STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BUD M. MONTREUIL,

Defendant-Appellant.

UNPUBLISHED
April 8, 1997

No. 178759
Oakland Circuit Court
LC No. 93-125737-FH

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial conviction of embezzlement by an agent or trustee over $100, MCL 750.174; MSA 28.371. Defendant was convicted as an aider and abettor on the charge and was sentenced to two years' probation, with the first six months to be served in jail on work release. We affirm.

Defendant initially argues on appeal that he was deprived of effective assistance of counsel at trial. We disagree. Defendant first contends that he was deprived of effective assistance when trial counsel cited the superseded test of *People v Golochowicz*, 413 Mich 298, 308-309; 319 NW2d 518 (1982), in opposing the prosecution's tender of other acts evidence under MRE 404(b). Defendant also raised this error in his motion for a new trial. We conclude that defendant was not prejudiced by trial counsel's error because the evidence contested by defendant was admissible under the current test for admission of other acts evidence presented in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1994).

Defendant next argues that trial counsel was ineffective because he failed to ask that defendant receive separate trials on his two embezzlement charges. We hold that even if trial counsel had sought severance, the outcome at trial would not have been affected. *Daniel, supra* at 58. The trial court had discretion to join the charges for trial because the two incidents underlying the separate charges were part of a common plan. *People v McCune*, 125 Mich App 100, 103-104; 336 NW2d 11 (1983). Defendant's goal was to deprive J.C. Penney of both shoes and credit. He did not receive credit in the first incident.

Defendant also argues that trial counsel was ineffective for failing to discover and argue *People v Bergman*, 246 Mich 68; 224 NW 375 (1929), as a basis for reducing defendant's charges to retail fraud or embezzlement under $100. We hold that defendant was not prejudiced by this error because *Bergman* does not apply to defendant's case. The employee in *Bergman* gave only credit to his employer's customers, and consequently was found not to have exercised control over any money belonging to his employer. *Bergman, supra* at 72. The shoe salesman, in contrast, gave shoes to defendant, over which he had the right to exercise control as a salesman for J.C. Penney. Defendant thus would not have prevailed on a motion to quash or reduce his charges, even if counsel had argued *Bergman*. *Daniel, supra* at 58.

Finally, defendant contends that trial counsel was ineffective for failing to seek relief once he learned that three jurors had been exposed to remarks about defendant. Defendant cannot prevail on this argument because he has failed to show that the remarks actually prejudiced the jurors against him. *People v Johnson*, 164 Mich App 634, 638; 418 NW2d 117 (1987). We hold that defendant has failed to establish that he was deprived of effective assistance of counsel, because he did not demonstrate that defense counsel made any prejudicial errors so serious that counsel was not functioning as an attorney guaranteed by US Const, Am VI. *Daniel, supra* at 58.

Defendant's second issue on appeal is that the trial court committed error requiring reversal by failing to inquire into the possibility that the jury had been tainted by the remarks overheard by the three jurors. Defendant also argues that the trial court's failure to grant defendant's motion for a new trial on this issue was an abuse of discretion. We disagree.

It is well established that reversible error will not be presumed merely because a juror is exposed to prejudicial remarks made by a stranger or bypasser. *Johnson, supra* at 638; *People v Hayes*, 126 Mich App 721, 729; 337 NW2d 905 (1983). Prejudice must be shown or facts clearly establishing the inference that it occurred from what was said or done. *Hayes, supra* at 729 (citing *People v Nick*, 360 Mich 219, 227; 103 NW2d 435 [1960]). A new trial will not be granted for juror misconduct unless it affects the impartiality of the jury. *People v Strand*, 213 Mich App 100, 103; 539 NW2d 739 (1995). Defendant did not show prejudice or any facts clearly establishing an inference that prejudice occurred. *Hayes, supra* at 729. Defendant merely presented his assumptions about juror reaction in his motion for a new trial. On this basis, we hold that the trial court did not abuse its discretion by denying defendant's motion for a new trial. *People v Legrone*, 205 Mich App 77, 79; 517 NW2d 270 (1994).

Defendant's third argument is that he was deprived of his right to a fair and impartial trial by the prosecutor's use of the evidence concerning defendant's charge account. We disagree. Defendant has not preserved this issue by objecting to the prosecutor's remarks at trial, so we review this issue only to prevent a possible miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

We conclude that the prosecutor's remarks did not deprive defendant of a fair trial nor were the remarks so prejudicial that our failure to review this issue would result in a miscarriage of justice.

Stanaway, supra at 687; *People v Kulick,* 209 Mich App 258, 259-260; 530 NW2d 163 (1995). The evidence was properly admitted, and the prosecutor confined her remarks to the proper use of the evidence. She linked defendant's amassing of credit to the elements of embezzlement, and argued that the facts that the credits were all for athletic shoes and were all acquired at the Oakland Mall store proved not only defendant's intent to defraud, but also the absence of mistake or accident. The prosecutor thus argued the evidence and all reasonable inferences therefrom as it related to her theory of the case, as she was free to do. *People v Lee,* 212 Mich App 228, 247; 537 NW2d 233 (1995).

Finally, defendant argues that the prosecution did not present sufficient evidence to sustain his conviction, because it did not establish that the shoe salesman committed embezzlement. We disagree.

The elements of embezzlement are: 1) The money or personal property in question must belong to the principal; 2) the defendant must have had a relationship of trust with the principal because he was an agent, servant, employee, trustee, bailee or custodian of the principal; 3) the money or personal property in question must have come into the defendant's possession or under his charge or control because of that relationship of trust with the principal; 4) the money or personal property must have been dishonestly disposed of or converted to the defendant's own use, or taken or secreted with the intent to convert it to his own use without the consent of his principal; 5) this act must have been done without the consent of the principal; and 6) at the time of the conversion or appropriation to his own use the defendant must have intended to defraud or cheat the principal of some property. *People v Wood,* 182 Mich App 50, 53; 451 NW2d 563 (1990). To sustain an aiding and abetting charge, the guilt of the principal must be shown. *People v Turner,* 213 Mich App 558, 569; 540 NW2d 728 (1995). However, the principal need not be convicted. Rather, the prosecutor need only introduce sufficient evidence that the crime was committed and that the defendant committed it or aided and abetted it. *Id.*

Looking at all of the evidence in the light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence to establish that the salesman committed embezzlement on March 3, 1993, and that defendant aided and abetted him. *Turner, supra* at 569; *People v Head,* 211 Mich App 205, 210; 535 NW2d 563 (1995). The athletic shoes were the property of J.C. Penney. The salesman was employed by J.C. Penney at the time defendant acquired the shoes. The salesman converted the shoes to his own use by giving them to defendant. In converting the shoes, the salesman need not have taken them for his personal use. The gist of this element is that the defendant exercises dominion or control or uses the property against the interests of the actual owner. *People v Miciek,* 106 Mich App 659, 666; 308 NW2d 603 (1981). That the salesman used the property against J.C. Penney's interest by giving it without charge to defendant can be inferred from the fact that J.C. Penney normally sold athletic shoes for prices ranging from $78 to $135. Similarly, the salesman's intent to defraud J.C. Penney can be inferred from defendant's charge account credits, which show a yearlong pattern by defendant of returning athletic shoes for credit to the same store. Defendant's statement to police implied that the salesman handled most, if not all, of defendant's transactions at that store.

Defendant's assistance in the salesman's embezzlement and his intent to help the salesman commit the crime are also shown by defendant's charge account credits and his admission that he knew

the salesman well. An aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal and the defendant's participation in the planning or execution of the crime. *Turner*, *supra* at 568-569. Defendant admitted a long association with the salesman. The fact that defendant's charge slips showed a yearlong pattern of buying and returning shoes suggests that defendant helped plan the crime. *Turner*, *supra* at 569. Further, defendant assisted the salesman by taking the shoes, enabling the salesman to use the property against J.C. Penney's interest. *Miciek*, *supra* at 666. We hold that the prosecution established all the elements of embezzlement by the salesman, and of defendant's assistance and intent to assist, and therefore provided sufficient evidence to support defendant's conviction. *Turner*, *supra* at 568-569; *Wood*, *supra* at 53.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Hilda R. Gage