# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STANLEY ROY JOHNS,

Defendant-Appellant.

UNPUBLISHED
October 23, 2001

No. 216956
Baraga Circuit Court
LC No. 98-000609-FH

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Before: Sawyer, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

This case involves defendant's failure to report income on his state tax returns and defendant's misuse of funds belonging to the Upper Peninsula Trappers' Association ("UPTA"). After a jury trial, defendant was convicted on five counts of tax evasion, MCL 205.27(1)(a), and one count of embezzling over $100. MCL 750.174.[1] The trial court imposed a suspended sentence of six months in the county jail, twenty-four months probation and restitution in the amount of defendant's unpaid taxes. Defendant appeals as of right. We affirm.

Defendant first contends that the evidence was insufficient to support his convictions. When reviewing a sufficiency claim, we view "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 proved beyond a reasonable doubt." *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Here, there was sufficient evidence to support defendant's conviction of tax evasion and embezzlement.

In order to find defendant guilty of felony tax evasion, the jury was required to find that: (1) defendant made a false statement on a tax return, and (2) defendant did so with an intent to defraud or to evade the payment of a tax or part of a tax. MCL 205.27. We conclude that a reasonable jury could have found that these elements were proven beyond a reasonable doubt.

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[1] The Legislature subsequently amended MCL 750.174, effective January 1, 1999. See 1998 PA 312. We apply the statutory language in effect when defendant committed the charged conduct.

Richard Harris, a state tax auditor, testified that he examined defendant's bank records and tax returns. Harris testified regarding the manner in which he examined the records and arrived at his calculations. He testified that defendant's income, as judged by various deposits made to defendant's personal bank account, substantially exceeded the income that defendant reported on his tax returns for the years in question. Further, the evidence indicated that defendant never claimed any income from his fur trading activities. Although defendant argued that his expenses offset all of that income, he failed to file a profit/loss statement with regard to his fur trading. The prosecutor presented evidence that defendant knew how to file such a statement, and that defendant did so with regard to his timber business. This evidence raised the reasonable inference that defendant was attempting to evade payment of taxes on his fur trade income. The evidence presented at trial was sufficient to convince a reasonable jury that defendant committed five counts of tax evasion.

In order to find defendant guilty of embezzlement, the jury was required to find that: (1) the money at issue belonged to the UPTA; (2) defendant had a relationship of trust with the UPTA as one of its agents; (3) the money came into defendant's possession because of that trust relationship; (4) defendant dishonestly disposed of or converted the money to his own use; (5) defendant did so without the UPTA's consent; and (6) at the time of the conversion, defendant intended to defraud or cheat the UPTA. *People v Collins*, 239 Mich App 125, 131; 607 NW2d 760 (1999).

The prosecution presented evidence that defendant received checks made payable to the UPTA, in his capacity as its president and agent, and that defendant deposited those checks into his personal bank account. A prosecution witness testified that defendant admitted depositing UPTA money into his personal bank account when he was short of funds with which to pay his personal bills. Evidence was also presented that other UPTA officers were unaware of defendant's practices. Defendant argues that he never intended to defraud or cheat the UPTA. He claimed that he deposited the UPTA funds into his personal account because the UPTA owed him reimbursements for expenses he made on the organization's behalf. However, defendant was unable to provide receipts for the vast majority of those claimed expenses. Further, the evidence indicated that a procedure existed for obtaining reimbursement from the UPTA, that defendant had utilized that procedure in the past, and that none of defendant's requests for reimbursements had ever been refused. Circumstantial evidence and the reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *Nowack, supra* at 400; *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Drawing all reasonable inferences and making credibility choices in support of the jury verdict, we conclude that the evidence was sufficient to sustain defendant's embezzlement conviction. *Nowack, supra* at 400.

Defendant next contends that the trial court erroneously refused to read CJI2d 7.5 to the jury. That instruction involves the "claim of right" defense to an embezzlement charge. This Court reviews jury instructions as a whole to determine if there is error requiring reversal. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999).

> Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights.

> Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. [*People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000)(citations omitted).]

Further, "[i]nstructions must cover each element of each offense charged, along with all material issues, defenses, and theories that have evidentiary support. Conversely, an instruction that is without evidentiary support should not be given." *Wess*, *supra* at 243 (citations omitted).

The "claim of right" instruction provides, in pertinent part:

> (1) To be guilty of [embezzlement], a person must intend to steal. In this case, there has been some evidence that the defendant took the property because he claimed the right to do so. If so, the defendant did not intend to steal.
>
> (2) When does such a claimed right exist? It exists if the defendant took the property *honestly believing that it was legally his or that he had a legal right to have it*. Two things are important: the defendant's belief must be honest, and he must claim a legal right to the property. [CJI2d 7.5 (emphasis added).]

Defendant admitted at trial that he deposited checks made payable to the UPTA into his personal bank account. Defendant claimed that he did so because he was entitled to reimbursement from the UPTA for monies he had expended on its behalf. However, as the trial court noted, defendant did not claim that checks made payable to the UPTA legally belonged to him. We conclude that the trial court did not commit error requiring reversal when it refused to read CJI2d 7.5, because the instruction was not supported by the evidence.

Defendant next contends that the trial court abused its discretion by denying defendant's motion for new trial based on newly discovered evidence. A post-conviction audit prepared by other members of the UPTA concluded that defendant did not owe the organization any money. In fact, the audit concluded that the UPTA "technically" owed money to defendant. Based on this audit, defendant filed a motion for a new trial. The trial court denied his motion, concluding that the evidence was not newly discovered, was cumulative, would not have produced a different result, and could have been produced at trial. See *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). It is apparent to this Court that the records and information upon which the audit was based were readily available to defendant before trial. Further, much of the same information was actually presented at trial, albeit in a different format. Therefore, we conclude that the trial court did not abuse its discretion when it denied defendant's motion for a new trial.

Defendant next contends that he was denied his constitutional right to remain silent because the state tax auditor testified that defendant failed to explain adequately his financial dealings with the UPTA, during the auditor's investigation. Defendant concedes that it is unclear from the record which of the auditor's comments involved pre-arrest and which involved post-arrest conduct. We note that many of the auditor's comments were made in response to questions by the defense, and this Court will not premise reversal on error to which defendant contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Further, we are not persuaded that defendant's silence was constitutionally protected.

Defendant has failed to demonstrate that his "silence" occurred while he was in custody, that his silence was in reliance on either the Fifth Amendment or *Miranda*[2] warnings given to him, or that his silence occurred in response to an accusation. *People v Hackett*, 460 Mich 202, 215; 596 NW2d 107 (1999); *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992). Finally, the trial court instructed the jury, sua sponte, that defendant was not obligated to talk to the auditor once the investigation began and that defendant's lack of response was "no indication that the defendant did anything wrong." On the facts of this case, we do not agree that reversal is warranted. *Carines, supra* at 763.

Defendant next contends that the trial court abused its discretion in admitting into evidence copies of defendant's personal checks. The record reveals that defendant's banking records were listed on the prosecutor's exhibit list. Further, it was obvious to everyone involved in this trial that defendant's financial records were at issue, even though the prosecutor did not obtain physical copies of the checks until the middle of trial. When reviewing a trial court's decision to admit or exclude evidence, our review is limited to an abuse of discretion. *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26 (1999), amended 459 Mich 1276 (1999). Further, "a 'decision upon a close evidentiary question by definition ordinarily cannot be an abuse of discretion.'" *Id*., quoting *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982). We conclude that the trial court did not abuse its discretion when it allowed the prosecutor to introduce copies of defendant's checks into evidence.

Finally, defendant contends that his trial counsel rendered ineffective assistance. We conclude that defendant has not "overcome the strong presumption that the assistance of his counsel was sound trial strategy." *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Counsel's failure to move for a directed verdict cannot constitute serious error, given our conclusion that the evidence was legally sufficient to sustain defendant's convictions. It appears from the record that defense counsel's strategy was to attack the state tax auditor as a bully who was harassing defendant. "The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel." *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). "This Court will not substitute its judgment for that of trial counsel in matters of trial strategy." *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Also, we will not assess with the benefit of hindsight trial counsel's decision to forego an independent audit before trial. *Rice, supra* at 445. The information presented and analyzed through the audit was cumulative to that already presented at trial through other means.

Affirmed.

/s/ David H. Sawyer
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).