

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERARD FOURNIER,

Defendant-Appellant.

UNPUBLISHED

October 14, 2004

No. 247533

Monroe Circuit Court

LC No. 02-032000-FH

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of larceny by false pretenses over \$100, MCL 750.218. We affirm.

Defendant argues that the evidence was not sufficient to support the conviction because it did not establish that he made a false representation about a present or past fact. After de novo review, we disagree. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

To prove larceny by false pretenses over \$100, the prosecutor must establish that (1) the defendant used a pretense or made a false statement about past or then existing facts and circumstances, (2) knowing it was false, (3) with the intent to defraud someone, (4) which was relied on by the accuser, (5) causing the accuser to lose money or other valuable thing, (6) that had a market value of over \$100 at the time of the crime. See *People v Lueth*, 253 Mich App 670, 680-681; 660 NW2d 322 (2002). Defendant disputes that the first element was proven beyond a reasonable doubt since his alleged intent was to dishonor promises to procure medical services for the victim and to invest the victim's money, and such intent was not a misrepresentation of a present or past fact.

However, the evidence included that defendant made several false statements about past and then existing facts and circumstances with the intent to lead the victim to believe that he was capable of (1) procuring particular medical treatment and (2) making knowledgeable financial investments. Defendant falsely represented to the victim that he was a former CIA agent and thus had special access to physicians at Bethesda Hospital and the Mayo Clinic. In reliance on those representations, the victim gave defendant the requested "deposits" to secure those services on her behalf. Defendant also falsely represented that he was the CEO of his own finance company located in Florida, and that he was a millionaire with a mansion in France and a condominium in Vancouver as a consequence of his financial prowess. In reliance on those

representations, the victim gave defendant large amounts of money to “invest” on her behalf. In sum, viewing the evidence in a light most favorable to the prosecution, a reasonable jury could find that defendant made false statements about past or then existing facts and circumstances, knowing they were false, with the intent to defraud the victim, which the victim relied on, causing her to give defendant more than \$100, that she did not recover. See *Johnson, supra*.

Next, defendant argues that the due process clause barred his prosecution because the lengthy delays in arrest and extradition caused him to suffer severe prejudice; therefore, his motion to dismiss should have been granted. We disagree. This Court reviews a trial court’s ruling on a motion to dismiss for an abuse of discretion. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998).

To establish a due process violation in the context of prearrest delay a defendant must demonstrate actual and substantial prejudice to his right to a fair trial and that the prosecution intended a tactical advantage. *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000); *Adams, supra* at 132-135. Here, the victim filed a complaint in Michigan on or about May of 1999, against defendant who resided in Florida. A warrant was authorized in Michigan in September of 1999, and apparently defendant was arrested in Florida in December of 1999. The record is unclear as to what occurred thereafter; defendant has failed to cite to the location in the record where the issue was pursued to a final determination in the trial court. See MCR 7.212(C)(7). It appears, however, that defendant agreed to turn himself in to authorities in Michigan if he was released from a Florida jail. Defendant was released but did not turn himself in and he was eventually arrested on the same warrant. It appears that defendant contested extradition to Michigan, but was eventually extradited in March of 2002. Defendant claims that he was prejudiced by the delays “because both his memory and [the victim’s] memory of the incident was impaired.” It is well established that a general claim that the memories of witnesses have suffered is insufficient to demonstrate actual and substantial prejudice. *Crear, supra*. Accordingly, this issue is without merit.

Next, defendant argues that the prosecutor engaged in misconduct by improperly shifting the burden of proof during cross-examination of defendant and arguing facts not in evidence during closing argument. We disagree. Prosecutorial misconduct issues are decided case by case. The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context and in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Here, defendant testified that the money the victim gave to him was necessary for him to secure medical treatment on her behalf. In response, the prosecutor questioned whether he had any records, in light of the fact that several defense subpoenas were issued, to support his claim that the money was necessary or that he made any attempt to procure the medical services and defendant stated that he did not have such records. This question was not improper; a challenge to the validity of defendant’s evidence does not shift the burden of proof, i.e., the prosecutor may comment on the defendant’s failure to present evidence to corroborate his own testimony. *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995). Defendant also testified that any money the victim gave him was related to her moving from Michigan to Florida to work for him in his medical management billing corporation. During closing argument, the prosecutor

commented on defendant's failure to produce any evidence to support these claims, including that such a corporation existed. Again, and for the same reason, such comment was not improper. Further, defendant's claim that the prosecution argued facts not in evidence during closing argument does not warrant relief. The prosecutor merely made a reasonable inference based on the evidence presented. See *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). And, the trial court issued the proper curative instructions to the jury. In sum, defendant was not denied a fair and impartial trial as a consequence of prosecutorial misconduct.

Defendant's final issue on appeal—that he was entitled to a remand for determination of the correct amount of restitution owed to the victim—was rendered moot by this Court's order granting defendant's motion for remand for an evidentiary hearing on the matter. *People v Fournier*, unpublished order of the Court of Appeals entered February 17, 2004 (Docket No. 247533). No further arguments were raised following the hearing and amendment of the judgment of sentence.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter