

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY ALAN STORRS,

Defendant-Appellant.

UNPUBLISHED

September 22, 2000

No. 214412

Leelanau Circuit Court

LC No. 98-000950-FH

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of embezzlement over \$100, MCL 750.174; MSA 28.3171. He was sentenced to nine months' imprisonment and twenty-four months' probation. Defendant appeals as of right. We reverse and remand for a new trial.

Defendant was a salesperson for Harbor Sea Doo ("Harbor"), a watercraft dealer. Defendant allegedly told one of Harbor's customers to make a check for Harbor merchandise payable to defendant personally and not the store, and then kept the money. At trial, defendant's defense was that he had no intent to embezzle, but rather had a claim of right to the money.

Defendant raises a number of issues on appeal, one of which we find dispositive. We agree with defendant that the prosecutor's improper comment on defendant's failure to testify denied defendant a fair trial. Therefore, defendant is entitled to a new trial.

Defendant argues two instances of prosecutorial misconduct on appeal, but failed to preserve his first claim of prosecutorial misconduct because he did not object at trial. Appellate review of allegedly improper conduct by a prosecutor is precluded where the defendant did not object at trial to the alleged misconduct, unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). Because a curative instruction could have eliminated any possible prejudice from the prosecutor's comment that defendant "must think that he's got some problems with his case," that comment does not require reversal of defendant's convictions.

Defense counsel's comments to the court following the prosecutor's remark on defendant's failure to testify were sufficient to preserve defendant's second claim of prosecutorial misconduct. Issues of prosecutorial misconduct are decided on a case-by-case basis, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The test is whether defendant was denied a fair trial. *Id.*

During rebuttal closing argument, the prosecutor in this case remarked as follows:

Something interesting in his Claim of Right defense, -- and it occurred to me while I was sitting, listening to him argue -- you know, we still do not have one shred of evidence before you as to why he took this money. *Normally I can't comment on the Defendant failing to testify -- and the Defendant chose not to -- but he stood up and made inferences and a comment --*

A prosecutor is not permitted to comment on a defendant's failure to take the stand. MCL 600.2159; MSA 27A.2159; *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996); *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). This rule is an important corollary to the Fifth Amendment privilege against self-incrimination. *Id.*; *Raper v Mintzes*, 706 F2d 161, 164 (CA 6, 1983). We consider especially suspect improper remarks by a prosecutor that are deliberately injected into the proceedings. *People v Nabers*, 103 Mich App 354, 370; 303 NW2d 205 (1981), rev'd in part on other grounds 411 Mich 1046 (1981).

Here, the prosecutor did not merely call the jury's attention to the fact that defendant did not testify. He deliberately mentioned defendant's failure to take the stand, explaining that "*Normally, I can't comment on the Defendant failing to testify.*" By using the word "normally," the prosecutor implied that there was something so outrageous about the defense that his commenting on defendant's silence was somehow justified. Moreover, the comment followed the prosecutor's assertion, contrary to the evidence adduced at trial, that there was not "one shred of evidence . . . as to why [defendant] took this money." Under these circumstances, we find that the prosecutor's comment on defendant's failure to take the stand was not harmless error. The comment was direct, not fleeting, and no curative instruction was given. Cf. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999); *Nabers, supra* at 369-371. Because the prosecution has failed to show that this direct comment on defendant's failure to testify was harmless beyond a reasonable doubt, *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Anderson (After Remand)*, 446 Mich 392, 405-407; 521 NW2d 538 (1994), defendant is entitled to a new trial. See also *Raper, supra*.

We briefly address defendant's remaining issues on appeal. First, defendant contends that the trial court erred in allowing evidence of a similar irregular business transaction to be introduced against defendant under MRE 404(b). We disagree. We review a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Here, the other acts evidence was relevant to proving defendant's intent to embezzle because the "other act" shows a common plan or scheme and absence of mistake. MRE 404(b)(1); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). The fact that no criminal charges were filed with regard to the alleged "other act" does not affect the relevance of the evidence. See MRE 404(b)(1). Moreover, the probative value of the evidence of the second transaction was not substantially outweighed by the danger of unfair prejudice. MRE 403; *VanderVliet*, *supra* at 74-75. The other acts evidence related to defendant's intent and was, therefore, highly probative. Further, contrary to defendant's assertion, the trial court did provide a limiting instruction regarding the proper use of the other acts evidence. *Id* at 75.

Defendant also contends that the trial court erred in refusing to allow defense counsel to question defendant's employer about the witness' mishandling of a free airline ticket sales promotion offered to customers. When arguing for admission of the testimony before the trial court, defense counsel told the court, "[m]y client's going to testify that the airline tickets were a factor" in his decision to tell the customer to make the check payable to defendant, and asserted that the witness' testimony regarding his handling of the ticket promotion was essential to defendant's claim of right defense. The court found that the evidence was "too far removed at [that] point in the trial." The court stated that if defendant testified, the evidence could become relevant and defendant could recall the witness, but that admission of the evidence was "premature" at that point. However, defendant never took the stand and defense counsel never raised the issue again before the court.

Because it was the defendant who linked the relevancy of the proffered testimony to defendant's testimony, we find that the court did not abuse its discretion in making a provisional ruling that the admissibility of that testimony hinged on defendant's testimony. Further, if after deciding not to testify, defendant believed that the testimony was still relevant and thus admissible, he was obligated to raise that issue with the court. He did not, and so he has failed to preserve this issue for appeal. See *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997); *People v Austin*, 209 Mich App 564, 569-570; 531 NW2d 811 (1995), rev'd in part on other grounds 455 Mich 439 (1997). Because manifest injustice will not result from our failure to review this issue, we decline to address it. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Defendant also argues that the trial court improperly excluded a letter written by him as hearsay. Because defendant did not make an offer of proof at trial regarding the substance of the letter, MRE 103(a)(2), we are unable to conclude that the exclusion of the letter affected defendant's substantial rights. MRE 103(a); *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra
/s/ Jeffrey G. Collins