

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 14, 2012

v

JOSEPH JOHN CARR,

No. 301823
Ingham Circuit Court
LC No. 10-000146-FH

Defendant-Appellant.

Before: WILDER, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Defendant appeals by right his October 28, 2011, conviction following a jury trial of false pretenses \$1,000 or more but less than \$20,000, MCL 750.218(4)(a), soliciting public donations without a license, MCL 400.293(1), and acting as a professional fundraiser for a charitable purpose without a license, MCL 400.287(1). Defendant's arguments on appeal involve only his conviction for false pretenses. Because we conclude that the evidence offered at trial supported a conviction under MCL 750.218(4)(a), we affirm.

I. STATEMENT OF FACTS

In the summer of 2008 defendant and his partner in a mortgage business responded to a newspaper ad regarding an income generating business opportunity. The business involved purchasing candy dispensing boxes in area businesses. The boxes featured a coin slot at the top marked "Please Deposit 25 Cents" and a compartment for dispensing candy at the bottom. Each box also contained a sticker with a picture of a missing child and the child's biographical information. The photos identified an actual missing child and appeared to be from the National Center for Missing and Exploited Children (NCMEC) website.

Eventually defendant and his partner invested in the enterprise. At some point, defendant bought his partner's share of the business and began operating the candy box business as his sole source of income. Defendant testified that he and his partner initially invested several thousands of dollars and received in return 50 candy-dispensing collection boxes and labels for the boxes. Defendant purchased the candy separately and received a "credit" from CMS. Defendant was told by representatives of CMS that a percentage of the money he paid for the boxes would go to the Beacon Project, a company which described itself as dedicated to spreading the word about missing children. Defendant was told that he was "basically paying up front" to the Beacon Project, and could therefore keep the funds earned by the boxes. None of the companies

defendant dealt with were registered as non-profit or charitable agencies in Michigan or North Carolina.

Defendant also distributed letters to the businesses that agreed to place the candy boxes that implied that defendant and Beacon Project worked with the NCMEC. Defendant admitted that he distributed the letters in order to continue to secure the counter space. Neither Beacon Project nor defendant was ever affiliated with NCMEC and none of the funds raised by defendant were ever given to the NCMEC or any other organization, as defendant retained all funds raised.

II. SUFFICIENCY OF THE EVIDENCE

Defendant challenges whether the evidence established beyond a reasonable doubt several of the elements of larceny by false pretenses. The elements of the crime of larceny by false pretenses under MCL 750.218(4)(a) are as follows:

(1) the defendant must have used a pretense or made a false statement relating to either past or then existing facts and circumstances, (2) at the time the pretense was used the defendant must have known it to be false, (3) at the time the pretense was used the defendant must have intended to defraud someone, (4) the accuser must have relied on the false pretense made by the defendant, (5) because of this reliance that person must have suffered the loss of some money or other valuable thing, and (6) the property obtained by the defendant must have had a fair market value of over . . . [\$1,000 but less than \$20,000] at the time of the crime. [*People v Lueth*, 253 Mich App 670, 680-681; 660 NW2d 322 (2002).]

Specifically, defendant challenges the sufficiency of the evidence related to the second, third, and fourth elements.

We review a defendant's claim of insufficient evidence de novo, *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), considering the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find 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 (1992). Importantly for this case, Michigan law is clear that circumstantial evidence, and all reasonable inferences from that evidence, are to be considered in a light most favorable to the prosecution. *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Kissner*, 292 Mich App 526, __; __ NW2d __ (Docket No. 296766, issued May 12, 2011), slip op, p 4.

A. STATE OF MIND

A defendant's knowledge of falsity and intent to defraud can be inferred from the entire evidence. *People v Reigle*, 223 Mich App 34, 39; 566 NW2d 21 (1997). It is undisputed that defendant was aware that none of the money deposited in the candy boxes was going towards helping find missing children. According to the testimony from a special agent of the Michigan Attorney General, defendant admitted that he intended to lead a reasonable person to believe that

money placed in the box would go toward finding missing children. Indeed, the owner of an East Lansing bicycle business testified that defendant told him the boxes were for the purpose of raising funds to help find missing children. And, although defendant asserts that none of the representations he made to store owners in order to secure counter space, or any representations made by the letters are relevant, evidence that defendant intended to mislead business owners into thinking the proceeds of the boxes went to help missing children is relevant to show a similar intent toward the general public.

Viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to support a jury finding that defendant possessed the requisite intent and knowledge.

B. DETRIMENTAL RELIANCE

In the crime of false pretenses, reliance occurs when a victim gives up money or other valuable property that he or she would not have given up in the absence of the false representation. *People v Johnson*, 28 Mich App 10, 17; 183 NW2d 813 (1970). If the victim acts for any other reason, this element of false pretenses is not established. See *People v Gould*, 156 Mich App 413, 416-417; 402 NW2d 27 (1986).

Plaintiff argued to the jury that proof of the requisite dollar amount (over \$1,000 but less than \$20,000) was derived from defendant's admission that he obtained \$1,500 to \$2,000 a month from the candy boxes.¹ Plaintiff also presented the testimony of the owner of a bicycle business where a box was placed who testified that he would occasionally place money in defendant's box because he believed he was helping missing children. The jury was also presented with evidence showing that defendant placed these boxes, all of which had prominently affixed to them a picture of a missing child (and his/her biographical information) in numerous high traffic locations. In some locations a letter describing the missing child efforts that would be taken was also placed next to the box. Based on this testimony, the prosecutor argued that "All of those people [who deposited money into the boxes] thought that because of the way [defendant] presented it and additional information he kept providing that it was going to help those kids. That's the way it works." It would certainly be reasonable for the jury to infer from the foregoing evidence that of the approximately \$9,000 to \$12,000 defendant raised in a six month period, that at least \$1,000 was contributed for the purpose of helping find missing children. Indeed, defendant admitted to the Special Agent that that was the purpose of the children's pictures and the accompanying letter describing the purpose of the funds. Defendant's argument to the contrary lacks any merit, and it ignores the inferences that the jury was permitted to make from the evidence presented.²

¹ MCL 750.218(8) provides, "The values of . . . money . . . obtained . . . in separate incidents pursuant to a scheme or course of conduct within any 12-month period may be aggregated to determine the total value involved in the violation of this section."

² *People v Dewald*, 267 Mich App 365; 705 NW2d 167 (2005) abrogated in part on other grounds *People v Melton*, 271 Mich App 590; 722 NW2d 698 (2006) superseded by statute on

III. PROSECUTORIAL MISCONDUCT

Defendant also argues that the prosecution made improper reference in his rebuttal closing statement to defendant's failure to call witnesses who were likely to assert their Fifth Amendment privilege against self-incrimination, and that this error was prejudicial. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

A lawyer may not call a witness knowing that he will exercise his valid Fifth Amendment privilege against self-incrimination. *People v Paasche*, 207 Mich App 698, 708-712; 525 NW2d 914 (1994). If it would have been an error for either the prosecution or defense to call a witness because he would assert his privilege against self-incrimination, then a prosecutor "should not denigrate an opponent for failure to do something which would have been improper if done." *People v Swindlehurst*, 120 Mich App 606, 612; 328 NW2d 92 (1982). If improper reference is made to the absence of witnesses who were not called because of the likelihood that they would assert their privilege against self-incrimination, the trial court should, upon request, provide a curative instruction to the jury, instructing them not to speculate about the possible nature of their testimony or draw any inferences from their absence. *People v Dyer*, 425 Mich 572, 582-583; 390 NW2d 645 (1986).

This Court has often spoken of the procedure to be used to determine if a potential witness will assert a valid testimonial privilege, which involves the trial court holding an evidentiary hearing outside the jury's presence to determine if the witness understands the privilege and if the witness's assertion is valid. *Paasche*, 207 Mich App at 709. Here it is undisputed that none of the possible witnesses referenced by the prosecutor were examined pursuant to this process. Further, defendant has not demonstrated that any potential error in the prosecution's isolated comment was outcome determinative and could not have been cured by an appropriate instruction, which was never requested. *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005). Moreover, the jury was instructed to only consider properly admitted evidence in the case, and that the statements of the attorneys were not evidence. In the absence of evidence to the contrary, we presume that the jury followed these instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

We likewise reject the contention that the prosecutor's comments shifted the burden of proof. Defendant pursued the explanation at trial that he had been duped into investing in the candy box scheme. He argued that his investigation of the opportunity posited in the ad did not show that the proposal was not legitimate. In light of this defense, the prosecution was entitled to comment on the failure of the defense to produce witnesses that could have supported these

other grounds MCL 777.39, does not require a different conclusion as *Dewald* dealt with direct evidence, not what reasonable inferences were permitted from circumstantial evidence.

assertions. See *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). In any event, the court clearly instructed the jury twice on the burden of proof, including that defendant has no obligation to prove his innocence.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Patrick M. Meter

/s/ Christopher M. Murray