

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARTER CONRAD GREEN,

Defendant-Appellant.

UNPUBLISHED

September 22, 2009

No. 284463

Wayne Circuit Court

LC No. 07-013655-FH

Before: Saad, C.J., and Sawyer and Borrello, JJ.

PER CURIAM.

The court conducted a bench trial and convicted defendant of conducting a criminal enterprise (racketeering), MCL 750.159i(1), and three counts of uttering and publishing, MCL 752.249. The court sentenced defendant to concurrent prison terms of 45 months to 20 years for the racketeering conviction and 3 to 14 years for each uttering and publishing conviction. For the reasons set forth below, we affirm defendant's convictions, but vacate his sentences and remand for resentencing.

I. Facts

Defendant's convictions arise from his involvement in a scheme to convert cemetery trust funds in excess of several million dollars. At trial, the prosecutor theorized that defendant aided in the conversion of funds when he knowingly provided false financial documents to state regulators during their investigation of the trust funds. The documents falsely indicated that trust fund assets were properly invested in his company, Fondren International. Defendant took the position that he had no knowledge of an illegal scheme, that the financial documents that he provided were based on misrepresentations from William Leyton that defendant did not realize were false, and that Leyton was setting defendant up as the "fall guy" for the operation.

II. MRE 404(b) Evidence

Defendant argues that the trial court abused its discretion by admitting evidence of his involvement in prior fraudulent business transactions. We review a trial court's decision to admit evidence under MRE 404(b)(1) for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

To be admissible under MRE 404(b)(1), evidence of prior bad acts must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant to an issue of fact of consequence at trial, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993).

Here, the evidence demonstrated defendant's intent and lack of mistake, both proper purposes under MRE 404(b)(1). Further, defendant's intent was an issue of fact at trial because defendant took the position that he was deceived by Leyton and did not knowingly provide false financial documents. When other acts evidence is offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts be of the same general category. *VanderVliet*, *supra* at 80. Similar to the charged offenses here, the prior acts involved defendant's use of false financial statements in fraudulent business transactions. Thus, the prior acts evidence was logically relevant to a disputed issue at defendant's trial.

Also, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *Crawford*, *supra* at 398. Here, the evidence was significantly probative of defendant's intent, which was the principal issue at trial. More significantly, defendant was tried before the court, not a jury, and a judge is less likely to be influenced by improper considerations.¹ *People v Edwards*, 171 Mich App 613, 619; 431 NW2d 83 (1988). Under the circumstances, the trial court did not abuse its discretion in admitting the evidence of defendant's prior business transactions under MRE 404(b)(1).

III. Directed Verdict

Defendant contends that the trial court erred in denying his motion for a directed verdict of acquittal. In reviewing the denial of a motion for a directed verdict, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the charged crimes were proven beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Defendant says that he could not be convicted of uttering and publishing because there is no evidence of presentation for payment, which defendant claims is a necessary element of uttering and publishing.

¹ Indeed, the trial court issued a lengthy written opinion detailing its findings of fact and conclusions of law, and explaining its rationale for resolving the disputed issues in the case. A review of that opinion discloses that the court was not improperly influenced by the prior acts evidence.

The trial court convicted defendant of violating MCL 750.249, which at the time the offenses arose provided²:

Any person who shall utter and publish as true, any false, forged, altered or counterfeit record, deed, instrument or other writing mentioned in the preceding section, knowing the same to be false, altered, forged or counterfeit, with intent to injure or defraud as aforesaid, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 14 years.

Defendant's reliance on *People v Hammond*, 161 Mich App 719, 722; 411 NW2d 837 (1987), *People v Grable*, 95 Mich App 20, 24; 289 NW2d 871 (1980), *People v Fudge*, 66 Mich App 625, 631; 239 NW2d 686 (1976), and *People v Kimble*, 60 Mich App 690, 694; 233 NW2d 26 (1975), to argue that presentation for payment is a necessary element of uttering and publishing is misplaced. Unlike this case, each of those cases involved instruments that were capable of being presented for payment. But the statute itself does not contain any "presentation for payment" requirement. Rather, the crime is committed by (1) uttering and publishing as true (2) a false, forged, altered, or counterfeit (3) record, deed, instrument, or other writing mentioned in MCL 750.248 (counterfeit financial transaction device), (4) with the intent to injure or defraud. To "utter and publish" means to offer something as if it is real, whether or not anyone accepts it as real. *People v Harrison*, 283 Mich App 374, 381-382; 768 NW2d 98 (2009). Indeed, this Court has held that a defendant may be convicted of uttering and publishing a false or forged record (that is not capable of being presented for payment) with the intent to defraud. See *People v Cassadime*, 258 Mich App 395, 399; 671 NW2d 559 (2003), and *People v Carter*, 106 Mich App 765, 768; 309 NW2d 33 (1981). Viewed in a light most favorable to the prosecution, the evidence here supported an inference that defendant offered as real three false financial records with the intent to defraud. Therefore, the trial court properly denied defendant's motion for a directed verdict with respect to the three counts of uttering and publishing.

Defendant also argues that he was entitled to a directed verdict on the racketeering charge. The elements of this offense are described as follows in *People v Martin*, 271 Mich App 280, 289; 721 NW2d 815 (2006):

In order to prove a racketeering violation, the prosecution must prove beyond a reasonable doubt that the defendant was employed by, or associated with, an enterprise and knowingly conducted or participated in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity. Pursuant to MCL 750.159f(c), a pattern of racketeering activity means the commission of not less than two incidents of racketeering, to which all of the following characteristics apply:

² After defendant was convicted, MCL 750.249 was amended by 2008 PA 378, effective December 23, 2008.

“(i) The incidents have the same or a substantially similar purpose, result, participant, victim, or method of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated acts.

(ii) The incidents amount to or pose a threat of continued criminal activity.

(iii) At least 1 of the incidents occurred within this state on or after the effective date of the amendatory act that added this section, and the last of the incidents occurred within 10 years after the commission of any prior incident, excluding any period of imprisonment served by a person engaging in the racketeering activity.”

“Racketeering” is further defined as “committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit” certain enumerated offenses for financial gain. Hence, the prosecution must normally prove the commission of each element of the predicate acts of racketeering, in addition to the other elements of racketeering, in order to prove a racketeering violation. [Citations omitted.]

Here, defendant contends that his actions did not amount to, or pose a threat of, continued criminal activity, as required by 750.159f(c). The evidence showed that defendant participated in the enterprise by providing false financial documents to different entities and investigators on multiple occasions over a lengthy span of time. This evidence is clearly sufficient to support a conviction for racketeering. Therefore, the trial court also properly denied defendant’s motion for a directed verdict with respect to the racketeering count.

IV. Claims of Bias

Defendant also argues that he was denied a fair trial because of judicial bias. Because defendant did not object to the trial court’s conduct or move to disqualify the trial court below, this issue is not preserved. Therefore, our review is limited to plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A party claiming judicial bias bears a heavy burden of overcoming the presumption of judicial impartiality. *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992). Portions of the record may not be taken out of context in an attempt to show a trial court’s bias; rather, the record is reviewed as a whole. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Here, the record does not support defendant’s claim of judicial bias. Though defendant argues that the trial court sometimes interrupted counsel to ask questions, a trial court is permitted to question witnesses to clarify testimony or elicit additional relevant testimony, and the court has greater discretion in questioning witnesses in a bench trial. *In re Forfeiture of \$1,159,420, supra* at 153. Nothing about the trial court’s questioning indicates bias. We also reject defendant’s argument that his claim of bias is supported by the trial court’s rulings against him. Judicial rulings, in and of themselves, almost never constitute a valid basis for a claim of bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible. *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003).

Here, defendant focuses on two evidentiary rulings concerning the relevancy of testimony. Both rulings were made in response to a party's objection, and the court's decisions were based on the purpose and nature of the proposed testimony. Nothing about the court's rulings reflects any favoritism or antagonism by the trial judge. Thus, we find no merit to this issue.

V. Sentence

Defendant avers that he is entitled to resentencing because the trial court improperly considered victims of financial loss as victims for purposes of offense variable (OV) 9, MCL 777.39, and therefore erred in scoring 25 points for this variable on the basis that there were ten or more victims. Because defendant did not object to the scoring of OV 9 on this basis below, this issue is not preserved. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). However, we may review the issue for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

We agree that the trial court plainly erred in scoring 25 points for OV 9. A trial court must score the sentencing guidelines under the version of the guidelines in effect on the date the crime was committed. MCL 769.34(2). The guidelines were scored for defendant's racketeering conviction. Defendant was charged with racketeering based on conduct committed in 2005 and 2006. Under the version of the guidelines in effect at that time, 25 points were to be scored for OV 9 if there were ten or more victims, MCL 777.39(1)(b), but only persons at risk of physical injury, and not financial injury, were to be counted as a victim for purposes of OV 9. *People v Melton*, 271 Mich App 590, 595-596; 722 NW2d 698 (2006). Because there is no evidence that any person was placed in danger of physical injury or loss of life, 0 points should have been scored for OV 9, and the trial court plainly erred in scoring 25 points for this variable. Further, the error affects defendant's substantial rights because it affects the appropriate guidelines range. Therefore, resentencing is required. *People v Sargent*, 481 Mich 346, 351; 750 NW2d 161 (2008).

We disagree with plaintiff that MCL 777.39, as amended by 2006 PA 548 to expressly allow victims of financial loss to be counted as victims for purposes of OV 9, applies to this case. The amendment was effective March 30, 2007. Plaintiff contends that the amendment applies because the amended information listed an offense date of "01/01/2003 – 04/30/2007." However, the racketeering count, for which the guidelines were scored, charged defendant with "knowingly conduct[ing] or participat[ing] in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity, consisting of two or more of the following incidents of racketeering, to wit" Each alleged incident of racketeering listed in the amended information involved conduct committed in either 2005 or 2006. Similarly, the trial court's findings of fact and conclusions of law reveal that it found defendant guilty of racketeering based on conduct committed in 2005 and 2006. Thus, the date of the crime of which defendant was convicted precedes the effective date of MCL 777.39 as amended.

Defendant's convictions are affirmed but his sentences are vacated and we remand for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Stephen L. Borrello