, I'm just going to suggest you may want to supplement the agreed statement of facts with the copy of the register coupon [sic]," which had been designated as State's exhibit 2.

Defense counsel having no objection to the exhibit, the court admitted State's exhibit 2 into evidence.

Prior to announcing its verdict, the court reminded Vanderhoeven that it had earlier "referenced another case I had a couple of weeks ago, um, I guess with the same coupon, as well as maybe an additional two or three other coupons." Defense counsel, pointing out that the court had "heard [his] argument before" in the other case involving the allegedly improper use of similar coupons, argued that because Walmart, which admitted to a "flaw in the system," had accepted Vanderhoeven's coupon and reduced his total payment by the value of the discount noted on the coupon, Vanderhoeven had committed no theft.

The court ruled:

> THE COURT: Um, I, I, again for purposes of the record and if this goes up on appeal, um, I'm going to, again based upon my prior knowledge of this other case and going through these receipts, the VMCDBL, um, I guess identification number that's on top of most of these receipts for Twenty-eight Dollars and Forty-four Cents ($28.44) is either a Visa card or something of that nature. Do you want to confer with [defense counsel], Mr. [Prosecutor], I know this is not your case, but again I think it's important to supplement the record so if the appeals court looking at this [sic], they know what it is.
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> [PROSECUTOR]: Okay, (unintelligible).
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> THE COURT: But based on my prior case, I believe that is some type of prepaid, loaded Visa card, MasterCard.
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> [DEFENSE COUNSEL]: Yes, yes.
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> [PROSECUTOR]: Yeah, in the, in the statement of facts we called them Fifty Dollar ($50.00) gift cards or Twenty-five Dollar ($25.00) gift cards. I guess to be more accurate, they would be the pre-loaded Visa Card, pre-loaded MasterCard.

* * *

> Okay, so I, just for purposes of supplementing the record, um, so the appeals court knows what those items are . . . .
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> COURT'S VERDICT
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> THE COURT: All right, um, understanding the Defense's argument, the Court is still satisfied beyond a reasonable doubt that the transaction that occurred at Wal-Mart on the 9th of January, 2014, um, was a theft under 7-104(b), obtaining unauthorized control over property by deception, again the Court making that finding beyond a reasonable doubt. Looking at State's Exhibit 2, as well as one, State's Exhibit 2 being 11, excuse me 12 cash register receipts, the first, which this Court understands to be 12 separate purchases at the same, again self-checkout line so that when Mr. Vanderhober, Vanderhoeven completed the first transaction, which is register receipt number one at 13 hours and 42 minutes and 2 seconds, he then completed the transaction and went right into transaction number two, which is register receipt number two, not even a minute later and he repeated that exercise at the same self-checkout counter, um, repeatedly until he had 12 separate transactions. The last transaction being clocked in at 13 38 minutes and 17 seconds. Well, actually I had that backwards. No, they're not in order.

The court, realizing it had misstated that all the alleged crimes occurred on the same date, continued:

> THE COURT: Okay. All right. I'm, all right, I misspoke. Hold on. Let me back up. I thought they were all on one day. Let me back up. All right, the January 9th, there's three separate transactions at the same checkout, the first one being at 1342 minutes and the last one being at 1344. So that's two minutes apart. Then the remainder of them are on the 21st of February, starting at 1326 and ending at 1337, so that's about ten minutes, or ten minute, so the Court is satisfied that, just by virtue of the repeated nature of what Mr. Vanderhoeven was doing, using, um, one Ten Dollar ($10.00) Fisher Price coupon on both days, the same coupon, being able to basically gain access to cash equaling Five Hundred and. . . [f]orty dollars,

> and spending how much money? On January 9th less than Two Dollars ($2.00) and February 21st. . .[s]pending only Fifty-nine ($59.00) to obtain control over hundreds of dollars in cash via these various gift cards would indicate to this Court beyond a reasonable doubt that Mr. Vanderhoeven was willfully, as well as knowingly using one coupon a repeated number of times with the intent to deprive Wal-Mart of the value of the gift cards, as well as any other items that he may not have paid for, um, knowingly again and willfully using the coupon in such a way that he knew was going to result in monetary gain to him. So that's why the Court is finding Mr. Vanderhoeven guilty beyond a reasonable doubt on that one count.

DISCUSSION

I.

Vanderhoeven first contends that the trial court erred by rendering a guilty verdict and imposing a sentence based, in part, on facts outside of the evidence presented at trial. Specifically, Vanderhoeven argues that the court based its guilty verdict and sentence in part upon information the court had gleaned from a prior proceeding based on a similar set of facts. Vanderhoeven asserts that because the court "had in mind testimony and facts relating to an entirely different case" when rendering its judgment and imposing its sentence, Vanderhoeven was deprived of his due process rights guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article 24 of the Maryland Declaration of Rights.

The State responds that this issue is not preserved for appellate review, an argument with which we concur. During Vanderhoeven's bench trial, when the court related it had obtained knowledge from a prior similar trial and suggested that the State introduce into evidence the Walmart cash register receipts of Vanderhoeven's allegedly deceptive

transactions, Vanderhoeven did not object or otherwise seek to exclude the trial court's reference to the previously obtained information. In fact, he specifically stated he had no objection to the admission of the exhibit.

Similarly, when the court suggested a review of the cash register receipts to show that Vanderhoeven had purchased prepaid credit cards, "based upon [its] prior knowledge of this other case," no objection was forthcoming from the defense. And, finally, when the court referred to the "other case" during sentencing, in an attempt to determine the proper recipient of the restitution, Vanderhoeven did not object.

Maryland Rule 8–131(c) defines the standard of review to be applied by an appellate court in review of a non-jury trial.[2] The rule does not, however, provide an exception to the general preservation rule or the requirement for a contemporaneous objection during a bench trial. *Bryant v. State*, 436 Md. 653, 669 (2014). Here, because Vanderhoeven made no objection based on the court's alleged reliance on facts outside the record in rendering a verdict or imposing sentence, he has failed to preserve this issue for our review.

Assuming *arguendo* that Vanderhoeven preserved the issue, he would not prevail. It is true, of course, that in a bench trial, the court may not rely on facts acquired from outside the record in rendering a verdict. *Massey v. State*, 173 Md. App. 94, 125 (2007). Our review of the record leads us to conclude, however, that the court did not impermissibly rely on facts acquired from outside the record in the present case.

[2] Rule 8-131(c) states, "When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses."

The court did nothing more than *suggest* to the prosecutor, based on its knowledge of a similar case, that he admit into evidence copies of the Walmart cash register receipts, whose unique identification numbers indicated the actual purchases made by Vanderhoeven by use of the Fisher Price coupon, so the nature and extent of the crime would be apparent to this Court should Vanderhoeven appeal a conviction. Defense counsel had apparently previously reviewed the cash register receipts and did not object to their admission.

Vanderhoeven does not aver, and we do not conclude, that it was unreasonable for the trial court, in light of its familiarity with a similar case, to make such a suggestion to the prosecutor. There is "no question that the trial judge has broad discretion to control the conduct in his or her courtroom . . . ." *Biglari v. State,* 156 Md. App. 657, 674 (2004). *See also Cooley v. State*, 385 Md. 165, 175 (2005) ("The conduct of the trial must of necessity rest largely in the control and discretion of the presiding judge and an appellate court should in no case interfere with that judgment unless there has been an abuse of discretion by the trial judge of a character likely to have injured the complaining party.").

The evidence admitted by the trial court related solely to the charges against Vanderhoeven and did not relate in any way to the court's prior case, but for the similarity of the crimes. In rendering its judgment, the court did not refer to, nor rely upon, any evidence outside the record when it determined, beyond a reasonable doubt, that Vanderhoeven had committed the crime of theft by deception.[3] The only evidence the

[3] Moreover, we have long held that appellate courts are confident that a trial court can rule on questions of admissibility of evidence and then assume the role (continued…)

court relied upon was the agreed statement of facts and the two properly admitted State's exhibits -- the copy of the single Fisher Price coupon Vanderhoeven used during his numerous transactions and the cash register receipts detailing his purchases and discounts. We are entirely confident that the court was able to draw upon its knowledge obtained in a matter similar to the one before it while not being impermissibly affected by that knowledge.

Similarly, we disagree with Vanderhoeven's related argument that the court impermissibly made use of information gained from the other case during sentencing. Prior to sentencing, the prosecutor asked for a restitution order in the amount of $540.00 in favor of Walmart, in addition to any other sentence the court deemed it reasonable to impose. Defense counsel indicated that Vanderhoeven had "no problem" with the amount of the restitution, but noted there "may be some question . . . as to who it goes to. If [the coupon has] been cashed it, it's Fisher Price. If it hasn't it's Wal-Mart, but I'll leave that . . . to the Court." The court responded, "Well, I don't know how we resolved that in the other case. I don't remember." Counsel recalled that the parties had settled on Wal-Mart as the recipient of the restitution in that case but again agreed to "leave that with the Court."

The sentence the court subsequently imposed was based entirely on the evidence before the court in Vanderhoeven's case, as well as his prior criminal record. It was not influenced by information the court had gained from another proceeding, but for the recipient of the restitution, to which Vanderhoeven agreed. Accordingly, we hold that

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of trier of fact without being prejudiced by a matter contained in evidence not admitted at trial. *Massey*, *supra*, 173 Md. App. at 125.

neither the verdict nor the sentence in this matter was impermissibly influenced by evidence outside the record of the matter immediately before the court.

II.

Vanderhoeven's next contention is that the evidence presented in the agreed statement of facts was insufficient to sustain his conviction of theft by deception in violation of Md. Code (2012 Repl. Vol.), §7-104(b) of the Criminal Law Article ("CL"), because the automated equipment in the self-checkout aisle at Walmart accepted the coupon he tendered and reduced the amount to be paid to the store by the face value of the discount on the coupon. Vanderhoeven asserts that because the store accepted the coupon and reduced the amount Vanderhoeven owed for the prepaid credit cards and other items, Walmart's loss was not caused by his theft or deception, but rather by Walmart's "poor business practice."

The evidence is sufficient to sustain a conviction if, "viewing the evidence in the light most favorable to the State, '***any*** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Riggins v. State*, 223 Md. App. 40, 60 (2015) (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)) (emphasis in original). "'[O]ur concern is only whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *State v. Manion*, 442 Md. 419, 431 (2015) (quoting *Taylor v. State*, 346 Md. 452, 457 (1997)), *reconsideration denied,* (Apr. 17, 2015). When evaluating the sufficiency of the evidence in a non-jury trial, we will not set

aside the trial court's judgment unless it is clearly erroneous. *Id*. We perceive no clear error here.

CL §7-104(b) defines the crime of theft by deception and provides:

> (b) *Unauthorized control over property--By deception.*--A person may not obtain control over property by willfully or knowingly using deception, if the person:
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> (1) intends to deprive the owner of the property;
>
> (2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
>
> (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

In turn, CL§7-101(b) defines "deception:"

> (b)(1) "Deception" means knowingly to:
>
> (i) create or confirm in another a false impression that the offender does not believe to be true;
>
> (ii) fail to correct a false impression that the offender previously has created or confirmed:
>
> (iii) prevent another from acquiring information pertinent to the disposition of the property involved;
>
> (iv) sell or otherwise transfer or encumber property without disclosing a lien, adverse claim, or other legal impediment to the enjoyment of the property, regardless of whether the impediment is of value or a matter of official record;
>
> (v) insert or deposit a slug in a vending machine;
>
> (vi) remove or alter a label or price tag;

> (vii) promise performance that the offender does not intend to perform or knows will not be performed; or
>
> (viii) misrepresent the value of a motor vehicle offered for sale by tampering or interfering with its odometer, or by disconnecting, resetting, or altering its odometer with the intent to change the mileage indicated.
>
> (2) "Deception" does not include puffing or false statements of immaterial facts and exaggerated representations that are unlikely to deceive an ordinary individual.

As the Court of Appeals has explained, theft by deception is a specific intent crime requiring both an intent to deceive and an intent to deprive. *Manion*, *supra*, 442 Md. at 433-34. Intent has been defined as "'the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act that is about to be done with such knowledge and liberty of action, willingly and electing to do it.'" *Coleman v. State*, 196 Md. App. 634, 654 (2010) (quoting *Nance v. State,* 7 Md. App. 433, 445 (1969)), *aff'd*, 423 Md. 666 (2011). Because of the difficulty in proving a defendant's intent without his cooperation, the trier of fact may consider the facts and circumstances of the particular case when making an inference as to the defendant's intent. *Titus v. State,* 423 Md. 548, 564 (2011).

In our view, a rational trier of fact could have found, beyond a reasonable doubt, that Vanderhoeven created or confirmed in Walmart a false impression that he did not believe to be true in depriving Walmart of its property. The following facts support Vanderhoeven's knowing creation of that false impression: his use of the self-checkout lane, as opposed to a live cashier who presumably would have declined to permit the

improper usage of the coupon; his use of a coupon that had expired; his use of a coupon requiring the purchase of Fisher Price products with no purchase of Fisher Price products; his use of a single coupon for multiple, consecutive purchases without relinquishing the coupon; his use of the coupon to purchase pre-paid credit cards at a significant discount, which he could then use to make further purchases; the untruth he told to Walmart's loss prevention officer about not using coupons during his checkout procedure, and; his apparent prior knowledge of the flaw in Walmart's system that would permit the usage of the coupon without the qualifying purchases.[4]

We, therefore, conclude that the evidence was sufficient to establish that Vanderhoeven committed the crime of theft by deception beyond a reasonable doubt.

JUDGMENT OF THE CIRCUIT COURT FOR CAROLINE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[4] Given the evidence, we are further unpersuaded by appellant's claims of "honest belief" or other defenses.