

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PENNY DANELLE EUBANKS,

Defendant-Appellant.

UNPUBLISHED

September 28, 2010

No. 291272

Oakland Circuit Court

LC No. 2008-221418-FH

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant was convicted by a jury of using false pretenses to intentionally defraud or cheat in the amount of \$1,000 or more but less than \$20,000, MCL 750.218(4)(a). Defendant was ordered to pay restitution in the amount of \$11,217.50 and was sentenced to 36 months' probation, with the first 45 days to be served in jail. After unsuccessfully moving for a new trial, she filed this appeal as of right. We affirm.

Defendant's initial contention on appeal is that MCL 750.218 is unconstitutionally vague and therefore void. A determination whether a statute is unconstitutional under the vagueness doctrine is subject to de novo review on appeal. *People v Hill*, 269 Mich App 505, 514; 715 NW2d 301 (2006).

Defendant did not raise this issue at trial and therefore it has not been preserved for appellate review. See *People v Wilson*, 230 Mich App 590, 593; 585 NW2d 24 (1998). Moreover, defendant, in her brief, merely states the legal rule for vagueness and makes no legal argument regarding how MCL 750.218 has impinged on her constitutional rights under the facts of this case. Thus, defendant has abandoned this issue by failing to provide proper analysis or support in her brief. MCR 7.212(C)(7); *People v Payne*, 285 Mich App 181, 187-188; 774 NW2d 714 (2009); see also *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) (“[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . .”).

Defendant next argues that her due process rights were violated because the trial court did not require the jury to determine if any false pretenses defrauded the actual “complainant” in this matter. The determination whether a party has been afforded due process is a question of law subject to de novo review on appeal. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

Defendant did not raise this issue at trial and therefore it has not been preserved for appellate review. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). Failure to object to jury instructions limits review to whether there was plain error affecting the defendant's substantial rights. MCL 768.29; *People v Carines*, 460 Mich 750, 761, 763; 597 NW2d 130 (1999). To establish a due process violation that requires reversal of a conviction, the defendant must prove prejudice to her defense. *People v McGee*, 258 Mich App 683, 700; 672 NW2d 191 (2003).

The process due in criminal cases depends on the facts in each case. *In re Meissner*, 358 Mich 696, 698; 101 NW2d 243 (1960); *McGee*, 258 Mich App at 700. Generally, it requires reasonable notice of the charge and an opportunity to be heard. *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682, 694 (1948); see also, generally, *People v Eason*, 435 Mich 228, 233; 458 NW2d 17 (1990). The rights include, at a minimum, the defendant's right to examine the witnesses against her, to offer testimony, and to be represented by counsel. *Oliver*, 333 US at 273; see also, generally, *Eason*, 435 Mich at 238. Additionally, the prosecutor must prove each element of the charge beyond a reasonable doubt. *Apprendi v New Jersey*, 530 US 466, 477; 120 S Ct 2348; 147 L Ed 2d 435 (2000); *Eason*, 435 Mich 233.

A trial court must instruct the jury concerning the applicable law, and "fully and fairly present the case to the jury in an understandable manner." *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). The instructions must include all the elements of the crime charged and any material issues, defenses, and theories for which there is evidence in support. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

To successfully prosecute a violation of MCL 750.218(4)(a), the prosecutor had to show that: (1) defendant used false pretenses; (2) defendant knew the pretense was false at the time she used it; (3) defendant intended to defraud or cheat someone at the time she used the false pretense; (4) the other person relied on defendant's false pretense; (5) by relying on the pretense, the person suffered the loss of something of value; and (6) the amount lost had a fair market value at the time it was taken of \$1,000 or more but less than \$20,000. MCL 750.218(4)(a); *People v Peach*, 174 Mich App 419, 422; 437 NW2d 9 (1989).

Defendant has not shown that her due process rights were violated when the trial court failed to direct the jury to determine whether her false pretenses defrauded the complainant in this case. The crime of which defendant was charged and convicted does not include as an element that the intended victim also be listed as a complainant in the case; it is merely necessary that defendant intended to defraud or cheat someone and then did so. The trial court's failure to instruct the jury to determine whether defendant's false pretenses defrauded the actual complainant did not prejudice the defense. *McGee*, 258 Mich App at 700.

Defendant was given reasonable notice of the charge and an opportunity to be heard. *Oliver*, 333 US at 273. Additionally, defendant was offered the right to examine the witnesses against her, to offer testimony, and to be represented by counsel. *Id.* at 273. The trial court's instructions mirrored the elements of MCL 750.218(4)(a), and nothing in the record indicates that the court fell short of fully and fairly presenting the case to the jury. *Moore*, 189 Mich App at 319. Reversal is therefore unwarranted.

Defendant next argues that her due process rights were violated because the jury instructions did not indicate whether her conduct was a civil or criminal wrong, and because the trial court denied her request for an instruction on the lesser-included misdemeanor of false pretenses involving \$200 or more but less than \$1,000, MCL 750.218(3)(a). We disagree.

On the final day of trial, defendant requested an instruction on the lesser-included misdemeanor. Therefore, this issue is preserved. MCR 2.516(C); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003), disapproved of in part on other grounds 469 Mich 967 (2003). However, defendant never raised an instructional issue related to whether the jury should be informed that her conduct was a civil or criminal wrong. Therefore, that issue is not preserved and review of it is limited to whether there was plain error affecting defendant's substantial rights. *Carines*, 460 Mich 763.

Issues of law arising from jury instructions are reviewed de novo on appeal, but a trial court's determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

"An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Defendant offers no legal argument for her claim that the lack of a jury instruction regarding civil versus criminal wrongdoing prejudiced her. Therefore, we summarily reject this claim.

Additionally, defendant's claim that the trial court erred in failing to give an instruction on the lesser-included misdemeanor is without merit.

Again, a trial court must instruct the jury concerning the applicable law, and "fully and fairly present the case to the jury in an understandable manner." *Moore*, 189 Mich App at 319. The instructions must include all of the elements of the crime charged and any material issues, defenses, and theories for which there is evidence in support. *McGhee*, 268 Mich App at 606.

[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it. [*People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003).]

The failure to instruct on a lesser-included offense can be harmless error. *Gillis*, 474 Mich at 140 n 18. The validity of the verdict is presumed, and the defendant bears the burden of showing that the error resulted in a miscarriage of justice; in other words, the defendant must show that, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome-determinative. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000). The failure to give a lesser-included-offense instruction is harmless if the instruction was not clearly supported by substantial evidence. *Cornell*, 466 Mich at 365.

On the final day of trial, defendant requested an instruction on the lesser-included misdemeanor of false pretenses involving \$200 or more but less than \$1,000, MCL 750.218(3)(a). After rebuttal by the prosecution, the trial court ruled:

I agree with the People that in this circumstance where you have checks for a thousand dollars or more that there is no evidentiary support to suggest that a lesser included offense is appropriate . . . the crux of this issue is whether or not the defendant committed false pretenses worth a thousand dollars or more and the key evidence is the checks, and the presentation thereof, and I think it would become an irrational response by the jury . . . to find all the necessarily lesser included offense [sic] of less than a thousand dollars. The evidence doesn't support that even in reviewing the evidence in the light most favorable to the defendant.

The trial court did not abuse its discretion when it determined that the lesser-included misdemeanor was not supported by the evidence. The court's decision resulted in an outcome within the range of principled outcomes. *Babcock*, 469 Mich at 269; *Carnicom*, 272 Mich App at 616-617.

Defendant merely argues that the trial court's failure to instruct on the misdemeanor permitted the jury to infer it had "no authority to consider facts relevant to calculating and determining the value of the amount of the fraud" and that the value "is all that distinguished the misdemeanor from the felony." However, defendant offers no theory or evidence concerning how the jury could have calculated the value of the fraud differently. The checks involved and offered into evidence were for amounts greater than \$1,000, and stipulated testimony¹ indicated that the total amount involved in the alleged fraud was over \$11,000.² Defendant has failed to show that the trial court abused its discretion and, even assuming that error occurred, has failed to show that it was more probable than not that the failure to give the misdemeanor instruction was outcome-determinative.

Defendant's final contention on appeal is that the evidence against her was insufficient to support the conviction. We disagree and hold that the evidence was sufficient for a rational jury to find that the essential elements of MCL 750.218(4)(a) were proven beyond a reasonable doubt.

When reviewing a claim regarding the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515, 489 NW2d 748 (1992), amended 441 Mich 1201, 489 NW2d 748 (1992); *People v Wilkens*, 267 Mich App 728, 738;

¹ The parties made a stipulation concerning the content of the testimony of a missing witness.

² Part of defendant's theory at trial was that she had not committed fraud at all because she was the owner of the company and was entitled to pay herself the money in question. The jury was free to consider this theory during deliberation, and clearly rejected it with their guilty verdict.

705 NW2d 728 (2005). A reviewing court must “not interfere with the jury’s role of determining the weight of the evidence or the credibility of witnesses.” *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003).

Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of a crime. *Carines*, 460 Mich at 757.

At trial, the prosecution offered testimony and evidence showing that defendant knowingly made false statements to Sterling Resources Financial Corporation, that defendant did so with the intent to defraud, and that Sterling relied on these false statements and issued checks totaling over \$11,000. Defendant stated in her interview with police that she knowingly sent falsified payroll documents to Sterling in order to pay back \$10,000 in debt she owed to the individuals listed on the payroll documents. Further, the prosecution offered into evidence copies of all the checks sent from Sterling to defendant in reliance on her falsified payroll documents. The prosecution also offered evidence that none of the individuals listed on the falsified documents were in fact employees of the business. The checks written by Sterling and offered into evidence were for amounts greater than \$1,000, and stipulated testimony indicated that the total amount involved in the alleged fraud was over \$11,000.

The evidence, circumstantial or otherwise, and the reasonable inferences that arose from it were sufficient for a rational jury to find that the prosecution had proven all the elements of MCL 750.218(4)(a) beyond a reasonable doubt. *Wolfe*, 440 Mich at 515. Consequently, defendant’s insufficiency claim is without merit.

Affirmed.

/s/ Michael J. Talbot
/s/ Patrick M. Meter
/s/ Pat M. Donofrio