# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 16, 2010 |
| v<br><br>TONY PALLONE,<br><br>Defendant-Appellant. | No. 288708<br>Wayne Circuit Court<br>LC No. 07-004886-FH |

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | |
| v<br><br>CLARENCE WARD VANCAMP,<br><br>Defendant-Appellant. | No. 288709<br>Wayne Circuit Court<br>LC No. 07-004886-FH |

Before: GLEICHER, P.J., and K. F. KELLY and ZAHRA, JJ.

PER CURIAM.

In Docket No. 288708, defendant, Tony Pallone (Pallone), appeals as of right his jury trial convictions for two counts of uttering and publishing, MCL 750.249. Pallone was sentenced to two years of probation. In Docket No. 288709, defendant, Clarence VanCamp, appeals as of right his jury trial convictions for five counts of uttering and publishing, MCL 750.249. VanCamp was sentenced to five years of probation. We affirm.

Pallone first argues that the trial court erred in denying his motion for a directed verdict. Although Pallone moved for directed verdict at trial, he did not argue, as he does now, that the instant case is merely a civil matter and not a criminal case. Accordingly, we review this unpreserved claim for plain error affecting his substantial rights. *People v Odom*, 276 Mich App 407, 421; 740 NW2d 557 (2007). In any event, Pallone fails to cite a single statute or case to support his argument. Argument must be supported by citation of appropriate authority or policy. MCR 7.212(C)(7); *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987). In addition, it is axiomatic that in the case of many crimes the defendant has also committed a tort.

To accept the premise that criminal prosecutions would be precluded because the complained-of acts could also give rise to a civil action would render a large portion of criminal statutory law dead letter. *People v Perkins*, 473 Mich 626, 638; 703 NW2d 448 (2005) (courts should avoid any construction that would render any part (in this case all) of a statute nugatory).

Pallone also argues that the verdict was not based on sufficient evidence. We disagree. On appeal for sufficiency of the evidence, this Court reviews all evidence in a light most favorable to the prosecution, to determine whether a rational trier of fact could have found that the prosecution proved all elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748 (1992), modified on other grounds 441 Mich 1201 (1992). The trier of fact, not this Court, determines what inferences may be drawn from the evidence, and concludes the weight to be given to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Questions of credibility and of the intention of witnesses are also left for the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). A challenge to the sufficiency of the evidence is reviewed de novo. *Wolfe*, 440 Mich at 515-516.

MCL 750.249 provides, in relevant part: "A person who utters and publishes as true a false, forged, altered, or counterfeit record, deed, instrument, or other writing listed in section 248 *knowing it to be false, altered, forged, or counterfeit with intent to injure or defraud* is guilty of a felony . . . ." [Emphasis added.] The elements of uttering and publishing are: (1) knowledge on the part of the defendant that the instrument was false; (2) intent to defraud; and (3) presentation of the forged instrument for payment. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). To be a false document, for purposes of uttering and publishing, an instrument itself need not be forged. *People v Aguwa*, 245 Mich App 1, 5; 626 NW2d 176 (2001). A legally valid instrument acquired by deceptive means is still false, and is proscribed by the uttering and publishing statute. *Id.* at 4-5. A defendant's intent may be inferred from circumstantial evidence. *Hawkins*, 245 Mich App at 458 (emphasis added).

The victim and defendants had known each other for around 20 years. The victim established a design company in 2003 and defendants performed work for the company as independent contractors. After the victim returned from a vacation she realized that she was missing several company checks. After reviewing a bank statement, the she discovered that the checks had been made payable to defendants and some of their acquaintances. The victim made repeated demands that defendants return the money but was never reimbursed. She eventually contacted the police. Upon reviewing the checks, the victim testified that she recognized that Pallone had forged her name and that VanCamp had endorsed several of the checks. She testified that Pallone did not have authority to sign her name. She testified that when she confronted Pallone about the checks, he "admitted it and said he was very sorry and it would never happen again . . . ." He also said he would pay the money back but did not. In addition, there was testimony that Pallone first "indicated to [Lieutenant John Szcepaniak of the Grosse Ile Police Department] via the phone that he had the authority to sign checks and do the things that he was doing." This evidence, viewed in a light favorable to the prosecution, was sufficient that a rational trier of fact could determine, beyond a reasonable doubt, that Pallone forged the checks in question with intent to defraud the victim.

Pallone also argues that the prosecutor abused his discretion in bringing criminal charges, again arguing the instant case is a civil matter and not a criminal one. As discussed previously,

Pallone fails to cite authority for his argument that the existence of a civil liability somehow precludes criminal liability. Further, the prosecutor has discretion to bring any charges supported by the evidence. *People v Yeoman*, 218 Mich App 406, 413-414; 554 NW2d 577 (1996). Here, because there was sufficient evidence to convict Pallone of the crimes charged, we conclude that Pallone fails to show that the prosecution abused its discretion in bringing charges against him.

We now turn to VanCamp's arguments. VanCamp argues that the evidence was constitutionally insufficient to sustain the convictions on the two counts of uttering and publishing. We disagree.

Unlike Pallone, there is no evidence that Vancamp forged the victim's signature. However, several of the checks were made payable to him, were endorsed by him and cashed. Further, the victim testified that when she informed VanCamp that Pallone had forged her signature on several checks, VanCamp acted surprised. VanCamp cannot now suggest that he had innocently endorsed the checks that Pallone had forged. VanCamp admits that this was a credibility contest. This Court is not in a position to judge the victim's credibility. *Avant*, 235 Mich App at 506. Although circumstantial, there is evidence that VanCamp knew that he endorsed several checks that Pallone had forged, intending to defraud the victim. Viewed in a light favorable to the prosecution, was sufficient so that a rational trier of fact could determine, beyond a reasonable doubt, that VanCamp knowingly endorsed checks forged by his partner, with intent to defraud the victim.

VanCamp next argues that his constitutional right to counsel was infringed because his trial attorney rendered ineffective assistance of counsel. We disagree.

Here, there was not a hearing in the trial court, and this Court's review is limited to the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973)*; People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the lower court are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Where the issue involves counsel's performance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). The defendant bears a "heavy burden" on these points. *People v Carbin*, 463 Mich 590,

599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "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." *Garza*, 246 Mich App at 255.

VanCamp first argues that defense counsel should have "moved to exclude reference to his prior *conviction*." (Emphasis added). Initially we note that at trial, defense counsel asked Lieutenant Szcepaniak whether he had prior contact with VanCamp's previous attorney, and he replied, "[y]es, I believe he represented Mr. VanCamp's on his prior criminal *complaint*." (Emphasis added). Thus, VanCamp's assertion on appeal that his prior conviction was presented to the jury is erroneous. We also conclude that defense counsel engaged in reasonable trial strategy by skillfully continuing the questioning of Lieutenant Szcepaniak without pause, minimizing the significance of prior criminal complaint to the jury. In any event, the reference to VanCamp's on his prior criminal complaint was not repeated, not mentioned by the prosecution in argument, and certainly not emphasized to the jury. Thus, we conclude VanCamp failed to establish that the result would have been different. *Strickland*, 466 US at 687-688.

VanCamp also argues that defense counsel failed to object when the trial court failed to give the cautionary instruction contained in CJI2d 4.11. We disagree. Again, we find defense counsel may have determined that any instruction would have highlighted defendant's prior criminal complaint. Defense counsel may have chosen not to draw unnecessary attention to this evidence. VanCamp fails to overcome the presumption that the defense counsel was engaged in sound trial strategy. Further, VanCamp's brief on appeal contains only a conclusory argument that he would have benefited from the instruction. Because he does not argue or offer support for his position that but for defense counsel's failure to request the instructions the outcome of trial would have been different, we conclude that defendant's final claim of ineffective assistance of counsel must fail. *Strickland*, 466 US at 687-688.

Finally, VanCamp argues that the trial court erred in denying his motion to disqualify the trial court judge for purposes of sentencing,[1] and now VanCamp requests a new trial. We disagree.

Because VanCamp did not move for a new trial below, this claim is unpreserved and we review for plain error affecting defendant's substantial rights. *Odom*, 276 Mich App at 421.

A trial judge has broad, but not unlimited, discretion when controlling the court's proceedings. *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002). The overriding principle is that a court's actions cannot pierce the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). Invading the prosecutor's role is a clear violation of this tenet. *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). The trial court, pursuant

[1] The motion to disqualify was made after trial and before sentencing, and VanCamp did not request a new trial. Therefore, VanCamp only sought disqualification for purposes of sentencing.

to MRE 614(b), may question witnesses in order to clarify testimony or elicit additional relevant information. *Conyers*, *supra*, 194 Mich App 395, 404; 487 NW2d 787 (1992). "However, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *Id.* at 405. The test to determine whether a new trial is warranted is whether the judge's questions and comments may well have unjustifiably aroused suspicion in the mind of the jury as to a witness's credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. *Id.* at 404. When a trial judge's questioning does cross the line of judicial impartiality, a harmless-error standard is used. *Davis*, *supra*, 216 Mich App 51.

Here, the trial court conducted an extended examination of the victim. The record reflects 22 pages of questioning. However, the questioning was mundane, eliciting evidence describing the layout of her office in which the checks were taken from and how the checks were produced. Indeed, VanCamp does not cite to one aspect of the trial court's questioning that adversely effected him. Further, the trial court elicited evidence favorable to defendants, including evidence that the victim sometimes loaned defendants money without a written agreement. There is no indication that the trial court's questions were intimidating, argumentative, prejudicial, unfair, or partial. VanCamp cites no authority to for the proposition that extensive questioning by the trial court alone constitutes error requiring reversal.

VanCamp also argues that the trial court was hostile to VanCamp's counsel. Specifically, VanCamp claims that the trial court was not sensitive to the hearing problems of VanCamp's counsel. The trial court admitted that it was "annoyed" with VanCamp's counsel because on several occasions in which VanCamp's counsel did not respond to the trial court's requests and cited hearing problems; yet on other occasions he spoke to the jury in soft tones, indicating that he could hear fine. Although we have concerns that the trial court harbored annoyance for VanCamp's counsel during trial, we simply cannot locate anywhere in the lower court record where this annoyance was manifested. Indeed, VanCamp's brief on appeals only contains the following analysis: "the judge yelled very loudly and in general did not handle the issue of Mr. Vancamp's attorney's hearing problem." A party may not leave it to this Court to search for the factual basis to sustainor reject his position, but must support factual statements with specific references to the record. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). VanCamp fails to establish error requiring reversal.

Last, we reject VanCamp's claim that he is entitled to a new trial because the trial court allegedly laughed in presence of the jury when Pallone claimed to be ill and yelled at Pallone when he tried to hand something to the victim at trial. VanCamp fails to explain how the trial court's behavior toward Pallone adversely affected him. The trial court adequately explained that it raised its voice at Pallone because the contact occurred shortly after the victim had testified against Pallone and the trial court sought to prevent any confrontation. In regard to the trial court allegedly laughing in the presence of the jury, the trial court explained that it initially believed Pallone was malingering but then changed its mind and apologized.

In sum, we conclude that the trial court's actions were not so extreme as to constitute a complete abandonment of the veil of impartiality such that the verdict of a jury would be overturned. The laughter was not aimed at VanCamp, and in his questioning of witnesses, the

trial court judge did not indicate any bias toward the prosecution. Accordingly, a new trial is not warranted.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly