STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 3, 1999
v	No. 202067 Oakland Circuit Court
PAUL ROBERT DUPELL, Defendant-Appellant.	LC No. 92-117372 FH

Before: Doctoroff, P.J., and Markman and J.B. Sullivan*, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of conspiracy to commit false pretenses over $100.00, MCL 750.157(a); MSA 28.354(1), false pretenses over $100.00, MCL 750.218; MSA 28.145, and filing a false police report, MCL 750.411a; MSA 28.643(1). He was sentenced to three years' probation with 183 days in jail. The jail term was to be suspended upon payment of $10,000 in restitution. He appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial by prosecutorial misconduct. However, appellate review of defendant's prosecutorial misconduct claims is precluded because defendant failed to object to the allegedly improper remarks at trial, a cautionary instruction could have sufficiently cured any prejudice resulting from the challenged remarks, and our failure to consider this issue will not result in a miscarriage of justice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995); *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We likewise conclude that defendant has failed to establish any basis for relief due to ineffective assistance of counsel based on trial counsel's failure to object to the prosecutor's remarks. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Next, defendant argues that there was insufficient evidence to support his convictions. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, this Court reviews the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

doubt. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

To establish the crime of false pretenses, the prosecution must show 1) a false representation concerning an existing fact, 2) knowledge by the defendant of the falsity of the representation, 3) use of the representation with the intent to deceive, and 4) detrimental reliance on the false representation by the victim. *People v Reigle*, 223 Mich App 34, 37-38; 566 NW2d 21 (1997). To establish that defendant was guilty of conspiracy, the prosecution was required to show that defendant had the specific intent to accomplish an illegal objective. *People v Whitney*, 228 Mich App 230, 258; 578 NW2d 329 (1998). For intent to exist, the prosecutor must show that the defendant knew of the conspiracy and its objective, and participated cooperatively to further that objective. *People v Blume*, 443 Mich 476, 485; 505 NW2d 843 (1993). The offense of conspiracy was discussed in *People v Carter*, 415 Mich 558, 568; 330 NW2d 314 (1982):

> "The gist of the offense of conspiracy lies in the unlawful agreement." *People v Atley*, 392 Mich 298, 311; 220 NW2d 465 (1974). The crime is complete upon formation of the agreement; in Michigan, it is not necessary to establish any overt act in furtherance of the conspiracy as a component of the crime. However, a twofold specific intent is required for conviction: intent to combine with others, and intent to accomplish the illegal objective. Perkins, Criminal Law (2d ed), ch 6, § 5, p 629.
>
> In spite of the importance of the element of agreement in conspiracy liability,
>
> "[d]irect proof of agreement is not required, nor is it necessary that a formal agreement be proven. It is sufficient if the circumstances, acts, and conduct of the parties establish an agreement in fact. * * *.
>
> "Furthermore, conspiracy may be established, and frequently is established by circumstantial evidence."

The evidence established that John Emanuel, a salesman for Taylor Freezer, met with defendant and Edward Hansen, while they were in the process of forming a company that rented out yogurt machines for parties. Previously, defendant had purchased three yogurt machines with serial numbers H8095749, H8095750, and H8095751 from Taylor Freezer through Emanuel. In August 1990, both defendant and Hansen signed an equipment purchase agreement to purchase two small yogurt machines from Taylor Freezer. As a result, the two small yogurt machines were delivered to Hansen's store, and defendant wrote the check for the balance due on delivery. Subsequently, Emanuel met with defendant and Hansen together at Taylor Freezer, and they asked Emanuel about trading the two small yogurt machines for three larger machines. Emanuel gave both defendant and Hansen quotes or memo bills for three smaller yogurt machines with serial numbers H9009317, H9105092 and H9105094. Defendant did not purchase any of these machines. However, Hansen purchased the machine with serial number H9105092, which was delivered to his store, and he signed an equipment purchase agreement to buy the machine with serial number H9105094, but never actually purchased it.

On December 10, 1990, defendant filed a police report alleging that five yogurt machines were stolen from his van. He gave the police the following serial numbers for the stolen machines: H8095749, H8095751, H9105092, H9105094, and H9009317. Defendant then contacted his insurance representative at State Farm and faxed invoices reporting that five yogurt machines, with serial numbers H8095749, H8095751, H9105092, H9105094, and H9009317, had been stolen. Based on this information, the State Farm agent issued a two-party check to defendant and Taylor Freezer in the amount of $50,000. Subsequently, the police received information from Taylor Freezer that it may have located the missing machines. On February 19, 1992, two Taylor Freezer service technicians went to the store owned by Hansen to pick up some yogurt machines for a sales evaluation. One of the machines that was picked up had the serial number H8095751. On the same day, defendant and Hansen delivered another yogurt machine from Hansen's store to Taylor Freezer for an evaluation. The machine was missing the front panel that contained the serial number, and the inside serial number was also missing. However, the compressor serial number, which corresponded with the serial number of the machine, was H9105092. Two days later, on February 21, 1992, one of Taylor Freezer's service technicians returned to Hansen's store and wrote down the serial numbers of other yogurt machines in the store. One of the machines had the serial number H109109 on the front panel, but its inside serial number was H8095749.

On February 22, 1992, the police executed a search warrant and seized three yogurt machines, two from Taylor Freezer and one from Hansen's yogurt store. The evidence revealed that, of the five yogurt machines that defendant reported stolen on December 10, 1990, the machines with serial numbers H8095749 and H8095751 (which defendant purchased in early 1989) were found in Hansen's possession, along with the machine with compressor serial number H9105092 (which was purchased by Hansen in 1990). In addition, the machine with serial number H9105094 (which Hansen declined to buy) was eventually purchased new by Michigan State University in February 1991. Finally, a machine with serial number H9009317 never actually existed because that serial number was a dummy number created by Taylor Freezer to allow defendant and Hansen to obtain financing for the purchase of three yogurt machines for their joint venture.

Viewed most favorably to the prosecution, the circumstantial evidence and reasonable inferences drawn therefrom were sufficient to establish a conspiracy between defendant and Hansen to fraudulently obtain insurance proceeds, and to show that defendant knew of the conspiracy and its objective and intended to cooperate to further that objective. While we agree with defendant that Hansen's plea of nolo contendere to conspiracy to commit false pretenses over $100.00 and false pretenses over $100.00 does not constitute substantive evidence of his guilt, *People v Manning*, 434 Mich 1, 14; 450 NW2d 534 (1990), we reject defendant's claim that there was insufficient evidence that Hansen shared the requisite intent to accomplish the underlying offense. Here, Hansen's intent could be inferred from the independent circumstantial evidence describing his involvement in the underlying transactions and his association with defendant.

With respect to defendant's conviction for false pretenses over $100, the evidence sufficiently established that defendant made a false statement of fact when he reported five yogurt machines stolen in December 1990, that his intent in doing so was to deceive his insurance company in order to collect

on a false insurance claim, and that the insurance company was in fact deceived when it issued a two-party draft in the amount of $50,000 to defendant and Taylor Freezer. Contrary to defendant's claim, Taylor Freezer and Emanuel's mistaken corroboration of the false information did not alter the false nature of defendant's statement, or necessarily negate defendant's intent. Defendant argues that the insurance company "suffered a loss" because it detrimentally relied upon the verification provided by Taylor Freezer and Emanuel. However, it is apparent that the insurance company would not have processed the claim, let alone issued a draft in the amount of $50,000, had defendant not falsely reported the theft of the five yogurt machines in the first instance. Accordingly, we conclude that the evidence was sufficient to support defendant's conviction for false pretenses over $100.00. MCL 750.218; MSA 28.145; *Reigle, supra.*

Finally, the foregoing evidence was also sufficient to support defendant's conviction for filing a false police report in December 1990. MCL 750.411a; MSA 28.643(1); *People v Lay*, 336 Mich 77; 57 NW2d 453 (1953).

Defendant next argues that he was denied the effective assistance of counsel. To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced defendant to the extent that it deprived him of a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Because defendant did not request an evidentiary hearing on this issue in the trial court, appellate review is foreclosed unless the alleged deficiencies are apparent from the record. *Id.*

Defendant's various claims alleging that counsel failed to adequately meet with him to discuss matters of trial strategy and failed to accept his own suggestions of trial strategy are not apparent from the record, nor has defendant overcome the presumption of sound strategy. *Stanaway*, *supra* at 687. Likewise, the existing record does not support defendant's claim that counsel did not prepare an adequate defense because defendant did not pay counsel's requested fees. The decision whether to call a hand-writing expert was also a matter of trial strategy and defendant has not established either that counsel's decision was unsound, or that a handwriting expert could have provided defendant with a substantial defense. *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). Accordingly, we conclude that defendant was not denied the effective assistance of counsel.

Next, defendant contends that his due process rights were violated by pre-arrest delay because a delivery man who could have verified that he actually received the yogurt machines in question died prior to arrest, and because the chief investigating officer "forgot" that his initial impression of defendant was that he was an honest man. We disagree. This issue presents a constitutional question, which we review de novo. *People v McIntire*, 232 Mich App 71; __ NW2d __ (1998).

To establish a due process violation on the basis of prearrest delay, the defendant must first come forward with evidence that he was prejudiced by the delay. *McIntire, supra*; *People v Bisard*, 114 Mich App 784, 791; 319 NW2d 670 (1982). Once the defendant does so, the prosecutor has the burden of persuading the court that the reason for the delay was sufficient to justify whatever prejudice resulted. *Id.* Factors for the court to consider when evaluating the reasons for the delay

include the explanation for the delay, whether the delay was deliberate, and whether undue prejudice attached to the defendant. *McIntire, supra.*

Here, defendant's claims of witness memory loss and the death of a potential witness are insufficient to establish actual and substantial prejudice to his right to a fair trial. *People v Adams*, 232 Mich App 128, 132; __ NW2d ___ (1998). Further, defendant failed to show that any delay was the result of the prosecutor's intention to obtain a tactical advantage. *McIntire*, *supra* at 94, n 11. As plaintiff correctly observes, although the criminal conduct occurred in December 1990, it was not until February 1992, that the police had reason to suspect that a crime was committed. Thus, we find no error.

Finally, defendant claims that the trial court erred in denying his motion for a new trial. Based on the foregoing, we also conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial. *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Stephen J. Markman
/s/ Joseph B. Sullivan