STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 1999
v	No. 206223 Recorder's Court
SHIRLEY HOWARD COATES, Defendant-Appellant.	LC No. 96-009708

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 206224 Recorder's Court
EL SHADAI, INC., Defendant-Appellant.	LC No. 96-009657

Before: Gribbs, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant, Shirley Howard Coates (hereinafter "defendant"), and defendant, El Shadai, Inc. (hereinafter "El Shadai"), were each convicted of obtaining money under false pretenses over $100, MCL 750.218; MSA 28.415, and conspiracy to commit the same, MCL 750.157a; MSA 28.354(1). Defendant was sentenced to serve five years' probation (with the final year, subject to review and waiver, to be served in the Wayne County Jail), two hundred hours of community service (not in adult foster care), and to pay $71,545 in restitution for amounts obtained under false pretenses, as well as $5,000 in restitution to the Office of the Attorney General for its costs of prosecution. We interpret the court's sentence with regard to El Shadai to impose joint and several liability for the amount of restitution. Defendant and El Shadai now appeal as of right. We vacate the

$5,000 restitution award to the Office of the Attorney General, but affirm the convictions and sentences in all other respects.

Defendant was accused of misrepresenting the amount of money spent by El Shadai (a corporation that she owned and controlled) on direct care work, under a contract to provide adult foster care, and thereby obtaining money under false pretenses from the State of Michigan. An adult foster care facility like the El Shadai home is funded under a contract that budgets expenses by their type. In this case, the funds flowed from the Michigan Department of Mental Health (the Department) to the Detroit/Wayne Community Mental Health Board, which contracted with Residential Care Alternatives, which in turn contracted with El Shadai. Each month, one twelfth of the home's annual budget was advanced to El Shadai. Direct care wages and fringe benefits are Schedule A items, Schedule C consists of utilities, insurance, transportation, consumables and certain other costs, while Schedule D covers costs to purchase equipment. Except for the Schedule E budget, which is designated for the home's administration, unexpended funds must be returned to the state at the end of the fiscal year. In this case, the prosecution presented testimonial and documentary evidence that work records had been falsified so that defendant and her family members would be paid direct care wages for hours that they had not actually worked at the El Shadai home.

Defendant and El Shadai first contend that the trial court erred by admitting unredacted summaries of wages and hours for defendant and others, that were prepared by an auditor who testified at trial. They argue that because these summaries included information taken from the records of adult foster care homes other than the El Shadai home, but with which defendant was also associated, the information was irrelevant and impermissibly suggested defendant's involvement in other acts of misconduct. Defendants also argue that no advance notice of intent to introduce such evidence had been provided. Moreover, defendant and El Shadai submit that because the underlying records from these other homes were not in evidence, the summaries were hearsay and not subject to adequate cross-examination. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Adams*, 233 Mich App 652, 656; 592 NW2d 792 (1999).

Evidence is relevant if it has "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. In addition to other evidence, the prosecution attempted to cast doubt on claims that defendant and her family members did work at the home by showing that the time records overlapped with time records from other homes. Specifically, with regard to defendant, demonstrating that in one year she claimed to have worked 7,232 hours between the El Shadai home and several other homes called into doubt the reasonableness of whether she legitimately could have worked twenty hours per day, seven days per week for an entire year. Consequently, linking the hours that defendant and her family members claimed to have worked at the El Shadai home with hours that they claimed to work at other homes was highly relevant to establishing that the El Shadai work records had been falsified. Furthermore, the summaries would have lost their probative value had they been redacted as requested by the defense.

As for the claim that the challenged wage and hour summaries suggested other acts of uncharged misconduct, we note that the evidence at issue does not typify the kind of evidence

contemplated by MRE 404(b). Records indicating that certain individuals claimed to have worked certain hours, and were paid certain amounts, do not, without additional information or an additional inference, suggest a trait of character or a propensity for conduct in conformance with other crimes, wrongs, or acts. See MRE 404(b). For this reason, and because no objection was raised at trial to a lack of pretrial notice pursuant to MRE 404(b)(2), we hold that any error with regard to lack of notice has been forfeited. *People v Carines*, 460 Mich 750, 761-767, 774; 597 NW2d 130 (1999). In any event, as detailed below, analyzed as other acts evidence the summaries were properly admitted.

"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 . . . ." MRE 404(b)(1). In order for other acts evidence to be properly admitted, the prosecution must offer a relevant purpose for its introduction that does not involve character or the defendant's propensity to commit the charged acts. If no such purpose can be articulated, the evidence must be excluded. If one or more non-character purposes are propounded, then provided that there is sufficient evidence to show that the other acts occurred and that they are logically relevant, the probative value of the evidence for its permitted purpose is examined to see if it is substantially outweighed by unfair prejudice, "taking into account the efficacy of a limiting instruction . . . ." *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998); *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993).

In this case, the prosecution offered the evidence under the theory that, because defendant and her family members were purporting to be in two places at the same time and because defendant had purported to have worked an unreasonably large number of total hours, it was less likely that defendant and her family members actually worked the claimed hours at the El Shadai home. The evidence accomplishes this task without moving through any intermediate inferences, and thus was not only relevant but also offered for a proper purpose under MRE 404(b). *Crawford, supra* at 390. Any unfair prejudice resulting from the jury's potential use of this information to infer action in conformance with character is clearly minimal, and the court appropriately gave a curative instruction in that regard. Consequently, the court did not abuse its discretion by not excluding the challenged exhibits on the basis that they described uncharged misconduct.

Defendant and El Shadai also claim that the summaries were hearsay, and thus inadmissible. "Hearsay is not admissible except as provided by [the rules of evidence]." MRE 802. Defendants make no argument that the underlying records from the other homes would have been hearsay had the prosecution sought to admit them. We note that those records clearly would not have been hearsay because they would not have been offered for their truth. MRE 801(c). See also *People v Jones (on Rehearing After Remand)*, 228 Mich App 191, 205; 579 NW2d 82 (1998). Furthermore, it is evident from the fairly lengthy summaries at issue that the underlying records are voluminous. MRE 1006 permits the admission of the type of summaries presently being challenged, provided the other side has an opportunity to examine or copy the underlying documentation.[1] The trial court expressly told defense counsel that he could have some time to interview the auditor, and because of an unanticipated adjournment of the proceedings, there were thirty-four days that elapsed between the presentation of this evidence and when the witness was cross-examined. Though the defense clearly had the opportunity to review the exhibits during this time, it did not. "It was up to defendant to avail himself of

his right under MRE 1006 to examine or copy the original records at issue." *People v Sawyer*, 215 Mich App 183, 196; 545 NW2d 6 (1996). The court did not abuse its discretion by not excluding the challenged exhibits on the basis that they were hearsay.

Defendant and El Shadai next contend that the court's curative instruction, with regard to these exhibits that they characterize as evidence of uncharged misconduct, was inadequate to protect their rights because the court omitted a word from the agreed upon instruction when it read the instruction to the jury. This Court "review[s] jury instructions in their entirety to determine if there is error requiring reversal." *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998). "Even if the jury instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected a defendant's rights." *Id.* at 252-253.

Our examination of the record reveals that no objection was raised at trial on this basis. Moreover, we note that with or without the omitted word, the instruction at issue conveyed to the jury the limited purpose for which it could consider the evidence presented. Consequently, there is nothing to demonstrate the required prejudice or justification for reversal necessary to avoid forfeiture of this claim of error. *Carines, supra* at 763-764.

Finally, defendant and El Shadai contend that under the circumstances of this case the court was not authorized to include an order of restitution as part of their sentences. Defendants claim that in so doing, the court erroneously applied amendments to the applicable statutes retrospectively and in violation of the Ex Post Facto Clauses of the federal and state constitutions.[2] We review de novo issues of statutory interpretation and constitutional analysis. *People v Jagotka*, 232 Mich App 346, 350; 591 NW2d 303 (1998); *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997).

The statutes prohibiting false pretenses and conspiracy under which defendant and El Shadai were convicted, MCL 750.218; MSA 28.415 (amended by 1998 PA 312); MCL 750.157a; MSA 28.354(1), do not provide for the imposition of an order of restitution as part of the sentence. However, two other statutes, both within the Code of Criminal Procedure, provide for restitution awards to be included as a part of criminal sentencing in addition to any other penalty provided by law. MCL 769.1a; MSA 28.1073; MCL 780.766; MSA 28.1287(766). These statutes were originally enacted by 1985 PA 89 and 1985 PA 87 respectively. In *People v Chupp*, 200 Mich App 45, 47-51; 503 NW2d 698 (1993), this Court held that under the versions of the restitution statutes in effect at the time, a governmental entity was not included in the definition of "victim," and thus a court could not order restitution to a governmental entity pursuant to the statutes. Thereafter, MCL 769.1a; MSA 28.1073 was amended by 1993 PA 343 §1 (effective May 1, 1994), and MCL 780.766; MSA 28.1287(766) was amended by 1993 PA 341 § 1 (effective May 1, 1994). Pursuant to these amendments the statutes now include a governmental entity within the definition of "victim" for the purposes of imposing restitution. In this case, the criminal conduct at issue occurred before the effective date of the amendments, but the convictions occurred subsequent to that date.

> Under Michigan law, a new or amended statute generally applies prospectively unless the Legislature has expressly or impliedly indicated its intention to give the statute retrospective effect. *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992).

> However, an exception to the general rule is recognized where a statute is remedial or procedural in nature. *Id*. "Statutes that operate in furtherance of a remedy already existing and that neither create new rights nor destroy rights already existing are held to operate retrospectively unless a different intention is clear." *Id.* [*People v Link*, 225 Mich App 211, 214-215; 570 NW2d 297 (1997).]

In this case, the amendments at issue are both remedial and procedural. Where "[t]he apparent purpose of the amendment is to extend protection to a class of presently existing victims," the amendment is remedial and it is presumed to have retrospective effect. See *Russo, supra* at 596-597. Including a governmental entity in the definition of "victim" was clearly a response to this Court's holding in *Chupp*. This expansion of the definition of "victim" within the restitution statutes does not operate to create new rights or to destroy old rights, at least insofar as it is applied to recover losses stemming directly from the crimes themselves. It does not increase the liability that a wrongdoer is subject to, but merely effects a procedural change in the manner by which that liability may attach. Because there is no contrary legislative expression, we find that the amendments were intended to apply to cases where the conduct occurred before their effective date.

As to whether the application of the amended restitution statutes in this case violates the Ex Post Facto Clauses:

> A statute that affects the prosecution or disposition of criminal cases involving crimes committed before the effective date of the statute violates the Ex Post Facto Clauses if it (1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence.
>
> The Ex Post Facto Clauses were intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit legislative control of remedies and procedures that do not affect matters of substance. Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto. [*Riley v Parole Bd*, 216 Mich App 242, 244; 548 NW2d 686 (1996) (citations omitted).]

The amendments at issue do not make punishable that which was not previously punishable, nor do they make any act a more serious criminal offense, nor do they permit the prosecution to convict on less evidence. Consequently, the question turns on whether their application increases the punishment, or whether their application simply implements a procedural change that perhaps disadvantages defendant and El Shadai, but does not affect matters of substance.

"The compensatory nature of restitution is . . . specifically designed to allow crime victims to recoup losses suffered as a result of criminal conduct." *People v Grant*, 455 Mich 221, 230; 565 NW2d 389 (1997). Although restitution implies a penalty, its goal is to return crime victims to their precrime status, which contrasts with the generally recognized sentencing goals of rehabilitation, deterrence, protection of society, and punishment. *Id.* at 230-231 n 10. The goal of restitution would

appear to be the same goal achieved by tort liability imposed on wrongdoers for the conduct that constitutes a crime. By authorizing a sentencing court to provide for restitution, however, the Legislature has effectuated a practice that recognizes that crime "victims are entitled to full restitution for their losses, payable immediately." *Id.* at 240. Of additional note, both restitution statutes provide for a set off against any civil recovery for amounts paid to a victim in restitution. MCL 769.1a(9); MSA 28.1073(9); MCL 780.766(9); MSA 28.1287(766)(9).

We hold that where the amended restitution statutes are applied to allow a governmental entity victim to recoup losses stemming directly from a crime committed prior to the amendments, the statutes do not increase the punishment for the crime because they do not alter the criminal defendant's liability to compensate his or her victim. Instead, they merely work a procedural change whereby the governmental entity is afforded the same right to recovery previously afforded to individual victims. Consequently, that portion of the restitution order associated with losses from the crime itself does not violate the Ex Post Facto Clauses. *Riley*, *supra* at 244.

However, where a governmental entity sought restitution for the costs incurred in bringing a defendant to justice, rather than for the losses resulting directly from the crime, this Court found that the suggested application of the statutes would result in an increase in punishment. See *People v Slocum*, 213 Mich App 239, 243-244; 539 NW2d 572 (1995). Defendant argues, and plaintiff concedes, that it was improper for the court to award restitution in the amount of $5,000 for costs associated with the prosecution of defendant. We agree that this portion of the court's award works an unconstitutional violation of the Ex Post Facto Clauses under the circumstances of this case.

The order for restitution to the Office of the Attorney General is vacated. The convictions and sentences are affirmed in all other respects.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Richard Allen Griffin

[1] Applying MRE 1006 in the context of a civil action, this Court cited federal authority for the proposition that there are four requirements that must be satisfied for a document to be admitted as an MRE 1006 summary. Specifically:

> First, the summary must be of voluminous writings, recordings or photographs which cannot be conveniently examined in court. . . .
>
> Second, . . . the underlying writings, recordings or photographs must themselves be admissible in evidence. . . .
>
> Third, the originals or duplicates of the underlying materials must be made available for examination or copying by the other parties, at a reasonable time and place. . . .

> Finally, . . . a summary must be an accurate summarization of the underlying materials. [*Hoffmann v Auto Club Ins Ass'n*, 211 Mich App 55, 100; 535 NW2d 529 (1995), quoting *White Industries v Cessna Aircraft Co*, 611 F Supp 1049, 1070 (WD Mo, 1985) (internal quotation marks omitted).]

[2] The United States Constitution provides, as a limitation on the power of Congress, that "No . . . ex post facto Law shall be passed." US Const Art I, § 9. The Michigan Constitution provides, "No . . . ex post facto law . . . shall be enacted." Const 1963, Art 1, § 10.