

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CATHERINE MARIE BARNES,

Defendant-Appellant.

UNPUBLISHED

December 20, 2007

No. 273570

Oakland Circuit Court

LC No. 2006-207384-FH

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from her conviction and sentence for embezzlement of over \$20,000, MCL 750.174(5)(a).¹ We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was the vice-president of finance at Blue Rock Management Company. The prosecution alleged that defendant made numerous unauthorized payments to herself and, because she was in charge of payroll, this was easily done. Defendant countered that she only paid herself authorized bonuses and reimbursements for mileage and expenses. She argued that the embezzlement charges were the result of retaliation because she questioned the company's CEO about dishonest financial statements.

Defendant first argues that she was denied the effective assistance of counsel at trial. We disagree. Because there was no *Ginther* hearing, our review is limited to plain errors on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and the failure to call witnesses or present other

¹ This Court previously denied defendant's motion to remand for a *Ginther* hearing, *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973), for defendant's failure to demonstrate by affidavit or offer of proof the facts to be established at a hearing. *People v Barnes*, unpublished order of the Court of Appeals, entered February 2, 2007 (Docket No. 273570).

evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Odom*, 276 Mich App 407, 415-417; 740 NW2d 557 (2007); *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defense counsel's failure to excuse two potential jurors with law enforcement ties during voir dire was not improper, especially where the jurors stated that those ties would not affect their ability to be fair and impartial. Defendant argues that defense counsel was not adequately prepared for trial because he failed to: (1) contact other company employees to see whether they were compensated in a similar manner as defendant; (2) fully interview the only witness for defendant until the day of trial; (3) subpoena documents from the company, which would have shown she had receipts for all reimbursement and would have shown the company's dire financial situation; (4) prepare defendant for her testimony, resulting in her being subject to brutal cross-examination; and (5) object to certain instances of prosecutorial misconduct.

The record demonstrated, however, that defense counsel was thwarted in his efforts to contact other company employees. They were not cooperative because they were still employed by the company. Defense counsel was only able to speak to his defense witness on the day of trial because the witness was involved in other litigation with the company and needed advice from his own attorneys regarding whether to testify. The record in no way supports defendant's contention that she was unprepared to testify, and defense counsel ably examined defendant and presented her theory of the case. While cross-examination may have been difficult, defendant provided reasonable answers to all discrepancies. Contrary to defendant's assertion, defense counsel did his best to procure documents from the company, but one of the central issues of the case was whether such documents even existed. Finally, defense counsel was under no obligation to object to actions by the prosecutor where, as shown below, such actions did not amount to prosecutorial misconduct. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Defendant was also not denied a fair trial because of prosecutorial misconduct. Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objected below, unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Nevertheless, a review of the record demonstrates that defendant's claim of prosecutorial misconduct is meritless. Opening statements is the appropriate time to state the facts that will be proven at trial. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). The prosecutor was within his right to set forth his theory of the case. Defendant's cross-examination was also appropriate. The prosecutor was free to comment on the failure of defendant to produce evidence on which she relied. *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005). The prosecutor's statement summarizing the testimony of a rebuttal witness was a fair comment on the witness's testimony. Finally, the prosecutor never made any reference to any uncharged crimes.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder