

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AL KELLY,

Defendant-Appellant.

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UNPUBLISHED

November 24, 2009

No. 286953

Washtenaw Circuit Court

LC No. 07-001609-FH

Before: Meter, P.J., and Murphy, C.J., and Zahra, J.

PER CURIAM.

A jury convicted defendant of embezzlement by an agent or trustee of money worth \$20,000 or more, but less than \$50,000, MCL 750.174(5)(a), and larceny by conversion of \$20,000 or more, MCL 750.362; MCL 750.356(2)(a). Defendant appeals as of right. We affirm.

Defendant first argues the evidence provided at trial was insufficient to uphold his convictions. When reviewing an insufficiency of the evidence claim, this Court reviews the evidence de novo. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). “The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. . . . The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

To prove embezzlement by an agent, MCL 750.174, the prosecutor must show:

(1) The money in question must belong to the principal, (2) the defendant must have a relationship of trust with the principal as an agent or employee, (3) the money must come into the defendant's possession because of the relationship of trust, (4) the defendant dishonestly disposed of or converted the money to his own use or secreted the money, (5) the act must be without the consent of the principal, and (6) at the time of conversion, the defendant intended to defraud or cheat the principal. [*People v Lueth*, 253 Mich App 670, 683; 660 NW2d 322 (2002).]

The elements of larceny by conversion, MCL 750.362, are:

(1) [T]he property at issue must have “some value,” (2) the property belonged to someone other than the defendant, (3) someone delivered the property to the defendant, irrespective of whether that delivery was by legal or illegal means, (4) the defendant embezzled, converted to his own use, or hid the property “with the intent to embezzle or fraudulently use” it, and (5) at the time the property was embezzled, converted, or hidden, the defendant “intended to defraud or cheat the owner permanently of that property.” Stated more simply, larceny by conversion occurs “where a person obtains possession of another's property with lawful intent, but subsequently converts the other's property to his own use.” [*People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001), quoting *People v Scott*, 72 Mich App 16, 19; 248 NW2d 693 (1976).]

Additionally, to support each conviction the prosecution must prove that the total value of the property converted exceeds \$20,000. MCL 750.174(5)(a); MCL 750.356(2)(a).

Defendant was hired to be the catering manager of a recently opened, franchise restaurant in 2004. Several months after the general manager, Michael Delly, hired defendant, Delly came to trust defendant and gave him primary responsibility for delivering the daily cash deposits to the bank. For almost two years, Delly did not check the company's bank statements to ensure that each deposit was actually deposited. In August of 2006, Delly compared the company's deposit books against its bank records and discovered many missing deposits. He subsequently confronted and fired defendant. Delly testified that when he did so, defendant admitted that he took the cash. Defendant spoke with Delly and the restaurant's owner about paying the money back, but he never actually returned any cash. In October 2006, Delly gave the company's deposit books and bank statements to the Ann Arbor police. From December 2004 through August 2006, during which defendant had primary responsibility for making the deposits, the deposit books showed 117 entries, totaling \$58,221.04, which were not reflected on the restaurant's bank statements.

Defendant argues the evidence was insufficient to support his convictions because the company had sloppy bookkeeping, and Delly admitted that sometimes, as a result of his own inexplicable errors, the amounts he wrote on the deposit slips did not always match the net cash collected, which appeared on the restaurant's electronically generated daily activity reports. This is essentially an argument that defendant's convictions were against the great weight of the evidence, an issue defendant has neither properly raised nor preserved. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Nevertheless, a verdict will be found to be against the great weight of the evidence if “the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). The standard has not been met in this case.

Delly testified that, regardless of discrepancies between some daily activity reports and deposit slips, the amount he put on the slips always reflected the actual amount of cash that he counted and gave to defendant to deposit. The testimony by the investigating police detective corroborated Delly's testimony. Further, defendant made statements that he blamed himself and that he pocketed the cash instead of depositing it in the bank. Drawing all reasonable inferences and making credibility choices in support of the verdict, *Nowack, supra* at 399-400, we conclude that the evidence presented at trial was sufficient to allow a reasonable jury to find, beyond a

reasonable doubt, that defendant was guilty of both embezzlement and larceny by conversion of more than \$20,000. MCL 750.174(5)(a); MCL 174.362. Specifically, defendant was an agent of the principal, the principal owned the money, the money was provided to defendant based on a relationship of trust, defendant converted the money to his own use without the principal's consent, and defendant intended to defraud the principal. Likewise, the evidence regarding any discrepancies in the company's records did not preponderate so heavily against the verdict that reversal is required. *Musser, supra* at 218-219.

Next, defendant argues that recorded voice messages he left for the restaurant's owner should not have been admitted as evidence because they were offers to settle or compromise a claim and were therefore barred by MRE 408. "This Court reviews for an abuse of discretion a trial court's decision to admit evidence. The abuse of discretion standard recognizes that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 47-48; 761 NW2d 151 (2008) (quotations omitted). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Questions of law involved in determining the admissibility of the evidence are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

MRE 408 provides that:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Assuming for purposes of this case that MRE 408 applies, defendant cannot prevail. Defendant essentially argues that his voice messages were actually offers to compromise or settle, but he provides no analysis supporting this point on appeal. A party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Nevertheless, "[o]ne of the tests of a compromise is that the offeror offers something less than the offeree claims or might fairly otherwise obtain by rejecting the offer and suing away. The notion of mutual concession is implicit." *Thirlby v Mandeloff*, 352 Mich 501, 505-506; 90 NW2d 476 (1958). Delly indicated that defendant admitted to taking the money; there is no indication that Delly intended to pursue a civil claim against defendant or imparted such information to defendant. At most, Delly indicated he would hold off on pressing criminal charges against defendant to give defendant a chance to repay him. The owner's testimony indicated that, in the voice messages, defendant

asked him what the total amount defendant owed him was, and the method of payment the owner would prefer. There was no indication that defendant disputed the validity or amount of the claim, or tried to get the owner to accept less money than he was owed. *Id.* Thus, even if offers of compromise or settlement are not admissible in a criminal trial, defendant's statements were not offers to compromise or settle, and there was no disputed claim as to validity or amount when defendant called the owner.

On appeal, defendant also challenges the content of the voice messages as being irrelevant and unfairly prejudicial. These issues are unpreserved and reviewed for plain error. *People v Carines*, 460 Mich 750, 762-764; 597 NW2d 130 (1999). In order to be relevant, evidence must be material, meaning it must be related to "any fact that is of consequence to the determination of the action," and it must make the existence of that fact more probable or less probable than it would be without the evidence. MRE 401; *People v Mills*, 450 Mich 61, 66-68; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). The prosecutor argued that the content of the voice messages demonstrated that defendant was stalling for time because he spent the cash deposits he took, making it more likely that he converted the money for his own use and intended to defraud the business of that money permanently. We agree that the voice mails were relevant because they dealt with issues "within the range of litigated matters in controversy," specifically defendant's intent and acts of taking the deposit money, which made it more probable that defendant committed the charged offenses. *Mills, supra* at 66-68.

Defendant also indicates that even if relevant, any marginally probative value of the voice messages was outweighed by their unfairly prejudicial effect and risk of misleading or confusing the jury. MRE 403. "Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony' by the trial judge." *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995), quoting *People v Vandervliet*, 444 Mich 52, 81; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The evidence was highly probative of defendant's intent and whether he took the cash deposits. Defendant has failed to explain how the messages were presented out of context, and there is no indication that the evidence risked confusing or misleading the jury. In sum, defendant has not demonstrated the existence of a plain error requiring reversal with respect to his challenge based on relevance and unfair prejudice.

Similarly, defendant's unpreserved claim that the admission of the challenged evidence violated his due process rights does not warrant reversal, because admission of the voice messages was not a clear obvious error that affected his substantial rights. *People v Carines*, 460 Mich 750, 762-764; 597 NW2d 130 (1999).

Affirmed.

/s/ Patrick M. Meter  
/s/ William B. Murphy  
/s/ Brian K. Zahra