

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CYNTHIA ULDINE LALONE-SITZLER,

Defendant-Appellant.

UNPUBLISHED
February 12, 2008

No. 275016
Wayne Circuit Court
LC No. 06-009631-01

Before: Fitzgerald, P.J., and Murphy and Borrello, J.J.

PER CURIAM.

Following a bench trial, defendant was convicted of embezzlement by an agent over \$20,000, MCL 750.174(5)(a), and was sentenced to five years' probation. She appeals as of right. We affirm.

Defendant's conviction arises from her alleged embezzlement from a business owned by her former husband, the victim, during the marriage. Defendant worked as a secretary at the business.

I

Defendant first argues that the trial court abused its discretion by asking inappropriate questions of defendant during direct examination by defense counsel. She contends that these questions, among other evidence, demonstrate bias on the part of the trial court, and that the trial court inappropriately shifted the burden to the defense to produce certain documents to support defendant's testimony. We disagree.

"This state encourages litigants to seek a fair and accurate trial the first time around..." *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999), citing *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994). Issues are required to be raised below in order to be considered on appeal. Since there were no objections to most of the trial court's interrogations of defendant or the prosecution's exhibit 4, these issues are not preserved for appeal. Because defense counsel did appear to object to a line of questioning pertaining to the existence and production of certain documents, that issue is preserved.

Unpreserved issues are to be reviewed by this court for plain error. *Carines*, *supra* at 762-763. This Court reviews preserved objections to a trial court's evidentiary rulings for an

abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, claims of trial court bias are reviewed de novo, and “[p]ortions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole.” *People v Paquette*, 214 Mich App 335, 340; 543 NW2d 342 (1996), citing *People v Collier*, 168 Mich App 687, 697-698; 425 NW2d 118 (1988).

The record does not support defendant’s claim that the trial court prevented defense counsel from cross-examining the complainant. The only objections raised by the prosecutor and sustained by the court pertained to questions that were asked and answered. The other objection pertained to the divorce action between defendant and the victim on the grounds of relevance. After a discussion on the record with the victim sequestered, the trial court overruled that objection and allowed defense counsel to proceed with his line of questioning despite questioning its relevance.

Defendant also challenges the trial court’s questioning of defendant as to whether or not she was authorized to take money from the company.

Q. [THE COURT] You said everything you took was authorized. You were authorized to just take the money from the Company and use it as you wanted to; is that what you just said?

A. For the home, yes.

Q. But you used some of it for drugs.

A. Yes I did.

Q. Okay. Was that authorized?

A. I don’t believe so.

Q. You don’t believe so? Are you sure? Maybe he authorized you to buy some drugs with that.

A. No.

Another line of questioning referenced the testimony of the company’s accountant and missing bank statements. The trial court again discussed with defendant her alleged authorization to write checks for the company and use of the money from those checks.

Defendant did not object to this these lines of questioning. In order to determine if this questioning was plain error “three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *Carines, supra* at 763. Here, the court’s line of questioning was clearly an attempt to determine whether defendant was authorized to take the money, and clearly was within the scope of his duties as fact finder. *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 153; 486 NW2d 326 (1992). Even assuming the line of questioning was improper, defendant has failed to demonstrate any actual prejudice to a substantial right as a result of the questioning.

Defendant also challenges a line of questioning with regard to receipts defendant claimed she received when using the money from writing checks to pay for home improvements that she argues were discussed with and approved by the claimant. She claimed that the victim had the receipts and would not give them to her. The trial court stated that he would like to see the receipts because the receipts were essential to defendant's defense. Defense counsel objected, stating that it was not his burden to produce the receipts. Ultimately, the trial court clearly stated that he could rely on and give weight to defendant's testimony without the receipts. We fail to see how the court's inquiry shifted the burden of proof to the defense.

Defendant asserts that the court's questioning of defendant demonstrates the court's bias. We disagree. The questions presented to defendant merely served the purposes of clarifying defendant's testimony and ascertaining facts. "The issue of bias or prejudice should come to this Court's attention only when a litigant can show that the trial judge's views controlled his decision-making process." *In re Forfeiture*, *supra* at 153. There is no showing by defendant that any views of the case by the trial court actually impacted the decision making process.

Defendant also contends that the trial court inappropriately limited direct examination of defendant by stopping defense counsel from continuing to ask about the divorce proceedings on the ground that the evidence was not relevant. Defendant contended that the only reason the victim accused defendant of embezzlement was to get defendant out of the house they were jointly awarded in the divorce matter. The trial court did not abuse its discretion in concluding that the divorce proceedings were not relevant to whether defendant embezzled the money. Additionally, defense counsel had an opportunity to question the victim regarding the divorce proceedings over the prosecution's objection and had the judgment of divorce entered into evidence. The trial court did not abuse its discretion by refusing to allow defense counsel to continue with questioning regarding the divorce proceedings.

Finally, defendant claims that the trial court demonstrated bias by refusing to admit defense exhibit B and admitting the prosecution's exhibit 4. Defendant did not object to the admission exhibit 4. Therefore, defendant did not preserve challenge to its admission. Additionally, this Court need not address the exclusion of defense exhibit B, as defendant provides no explanation of its contents, does not explain its relevance, and does not demonstrate prejudice as a result of its exclusion.

II

Defendant next argues that the trial court abused its discretion when it denied defendant's motions to adjourn that were based on the alleged unavailability of evidence. We disagree. This Court reviews a trial court's denial of a motion to adjourn for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003).

MCR 2.503(C) provides:

(1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.

(2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

(3) If the testimony or the evidence would be admissible in the proceeding, and the adverse party stipulates in writing or on the record that it is to be considered as actually given in the proceeding, there may be no adjournment unless the court deems an adjournment necessary. [MCR 2.503(C)]

Here, defense counsel moved for two adjournments. The first request for an adjournment followed defense counsel's cross-examination of the victim regarding defendant's role at the business. The victim testified that defendant was a secretary and was not the corporate secretary. When the victim indicated that he did not bring a copy of the corporate bylaws, which he recalled did not name a corporate secretary, defense counsel requested an adjournment to enable him to secure a copy of the corporate bylaws. The trial court denied this motion because defense counsel knew in advance that the corporate bylaws were important to his line of questioning, but failed to secure their production before trial.

Second, defense counsel requested time to seek records that defendant referenced in her testimony, namely receipts from contractors noting cash payments from defendant for home renovations. Defense counsel informed the trial court that he did not subpoena the records despite their obvious value to the defense. Defense counsel demonstrated a lack of diligence by failing to subpoena before trial documents clearly essential to his client's defense. MCR 2.503(C)(2). Consequently, the trial court did not abuse its discretion in refusing to grant an adjournment.

III

Defendant also argues that the trial court abused its discretion when it excluded defendant's testimony that, during the divorce settlement negotiations, the victim promised that his claims against her for embezzlement "would all go away." Defendant argued at trial that these statements fall within the state of mind exception to hearsay. This evidentiary challenge is reviewed for an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). Under MRE 803(3), "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)..." is not excluded by the hearsay rule.

However, "[e]vidence which is not relevant is not admissible." MRE 402. Even if the victim's statements impacted defendant's state of mind and caused her to believe she would not face criminal charges for her embezzlement, the statements are not relevant. The victim made the alleged promises during divorce settlement negotiations. Whether or not these statements were made is not relevant to whether defendant embezzled funds. Accordingly, we conclude that the trial court did not abuse its discretion when it declined to admit defendant's testimony.

IV

Finally, defendant argues that the prosecutor failed to present legally sufficient evidence to support a finding that defendant embezzled the statutory minimum amount of \$20,000. We disagree.

This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). This Court “must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant claims that the prosecution failed to present legally sufficient evidence that the checks admitted into evidence were cashed or that defendant converted the proceeds from those checks for her unauthorized, personal use. However, defendant admitted that she handwrote checks, endorsed them and used the proceeds from those checks to purchase cocaine. The victim testified that defendant took “around \$45,000.” After analyzing the corporation’s financial records, the company’s accountant found that defendant took \$45,383.06. The accountant explained that defendant voided authorized checks and wrote checks to herself for similar amounts, wrote duplicate paychecks to herself and wrote checks to cash that were not accounted for. This evidence was admitted without objection.

The victim testified that none of the \$30,000 to \$35,000 defendant claims was spent on authorized uses was actually used for such purposes. Evidence was presented showing that it was the company’s policy to print authorized checks electronically, not to handwrite them as was the case with some of the checks. Evidence was also presented that defendant endorsed these checks payable to herself and cash. The victim testified that defendant was never authorized to endorse checks for the company. Viewed in a light most favorable to the prosecution, this evidence clearly shows beyond a reasonable doubt that the \$30,000 to \$35,000 that defendant claims was authorized was, in fact, embezzled. This evidence, together with evidence regarding the amounts defendant admitted to embezzling, is sufficient to show that defendant embezzled at least \$20,000.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ William B. Murphy

/s/ Stephen L. Borrello