STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2002
v	No. 234195 Charlevoix Circuit Court
THOMAS CHARLES LOOZE, Defendant-Appellant.	LC No. 00-050509-FH

Before: Fitzgerald, P.J., and Holbrook, Jr., and Cavanagh, JJ.

PER CURIAM.

Following a jury trial defendant was convicted of fraudulent retention of building contract funds, MCL 570.152. Thereafter sentenced to nine months in jail and thirty-six months' probation defendant appeals as of right. We affirm.

Defendant's appeal primarily concerns the sufficiency of the evidence supporting his conviction, challenged in the trial court with motions for directed verdict and for new trial. He asserts that the prosecutor failed to prove he could be held personally responsible for the criminal acts of Boyne Country Custom Homes (BCCH), the contractor, and that there was no evidence proving he used the contract funds contrary to the terms of the contract. We disagree.

The Michigan builders' trust fund act (MBTFA), MCL 570.151 *et seq*., prohibits fraudulent retention of building funds by a contractor:

> Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefor, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of a felony in appropriating such funds to his own use while any amount for which he may be liable or become liable under the terms of his contract for such labor or material remains unpaid, and may be prosecuted upon the complaint of any persons so defrauded, and, upon conviction, shall be punished by a fine of not less than 100 dollars or more than 5,000 dollars and/or not less than 6 months nor more than 3 years imprisonment in a state prison at the discretion of the court. [MCL 570.152.]

Moreover, the act specifies that "appropriation" of construction funds by the contractor-trustee is evidence of intent to defraud:

> The appropriation by a contractor, or any subcontractor, of any moneys paid to him for building operations before the payment by him of all moneys due or so to become due laborers, subcontractors, materialmen or others entitled to payment, shall be evidence of intent to defraud. [MCL 570.153.]

The record is not clear whether BCCH was a sole proprietorship or a corporation; however, under either circumstance, defendant can be held responsible for criminal acts of the entity. *People v Brown*, 239 Mich App 735, 739-741; 610 NW2d 234 (2000); *People v Whipple*, 202 Mich App 428, 431; 509 NW2d 837 (1993). In this case, there was no evidence that any other officers existed for BCCH. While some of the workmen had authority to spend money in the name of BCCH, no one other than defendant had authority to receive funds, and defendant had ultimate responsibility for BCCH's accounts. No other officer or board of directors apparently exist for BCCH. Any misdeed on the part of that entity therefore had to occur with defendant's participation, and he can thus be held liable for its criminal acts. *Brown, supra* at 740.

Defendant's argument that there was insufficient evidence that he used the funds contrary to the act also fails. Although he correctly asserts that the prosecutor must show more than the fact that a laborer, subcontractor, or materialman went unpaid, the prosecutor is not required to prove exactly where the money went, and there is no requirement that the money be spent. *Whipple, supra* at 435-436. When a defendant has retained the funds, or used them in any way other than to pay those identified by the statute, he has appropriated funds for his own use. MCL 570.152.

In the instant case, defendant's own accounting and testimony from witnesses showed that a laborer, subcontractor, or materialman was unpaid at the time defendant sought release from the contract. However, because of the nature of a "time and materials" contract such as exists here, it is possible that $70,000 could be paid and money still be owed without any misdoing by defendant. Even if bills remained unpaid, this is not conclusive proof that funds were misspent. Thus, the proof in this case lies in the accounting and whether the prosecution could prove that not all of the $70,000 went toward contract-related bills.

Although defendant's figures accounted for much of the money, it did not account for all of it, and the prosecutor presented credible evidence that defendant's accounting was highly suspect. Further, even if defendant did comingle his accounts to the extent required to make his figures credible, it must be remembered that the funds paid by the homeowners were essentially held by defendant in trust, and defendant was obliged to handle those funds with the conduct required of a trustee: to "exercise a proper and honest judgment considering the nature and object of the trust." MCL 570.151; *Whipple, supra* at 433; *People v Miller*, 78 Mich App 336, 342; 259 NW2d 877 (1977), quoting *Chambers v Chambers*, 207 Mich 129, 136; 173 NW 367 (1919).

In short, the prosecutor's burden of proving that defendant misappropriated the funds, without proof of how the money was used, is a difficult one, but in this case it was satisfied by showing that $70,000 was paid in but only some of that amount was paid out. Therefore, the

trial court did not err in finding the prosecutor's case sufficient to overcome defendant's motions.

Defendant next argues that the prosecutor improperly introduced character evidence when two witnesses testified concerning defendant's failure to pay one of the subcontractors on an unrelated worksite. An unpreserved claim of prosecutorial misconduct is not reviewed unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Although defendant objected to one witness on other grounds, that objection was overruled and no objection was made to the testimony here in dispute. The testimony of this witness was not clearly damaging because it implied that the homeowner at the second site was admittedly responsible for the bill. The other witness' testimony was of no assistance to the prosecution. Finally, our review of the record clearly demonstrates that there was sufficient evidence of defendant's guilt and that any prejudice resulting from such testimony did not amount to a miscarriage of justice.

Defendant's assertion that other testimony unfairly prejudiced his case is likewise without merit. He argues he was prejudiced by evidence that the roof was off so long that the house was damaged, that some of the work was in violation of code and had to be redone, and that he paid some workers without deducting taxes – all in attempt to show he was a "bad man." The quality of the work was not at issue and therefore the evidence had little probative value. Rather, the testimony was res gestae evidence of the "complete story" and mainly served to illustrate how costs could have escalated. We find that the evidence does not cumulate to the level of plain error, and was not outcome determinative. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Finally, defendant argues that prosecutorial misconduct during closing argument, in the form of reliance on inadmissible evidence, character evidence, and improper vouching for credibility resulted in the jury's guilty verdict. We disagree. Defendant failed to object to the prosecutor's closing remarks; therefore, this Court reviews the claim for plain error that affected his substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Taken in context, it is apparent that the prosecutor was merely arguing that the changes made to the original plans could not account for all the money that had been spent because they were largely completed after defendant left the job. The prosecutor also commented in rebuttal on a matter raised by defendant during defense counsel's closing argument. The prosecutor may comment on otherwise impermissible subjects when they are previously raised by the defendant. *People v Potra*, 191 Mich App 503, 513; 479 NW2d 707 (1991). Defendant presents no authority in support of his assertion that the prosecutor impermissibly expressed his personal opinion when he commented on how the later accounting accounted for over twice as many hours of labor as the earlier accounting, and he does not explain how this comment, not objected to at the time, prejudiced the outcome of the case. Hence, this issue is considered abandoned. See *People v Sowders*, 164 Mich App 36, 49-50; 417 NW2d 78 (1987). Finally, defendant argues that the prosecutor improperly invited the jury to disregard testimony from defense witnesses simply because it came from a defense witness. While it does not appear to us that such was the case, we point out that in a closing argument the prosecutor may properly argue whether a witness should or should not be believed. See *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 225 (1984).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh