

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HEATHER ANNE BEARSS,

Defendant-Appellant.

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UNPUBLISHED

July 16, 1999

No. 209568

Emmet Circuit Court

LC No. 97-116608 FH

Before: Neff, P.J., and Hood and Murphy, JJ.

MURPHY, J. (concurring).

In concur in the lead opinion's decision to reverse defendant's conviction for false pretenses over \$100, MCL 750.218; MSA 28.415, as well as its decision to remand for entry of a judgment of conviction on the lesser included charge of three insufficient funds checks within ten days, MCL 750.131a(2); MSA 28.326(1)(2). However, I write separately to express my concern that the remedy employed in this case appears to implicate defendant's right under the due process clause of the Fourteenth Amendment not to be convicted of a crime except upon proof beyond a reasonable doubt of each element of that crime.

The lead opinion cites *People v Chappelle*, 114 Mich App 364; 319 NW2d 584 (1982), to support its decision to remand this case for entry of a judgment on the lesser included insufficient funds offense. In *Chappelle*, the defendant was convicted of multiple charges of larceny by false pretenses resulting from the defendant's writing of bad checks at a business. This Court reversed the convictions because the prosecution failed to present any evidence that the employee who took the defendant's checks relied on anything that the defendant said or did in the accomplishment of the fraud. However, in lieu of reversing the case outright, this Court remanded for entry of judgment on a lesser included insufficient funds charge, MCL 750.131; MSA 28.326, because the panel concluded that "there was ample evidence to sustain a conviction on an insufficient funds charge." *Id.*, 370.

Although this Court's decision in *Chappelle* provides authority for the remedy employed in this case, I have reservations regarding the entry of a conviction on a cognate lesser included offense. An offense is a necessarily lesser included offense of another if it is impossible to commit the greater offense without also committing the lesser offense. *People v Ora Jones*, 395 Mich 379, 387; 236 NW2d 461

(1975). Cognate lesser included offenses are those that share some common elements, and are of the same class or category as the greater offense, but have some additional elements not found in the greater offense. *Id.*

The elements of false pretenses over \$100 are (1) the defendant must have used a pretense or made a false statement relating to either past or then-existing facts and circumstances; a pretense is any statement, device, trick, document, writing or object which is false; (2) at the time he made or used the pretense, the defendant must have known it to be false; (3) at the time he made or used the pretense, the defendant must have intended to defraud or cheat someone; (4) the person alleged to have been defrauded must have relied on the false pretense made by the defendant; (5) in so relying, that person must have suffered the loss of some money or other valuable thing; and (6) the property which was taken must have had a fair market value which exceeded \$100 at the time of the obtaining of the property. *People v Peach*, 174 Mich App 419, 422-423; 437 NW2d 9 (1989).

The elements of three insufficient funds checks within ten days are (1) the defendant wrote three separate checks, drafts, or money orders within ten days; (2) the defendant did not have sufficient funds available in the bank to cover the amounts of the checks, drafts, or money orders; (3) the defendant knew that he did not have sufficient funds available in the bank to cover the amounts of the checks, drafts, or money orders; and (4) that when the defendant wrote or delivered each of these three checks, drafts, or money orders, the defendant intended to defraud or cheat someone. CJ12d 29.8.

Although the offenses of three insufficient funds checks within ten days and false pretenses over \$100 share some common elements and are of the same class or category, the insufficient funds charge has additional elements not found in the false pretenses offense. In other words, it is possible to commit the offense of false pretenses over \$100 without also committing the offense of three insufficient funds checks within ten days. Accordingly, the offense of three insufficient funds checks within ten days is a cognate lesser included offense of false pretenses over \$100.

In this case, the trial court should not have instructed the jury respecting the offense of false pretenses over \$100. However, in convicting the defendant of the false pretenses offense, the jury did not necessarily determine defendant's guilt with respect to the offense of three insufficient funds checks within ten days. Because the due process clause of the Fourteenth Amendment guarantees defendant the right not to be convicted except upon proof beyond a reasonable doubt of each element of the crime for which he is charged, *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970); *People v Goss*, 446 Mich 587, 596; 521 NW2d 312 (1994), this case presents a conflict between defendant's due process rights and a procedural device that avoids a retrial by reducing the degree of a conviction.

In resolving this apparent conflict in favor of the result reached in the lead opinion, I share the concerns noted by this Court in *People v Goliday*, 153 Mich App 29, 35-37; 394 NW2d 476 (1986). In *Goliday*, this Court observed that the remedy of remanding a case for entry of a conviction on a cognate lesser included offense appears to implicate a defendant's due process rights; however, the panel nevertheless employed the remedy because our "Supreme Court has employed such a remedy repeatedly, without any hint that it is unconstitutional." *Id.*, 37. See, e.g., *People v Brager*, 406 Mich 1004; 280 NW2d 826 (1979); *People v Kamin*, 405 Mich 482; 275 NW2d 777 (1979); *People v*

*Chamblis*, 395 Mich 408; 236 NW2d 473 (1975); *People v Van Wyck*, 402 Mich 266; 262 NW2d 638 (1978); *People v Lank Thomas*, 399 Mich 826; 249 NW2d 867 (1977). I agree with this Court's conclusion in *Goliday* that "any declaration of unconstitutionality should come from the Supreme Court and not this Court" with regard to a remedy employed by our Supreme Court on numerous occasions. *Goliday, supra*.

Therefore, I join the lead opinion's decision to remand this case for entry of a judgment of conviction on the offense of three insufficient funds checks within ten days.

/s/ William B. Murphy