STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY BARRETT,

Defendant-Appellant.

UNPUBLISHED
November 12, 1999

No. 203699
Recorder's Court
LC No. 96-502408

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY A. GRISSOM,

Defendant-Appellant.

No. 204709
Recorder's Court
LC No. 96-502408

Before: Cavanagh, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendants Barrett and Grissom were each convicted, following a joint bench trial, of attempted larceny by false pretenses over $100, MCL 750.92 and MCL 750.218; MSA 28.287 and MSA 28.415, for falsely representing to an elderly homeowner that her home's existing ductwork needed to be replaced. Defendant Barrett was sentenced to 1-1/2 to 5 years' imprisonment, and defendant Grissom was sentenced to 2 to 5 years' imprisonment. Defendants appeal as of right. We affirm.

Defendant Barrett first argues that, because the Forbes Mechanical Contractors Act, MCL 338.971 *et seq*.; MSA 18.86(1) *et seq*., authorizes the Michigan Department of Labor to regulate the activities of mechanical contractors, the trial court should have declined to exercise jurisdiction pursuant to the doctrine of "primary jurisdiction." However, this issue was never presented to the trial court and,

therefore, was not preserved for review. *People v Hogan*, 225 Mich App 431, 437-438; 571 NW2d 737 (1997). Accordingly, we decline to consider it.

Defendant Barrett next claims that, because the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq.*, proscribes certain deceptive practices against consumers, the act somehow precludes his conviction under the criminal statutes. We disagree. Defendant has furnished no authority, and we are aware of none, supporting his proposition that the existence of the MCPA bars his conviction of attempted false pretenses over $100. An individual may be subject to both civil and criminal sanctions for the same act. *People v Everard,* 225 Mich App 455, 465; 571 NW2d 536 (1997).

Next, defendants Barrett and Grissom both contend that the evidence produced at trial was insufficient to sustain their convictions. We disagree. When reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The elements of larceny by false pretenses are: (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 by the victim on the false representation. *People v Shively*, 230 Mich App 626, 631; 584 NW2d 740 (1998). An examination of the evidence in the light most favorable to the prosecution compels the conclusion that the prosecution presented sufficient evidence to support the larceny by false pretenses convictions.

First, both defendants assured the victim that the existing ductwork in her home needed to be replaced in order to make her air conditioner work properly. According to plaintiff's witnesses, the existing ductwork did *not* need to be replaced for any reason. Defendants' assertion that replacement was necessary was therefore a false representation concerning an existing fact. Second, we note that defendant Barrett purported to be an experienced heating and cooling salesman, took it upon himself to thoroughly examine the existing ductwork and, without testing the system's operation to verify the victim's complaint, informed her that the ductwork had to be replaced. In view of plaintiff's expert testimony to the contrary, a rational trier of fact was entitled to infer that Barrett knew of the falsity of his statement. This conclusion is also applicable to defendant Grissom in view of his history of having worked on the victim's heating and air conditioning system over a period of time. As the court pointed out, when Grissom sold the victim an air conditioner in 1995, no city permit was requested for ductwork, thus indicating that both the air-conditioning unit and the ductwork were adequate, properly sized, and up to code requirements. Therefore, a rational trier of fact could justifiably infer that the second element was satisfied with regard to Grissom because he knew that the representation was false. Third, because defendants knew that there was in fact no need for new ductwork, their insistence that this work was needed constituted an intent to deceive. Finally, the evidence clearly showed that the victim relied on defendants' false representations, to her detriment, thereby satisfying the fourth element. Thus, we conclude that the evidence was sufficient to convict defendants of attempted false pretenses over $100.

Defendant Barrett further maintains that the recommendation for new ductwork related to the satisfaction of the home's future cooling needs and therefore cannot meet the requirement that the false statement must deal with an existing fact. We disagree. Although a conviction of false pretenses cannot stand where the misrepresentation involved relates only to future events or facts, *People v Cage*, 410 Mich 401, 406; 301 NW2d 819 (1981), defendants' misrepresentation to the victim that she needed the ductwork in her home replaced related to a present fact or circumstance. Thus, no error occurred.

Next, defendant Grissom contends that the trial court erred by permitting the introduction into evidence of bills of sale regarding equipment sold to the victim without Grissom's participation. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *VanderVliet, supra* at 60. Although defendant Grissom's name does not appear on the bills of sale to which he now objects, these documents were relevant because they gave important background information and helped to put in proper perspective the victim's continuing relationship with the two heating and cooling companies. It would be impossible for the trier of fact to understand the totality of the circumstances and the course of conduct involving both companies' business relationships with the victim without first describing the history of various transactions preceding the one with which defendants were charged. Therefore, we conclude that the trial court did not abuse its discretion by admitting the evidence.

Finally, defendants contend that their sentences violate the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). However, because defendants have already served their minimum sentences, this issue is moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). Furthermore, after having reviewed the record and the sentence departure evaluation, we conclude that the trial court did not abuse its discretion in sentencing defendants.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell