STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 17, 2009
v	No. 281739 Wayne Circuit Court
CLARENCE WARD VANCAMP, JR., Defendant-Appellant.	LC No. 06-011706-FH

Before: Jansen, P.J., and Borrello and Stephens, JJ

PER CURIAM.

Defendant was convicted by a jury of writing an insufficient funds check of $500 or more, MCL 750.131(3)(c), and sentenced to three years' probation. He appeals as of right. We affirm.

Kenneth Walker hired defendant and his business partner, Anthony Palone, to do interior decorating work. Defendant subsequently asked Walker for a $20,000 loan. According to Walker, he was told that the money would be used to purchase items for a different customer at a discounted rate. Walker loaned the money to defendant in December 2004, pursuant to a written agreement that required defendant to give Walker a check for $20,000 to repay the loan amount, postdated to January 15, 2005, and to pay interest for the loan by purchasing a chair for Walker. Walker testified that he never received repayment of the $20,000 or the chair, but later agreed to accept some work in lieu of the chair. Defendant's checking account, which had a balance of $4.78 on January 15, 2005, and never had a balance of $20,000 or more, was closed in April 2005.

On appeal, defendant argues that the evidence was insufficient to prove the requisite intent to defraud to support a conviction under MCL 750.131, inasmuch as his alleged fraudulent conduct related to a future event or promise. The trial court rejected this argument when denying defendant's posttrial motion for a directed verdict.

We review the trial court's denial of defendant's motion for a directed verdict de novo. *People v Martin*, 271 Mich App 280, 319; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008). We must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

The proper meaning of a criminal statute is also reviewed de novo as a question of law. *Id*. The primary task in construing a statute is to determine the Legislature's intent. *Id.* at 114. The words used in the statute provide the most reliable evidence of the Legislature's intent. *Id.* Further, MCL 8.3a provides that

> [a]ll words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

A lay dictionary may be used as an aid in determining the definition of common words or phrases that lack a unique legal meaning. *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007). As far as practical, effect must be given to every word, phrase, and clause. *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999); *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). If statutory language is unambiguous, the statute must be enforced as written. *Gillis*, *supra* at 115. Provisions of the Penal Code are construed "according to the fair import of their terms, to promote justice and to effect the objects of the law." MCL 750.2. Under the rule of lenity, a court should mitigate punishment where a criminal statute is unclear, but "[t]he rule of lenity applies only in the circumstances of an ambiguity, or in the absence of any firm indication of legislative intent." *People v Denio*, 454 Mich 691, 699- 700; 564 NW2d 13 (1997), quoting *People v Wakeford*, 418 Mich 95, 113-114; 341 NW2d 68 (1983). A statute is ambiguous if it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning. *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008).

Defendant was convicted of violating MCL 750.131, which provides for two forms of the offense:

> (1) A person shall not make, draw, utter, or deliver any check, draft, or order for the payment of money, to apply on account or otherwise, upon any bank or other depository *with intent to defraud* and *knowing* at the time of the making, drawing, uttering, or delivering that the maker or drawer does not have sufficient funds in or credit with the bank or other depository to pay the check, draft, or order in full upon its presentation.
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> (2) A person shall not make, draw, utter, or deliver any check, draft, or order for the payment of money, to apply on account or otherwise, upon any bank or other depository *with intent to defraud* if the person does not have sufficient funds for the payment of the check, draft, or order when presentation for payment is made to the drawee. This subsection does not apply if the lack of funds is due to garnishment, attachment, levy, or other lawful cause and that fact was not known to the person when the person made, drew, uttered, or delivered the check, draft, or order. [MCL 750.131 (emphasis added).]

Evidentiary rules pertaining to the intent to defraud element are contained in MCL 750.312[1] and MCL 750.313.[2] A defendant's intent to deceive can be inferred from the evidence, and minimal circumstantial evidence is sufficient to prove intent. *People v Dewald*, 267 Mich App 365, 372; 705 NW2d 167 (2005).

In this case, defendant was charged with violating subsection (2) of MCL 750.131, which was first added to the statute by 1962 PA 65. Because our Supreme Court's interpretation of the statute in *People v Jacobson*, 248 Mich 639; 227 NW 781 (1929), precedes the 1962 amendment, defendant's reliance on *Jacobson* as support for his argument that a conviction may not be based on a postdated check is misplaced. The statute in effect at the time *Jacobson* was decided contains the same intent and knowledge elements now contained in MCL 750.131(1). Within this context, the Supreme Court construed the statute as prohibiting a maker from falsely representing, expressly or impliedly, that there are funds on deposit from which a bank will pay a check on presentation. The Court concluded that "[i]t is not possible to thus perpetrate a fraud if the check is given by the maker and accepted by the payee with the latter's full knowledge that the maker does not then have either a deposit or credit at the bank which will result in payment of the check on presentation." *Id.* at 642-643.

Subsections (1) and (2) of MCL 750.131 both prohibit fraud incident to the giving of a check. Subsection (2) of MCL 750.131, unlike subsection (1), does not require that a person make a known false representation, expressly or impliedly, regarding existing funds on deposit. Read in its proper grammatical context, the word "if" in subsection (2) denotes conditional language. "If" means "in case that; granting or supposing that; on condition that." *Random House Webster's College Dictionary* (1997), pp 648-649. Thus, subsection (2) conditions criminal liability on a future event, namely, the defrauding party not having sufficient funds for payment "when presentation for payment is made to the drawee." Subsection (2) unambiguously

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[1] MCL 750.132 provides:

> As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, when presented in the usual course of business, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within 5 days after receiving notice that such check, draft or order has not been paid by the drawee.

[2] MCL 750.313 provides:

> Where such check, draft or order is protested, on the ground of insufficiency of funds or credit, the notice of protest thereof shall be admissible as proof of presentation, non-payment and protest, and shall be prima facie evidence of intent to defraud, and of knowledge of insufficient funds or credit with such bank or other depository.

reflects the Legislature's intent to permit a conviction based on a false promise regarding future conduct, so long as there is a present intent to defraud. Accordingly, the giving of a postdated check that the maker never intends to honor and fails to have sufficient funds on hand when it is presented for payment satisfies MCL 750.131(2).

Contrary to defendant's argument on appeal, our Supreme Court's construction of the general false pretenses statute, MCL 750.218, in *People v Cage*, 410 Mich 401, 405-406; 301 NW2d 819 (1981), as precluding a conviction based on a false statement of promise or intention absent a legislative amendment expressing the intention to incorporate this form of misrepresentation, does not affect the interpretation of MCL 750.131(2). We recognize that in *People v LaRose*, 87 Mich App 298, 304; 274 NW2d 45 (1978), this Court construed MCL 750.131 as carving out an exception to the general false pretenses statute. However, *LaRose* did not involve a conviction for the form of the offense set forth in subsection (2) of MCL 750.131. Rather, the defendant's conviction was based on his intent to defraud a bank by presenting an insufficient funds check with knowledge that the account did not have sufficient funds to cover it. *Id.* at 301. This conduct falls within the scope of subsection (1) of MCL 750.131(1).

We also recognize that statutes that relate to the same subject or share a common purpose are in pari materia. *Sinicropi v Mazurek*, 273 Mich App 149, 157; 729 NW2d 256 (2006). They are to be construed as one law, even if they were enacted at different times and without specific reference to each other, with the objective of giving effect to the legislative purpose found in harmonious statutes. *Id*. Here, however, 2004 PA 154 amended the general false pretenses statute was to allow a conviction predicated on a "representation regarding the intention to perform a future event or to have a future event performed." MCL 750.218(9). Thus, the general false pretenses statute currently permits a conviction based on a false promise.

And while enacted earlier, giving effect to the 1962 amendment of MCL 750.131 and the addition of the offense prescribed in subsection (2), it is apparent that the Legislature intended to permit a conviction based on a false promise regarding future conduct, so long as there is a present intent to defraud. In pertinent part, subsection (2) provides for criminal liability when the person did "make, draw, utter or deliver any check . . . with intent to defraud if the person does not have sufficient funds for the payment of the check . . . when presentation for payment is made to the drawee." Because the statute is unambiguous, it is to be enforced as written. *Gillis, supra* at 115.

Accordingly, the mere fact that this case involves a postdated check does not preclude a finding of criminal liability under MCL 750.131(2). There are many reasons why a maker may give a postdated check, only one of which is a maker's expectation that the funds will be supplied before the stated date on the check. The delivery of a postdated check, even if there are insufficient funds on deposit to cover the check at the time of delivery, can constitute a representation by the maker to the payee that there will be funds on deposit on the day that the check is cashed. *State v Etheridge*, 74 Wash 2d 102, 107-108; 443 P2d 536 (1968). The evidence in this case, viewed in a light most favorable to the prosecution, permitted a rational trier of act to infer that defendant falsely represented, expressly or impliedly, his intention to have funds on deposit when he delivered the postdated check to Walker, for the purpose of defrauding Walker of his money. Thus, the evidence was sufficient to establish the requisite intent to defraud element to sustain a conviction under MCL 750.131(2). Therefore, the trial court correctly denied defendant's motion for a directed verdict.

We find no merit to defendant's argument that his right to due process was violated by a retroactive change in the rules set forth in *Jacobson* and *Cage, supra*. The due process concepts that limit ex post facto judicial decisions regarding the applicability of a criminal statute to a defendant are based on the core principles of notice, foreseeability, and the right to fair warning. *United States v Scott*, 529 F3d 1290, 1305 (CA 10, 2008); *Niederstadt v Nixon*, 505 F3d 832, 836 (CA 8, 2007). Our interpretation of MCL 750.131(2) does not change any rule of law established by our Supreme Court in *Jacobson* or *Cage, supra.* Nor would it be appropriate to do so, given that this Court is bound to follow precedent established by our Supreme Court. *Solomon v Highland Park Civil Service Comm*, 64 Mich App 433, 436; 236 NW2d 94 (1975). Defendant has not established that his conviction under MCL 750.131(2) presents any due process concerns. *People v Schaefer*, 473 Mich 418, 444 n 80; 703 NW2d 774 (2005), mod in part on other grounds in *People v Derror*, 475 Mich 316, 334; 715 NW2d 822 (2006).

Next, relying on the trial testimony of Palone, a defense witness, defendant argues that he is entitled to a directed verdict based on a provision in the Deferred Presentation Service Transactions Act (DPSTA), MCL 487.2121 *et seq.*, which precludes criminal penalties related to deferred presentation service transactions. See MCL 487.2158(4). Because defendant did not raise any claim based on the DPSTA in the trial court, this issue is unpreserved and our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The DPSTA was enacted by 2005 PA 244, effective November 28, 2005, well after the date when Walker entered into the loan agreement with defendant. It permits a licensee to enter into certain transactions to hold a customer's check for a period of time, in exchange for fee. See MCL 487.2122(1)(g) and MCL 487.2153(1). Here, even if Palone's testimony regarding Walker's business activities is considered, Walker was not and could not have been a licensee when he entered into his agreement with defendant. We therefore reject defendant's argument that the DPSTA applies to his transaction with Walker.

Next, defendant argues that the evidence was insufficient to establish the "presentation" element of MCL 750.131(2). We disagree. The requirement of "presentation" is part of the condition that there be sufficient funds for payment "when presentation for payment is made to the drawee." Although "presentation" is not defined in the statute, the relevant lay definition of "presentation" is "the presentment of a bill, note, or the like." *Random House Webster's College Dictionary* (1997), p 1030. "Presentment" means "the presenting of a bill, or the like, as for acceptance or payment." *Id.* Among the definitions of the word "present" is "to hand over or submit (a bill or check)." *Id.* Therefore, the lay definition of "presentation" requires that a person take some type of affirmative action to request payment of the check from the drawee.

But given that the word "presentment" has acquired a unique meaning under the law applicable to negotiable instruments, such as checks, we find merit to defendant's argument that it would be appropriate to consult Article 3, MCL 440.4301 *et seq.*, and Article 4, MCL 440.4101 *et seq.*, of the Uniform Commercial Code (UCC), to determine how a person presents a check to a drawee for payment. MCL 8.3a; *Thompson, supra* at 151-152. The UCC was enacted by 1962 PA 174, effective January 1, 1964. Article 4 applies to bank deposits and collections. Article 3 is intended to apply to all negotiable instruments, with limited exceptions, and governs in the event of a conflict with Article 4. See MCL 440.3102; *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 72; 711 NW2d 340 (2006). Article 3 defines "presentment" as including a

demand for payment "by or on behalf of a person entitled to enforce an instrument."[3] MCL 440.3501(1). The presentment "may be made by any commercially reasonable means, including an oral, written, or electronic communication." MCL 440.3501(2)(a).

We find it immaterial whether we use either the UCC or lay definition of "presentment" for purposes of this case, because there was sufficient evidence of presentation under either definition. Even assuming for purposes of review that Walker's testimony regarding the phone calls that he made to the bank in January 2005, to determine whether there were adequate funds on account to cover the check, was insufficient to establish a "presentation for payment" under MCL 750.131(2), the evidence that Walker went through the formal process of attempting to cash the check through the bank was sufficient to establish that the requisite presentation was made to the drawee.

We reject defendant's argument that the presentation was ineffective because Walker did not formally submit the check for payment until more than six months after the date of the check. Neither MCL 750.131(2) nor the UCC impose a six-month time limit on presentment. Although the UCC requires that the person making the presentment be entitled to enforce the instrument, MCL 440.3301 provides:

> "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 3309 or 3418(4). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

The "holder" is "the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession." MCL 440.1201(20); see also MCL 440.3101 (discussing the applicability of general definitions in Article 1 to Article 3). Walker was a holder and, therefore, entitled to enforce the check for payment.

Contrary to defendant's argument on appeal, MCL 440.4404 does not affect a person's authority to make a presentation, but rather concerns a bank's duty to its customer with respect to a check that is presented six months after its date. Because there is no requirement in MCL 750.131(2) that a bank make or refuse payment, MCL 440.4404 is immaterial to defendant's conviction. Similarly, defendant has failed to establish anything about the rules governing dishonorment in MCL 440.3502, or the definition of an overdue check in MCL 440.3304(1)(b), that affect a person's authority to make a presentation. Although an overdue check might affect a person's or bank's ability to claim "holder in due course" status under MCL 440.3302, it does affect a person's authority to present a check for payment.

[3] "Instrument" is defined as "a negotiable instrument." MCL 440.3104(2). "Negotiable instrument" means "an unconditional promise or order to pay a fixed amount of money . . . ." MCL 440.3104(1).

In sum, subject to certain exceptions such as garnishment and legal cause that do not apply here, MCL 750.131(2) only requires that there be insufficient funds for the payment of the check when it is presented for payment to the drawee. Because the evidence, viewed in a light most favorable to the prosecution, established that defendant did not have sufficient funds for the payment of the check when Walker presented it for payment, there was sufficient evidence to support defendant's conviction.

Defendant alternatively argues that MCL 750.131(2) is void for vagueness because it does not impose a time restriction on when a person can make a presentation for payment. Because defendant did not challenge the constitutionality of the statute in the trial court, this issue is unpreserved and, accordingly, our review is for plain error affecting defendant's substantial rights. *Carines, supra* at 763. Vagueness challenges that do not implicate the First Amendment are examined in light of the facts of the particular case. *People v Lino*, 447 Mich 567, 575; 527 NW2d 434 (1994). "A statute is unconstitutionally vague if persons of ordinary intelligence must necessarily guess at its meaning." *People v Pierce*, 272 Mich App 394, 398-399; 725 NW2d 691 (2006).

A person of ordinary intelligence would not have to guess at the meaning of MCL 750.131(2). Contrary to what defendant argues, the statute does not penalize a person's failure to fund a stale check, but rather the initial making, drawing, uttering, or delivering the check with an intent to defraud. Had the Legislature intended to limit the time when a defrauded party must present a check for payment, it could have added this limitation to the statute. Further, as applied to the particular facts of this case, the statute is not void for vagueness because defendant's conduct clearly falls within the scope of MCL 750.131(2). Thus, defendant has failed to show a plain error. *Carines, supra* at 763; *Pierce, supra* at 398-399.

Finally, defendant argues that trial counsel was ineffective for failing to move for a directed verdict at trial, and failing to raise any claim based on the DPSTA. Having considered defendant's challenges to the sufficiency of the evidence on appeal and having concluded that the DPSTA does not apply to this case, defendant's ineffective assistance of counsel claims necessarily fail. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Trial counsel was not required to make futile arguments or motions. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens