

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL GORDON BAZELEY,

Defendant-Appellant.

UNPUBLISHED

July 11, 1997

No. 191440

Iosco Circuit Court

LC No. 95-003125-FH

Before: Gage, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of fraud in the use of building contracts pursuant to MCL 570.152; MSA 29.332. Defendant was sentenced to three years probation with the first four months to be served in jail and was ordered to pay restitution in the amount of \$8,519.96. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction. To prove fraud in the use of building contracts, the prosecution must show that defendant (1) retained or used (2) with the intent to defraud (3) any payments made to him (4) for a purpose other than paying laborers, subcontractors, and materialmen owed payment. MCL 570.152; MSA 26.332; *People v Miller*, 78 Mich App 336, 340; 259 NW2d 877 (1977). Defendant argues that the prosecution failed to prove his intent to defraud.

The contractor fraud statutes specifically impose fiduciary duties on contractors, like defendant, by requiring them to hold funds in trust for persons who are hired to work on a project. MCL 570.151 *et seq.*; MSA 26.331 *et seq.*; *Id.* at 342; *People v Whipple*, 202 Mich App 428, 432; 509 NW2d 837 (1993). These depression-era laws were designed to “afford additional protection to subcontractors and materialmen” by preventing “contractors from juggling funds between unrelated projects” and “[ensuring] that funds for a particular project [would] be used for that project alone.” *Miller, supra* at 342. An inference of a defendant’s specific intent to defraud arises upon the showing of his appropriation of funds for building operations before they are due or while persons in his employ

go unpaid. *Whipple, supra* at 435. This inference is codified in MCL 570.153; MSA 26.333, which provides:

The appropriation by a contractor, or any subcontractor, of any moneys paid to him for building operations before the payment by him of all moneys due or so to become due laborers, subcontractors, materialmen or others entitled to payment, shall be evidence of intent to defraud.

As this Court has pointed out in interpreting § 570.133, the prosecution is not required to show actual appropriation. Instead, it may prove the inference of appropriation by demonstrating that a contractor has been paid construction funds and has subsequently failed to pay laborers, subcontractors, materialmen, or others entitled to payment. *Whipple, supra* at 435.

In the present matter, defendant was given \$13,140 in construction funds, of which he failed to account for between \$1,300 to \$2,000. Moreover, defendant admitted to investigators that he deposited \$3,140 directly into his personal bank account while his subcontractors, materialmen, and laborers went unpaid. Irrespective of defendant's failure to account for the missing proceeds, his actions specifically contravened the trust provisions of the contractor fraud statutes which required him to satisfy his obligations to subcontractors and laborers and materialmen *before* taking his share. *Miller, supra* at 343.

At trial, defendant offered no evidence to refute the findings of the investigating officer that he deposited funds into his personal account, nor did he offer any evidence to refute allegations that he could not account for nearly \$2,000 of the contract funds. Nevertheless, throughout the entire project, defendant allowed several subcontractors and laborers to go unpaid. Viewing this evidence in the light most favorable to the prosecutor, a rational jury could have inferred that defendant appropriated the funds which he was given. Based on the finding of a misappropriation, the jury could have inferred that defendant possessed the requisite intent to defraud necessary for conviction under MCL 570.153; MSA 26.333. See *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). When defendant's conviction is evaluated in light of these inferences, there was sufficient evidence to convict.

Defendant next argues that the trial court erred in excluding evidence of defendant's prior history of good business practices. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1996). During his cross-examination of John Rinehart, a laborer hired to work on the project at issue, defense counsel inquired whether Rinehart had previously worked for defendant. Following the prosecution's objection, defense counsel made an offer of proof insisting the questions were designed to show that prior to this incident, defendant always paid his bills on time. We find no abuse of discretion in the exclusion of this evidence because it was not relevant. It did not have "any tendency to make the existence of any fact that is *of consequence* to the determination of the action more probable or less probable than it would be without the evidence." MRE 401 (emphasis added).

Whether defendant did or did not defraud Rinehart on a previous occasion was not material to the issue before the court -- did defendant defraud Rinehart and the others during the project at issue? The intent to defraud was to be inferred from the appropriation of funds that defendant was using for

the project at issue, not his previous handling of funds. Therefore, defendant's business dealings prior to this offense were not material to the question of whether he possessed the requisite intent on this occasion. Accordingly, the evidence was not relevant under MRE 401 and it was therefore inadmissible under MRE 402. *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993).

Defendant proposes that this Court expand the generally accepted interpretation of MRE 404(b) to allow a defendant to offer evidence of his prior good acts, which would tend to mitigate or vitiate his intent in a specific intent crime. We decline to do so.

MRE 404(b) provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, *whether such other crimes, wrongs, or acts* are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [Emphasis added.]

MRE 404(b) allows the prosecution to use evidence of past bad acts to prove a host of mental states. *VanderVliet*, *supra* at 61-64. There is nothing in the rule or the comments which follow it which would lend any credence to defendant's argument. Instead, MRE 404 suggests that the proper avenue for defendant to put Rinehart's testimony regarding defendant's good business character before the jury would have been to offer it through MRE 404(a)(1), which allows a defendant to offer evidence of his good character in the form of reputation or opinion testimony. See also, MRE 405(a).

As this Court pointed out in *People v George*, 213 Mich App 632; 540 NW2d 632 (1995), a defendant has an absolute right to put evidence of his good character before the jury. *Id.* at 634 citing *People v Whitfield*, 425 Mich 116, 130; 338 NW2d 206 (1986). The only proviso is that once a defendant opens the door to discussing his character, the prosecution may rebut this testimony and may inquire into specific instances of bad acts on cross-examination.

For strategic considerations, defendant chose not to offer Rinehart's testimony under MRE 404(a)(1), thereby foreclosing the only avenue which allowed him to put these notions to the jury. Contrary to his assertions on appeal, there is no basis in MRE 404(b), its commentary, or its subsequent interpretations to suggest that the rule may be used to put in good acts evidence to vitiate intent. As such, this evidence was properly excluded from the jury's consideration as irrelevant, and the trial court did not abuse its discretion.

Affirmed.

/s/ Hilda R. Gage
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald

