STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN AL BINION,

Defendant-Appellant.

UNPUBLISHED
December 12, 1997

No. 184843
Ingham Circuit Court
LC No. 94-067730-FH

Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant was convicted of two counts of aiding and abetting embezzlement by a public official, MCL 750.175; MSA 28.372 [Counts I and II]; one count of conspiracy to embezzle, MCL 750.157a; MSA 28.354(1) [Count III]; one count of filing a false state income tax return, MCL 205.27(1)(a); MSA 7.657(27)(1)(a) [Count IV]; and one count of failing to file a tax return, MCL 205.27(1)(a); MSA 7.657(27)(1)(a). For Counts I and IV, embezzlement and filing a false tax return, he was sentenced to concurrent terms of five years' probation, with the first nine months to be served in jail. He was ordered to spend an additional 180 days on tether after serving his jail time, and was required to perform 600 hours of community service. For Counts II and V, embezzlement and failure to file a tax return, defendant was fined $5,000 and $2,500, respectively. For Count III, conspiracy to embezzle, defendant was sentenced to nine months in jail, to be served concurrent with his other sentences. In addition to the sentences and fines, defendant was ordered to pay $59,550 in restitution to the state. Defendant appeals as of right. We affirm defendant's convictions and affirm defendant's sentences except with respect to the trial court's order requiring payment of restitution.

I.

Defendant argues that there was insufficient evidence to support his convictions for aiding and abetting embezzlement, conspiracy, and tax evasion. We disagree.

Defendant's convictions for aiding and abetting embezzlement by a public official were supported by the record. In order to obtain a conviction, it was necessary for the prosecution to prove

that defendant aided and abetted in the commission of a crime. In this case, House Fiscal Agency (HFA) director Morberg's conduct was covered by and violated the embezzlement statute, MCL 750.175; MSA 28.372[1]. Conviction was appropriate if the evidence demonstrated that defendant rendered assistance to Morberg or engaged in words or deeds that supported, encouraged, or incited the commission the crime. See *People v Turner*, 213 Mich App 558, 568 (1995).

By approaching Morberg and asking for money and providing kickbacks in return, defendant performed acts which assisted or encouraged Morberg in the misappropriation of the HFA imprest funds. Defendant's intent to have Morberg embezzle funds can be inferred from the same evidence, which indicated that he approached Morberg on at least twenty-two occasions in 1991 and 1992, asking for money, receiving money, and occasionally providing a kickback. Defendant's knowledge that his conduct was criminal can also be inferred because the evidence indicated that he approached Morberg and delivered kickback money to him in secrecy, and that he participated in an attempted cover-up after November 1992. Viewing the evidence presented at trial in a light most favorable to the prosecutor, a rational jury could conclude beyond a reasonable doubt that all of the elements of the charged crime were proven and that defendant aided and abetted Morberg in the embezzlement. See *People v Jolly*, 442 Mich 458, 465-466; 502 NW2d 177 (1993); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

Similarly, defendant's conviction for conspiracy to embezzle, MCL 750.157a; MSA 28.354(1) was supported by the evidence. We disagree with defendant that there was no evidence indicating he knew his conduct was illegal and that there was no evidence of any agreement between Morberg and himself. A conspiracy may be established by circumstantial evidence or may be based on inference. *People v Atley*, 392 Mich 298, 314-316; 220 NW2d 465 (1974). From the evidence, it can be inferred that defendant knew he was breaking the law; that he intended for Morberg to embezzle money; and that the two men had a tacit agreement to engage in the embezzling of funds. Morberg gave defendant approximately $52,000 from the imprest account over a two-year period, in twenty-two separate checks. On each occasion defendant approached Morberg in secret. On certain occasions Morberg would ask for a kickback, which defendant would pay in secret. Morberg testified that on December 7, 1992, he even asked defendant if he thought they should do this, and defendant answered, "Yes. Let's do it." Additionally, defendant participated in the attempt to cover up the payments as purported salary advances and failed to disclose receipt of the money on his tax returns. Viewing the evidence in a light most favorable to the prosecutor, a rational jury could conclude that defendant intended to combine efforts with Morberg to embezzle money from the HFA, an act that he knew was illegal. *Jolly*, *supra*; *Hampton*, *supra*. This is not a case where the conviction was obtained by piling inference upon inference as defendant claims.

Defendant's convictions for failing to file a tax return in 1992 and filing a false return in 1991 were also proper. Defendant argues that he should not have been convicted for two reasons: First, the Department of Treasury did not notify defendant of his tax liability or assess the tax against him; and second, he would still be able to file an amended tax return for either of those years. Nothing in MCL 205.27(1)(a); MSA 7.65(27)(1)(a) indicates that the Department of the Treasury must notify a

defendant of his tax liability or assess the unpaid tax against him before the state may pursue criminal charges for failing to file a return or filing a false return. Nor has defendant presented any authority to support his assertion that he could not be prosecuted for failing to file a return or filing a false return while he still had the opportunity to file an amended return. A taxpayer cannot avoid criminal liability for tax evasion by simply filing an amended return at a later date. The evidence showed that defendant's 1991 tax return did not mention the additional $19,600 he had received that year through embezzlement. Defendant did not file his tax return for 1992 until the expiration of the last extension period, and that return did not list the additional $32,100 he had wrongfully received from the HFA imprest account. Under the circumstances one could easily infer that defendant did not list his income from embezzlement on his 1991 return or file his 1992 return on time in order to conceal his illegal income and avoid paying taxes on it. Sufficient evidence was therefore presented to support the convictions for filing a false return and failing to file a tax return. MCL 205.27(1)(a), (2); MSA 7.65(27)(1)(a), (2); *Jolly*, *supra*; *People v Paasche*, 207 Mich App 698, 707 n 5; 525 NW2d 914 (1994).

On appeal, defendant also argues that the convictions were against the great weight of the evidence. This argument was not raised below and therefore, is not preserved for appeal. *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987).

II.

Defendant next argues that his convictions must be reversed because of certain comments made by the prosecutor during closing and rebuttal arguments. We disagree. Initially, we note that defendant did not object to the complained-of remarks at trial. Because there was no objection, our review of the issue is precluded absent a miscarriage of justice. *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1996). While a prosecutor may properly relate the facts presented at trial to her theory of the case and argue all reasonable inferences arising from the evidence presented, she may not make statements to the effect that she has some special knowledge concerning a witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276, 282-283; 531 NW2d 659 (1995). In this case, the complained-of remarks did not constitute improper vouching because, based on our review of the record, the prosecutor was arguing that Morberg's testimony was credible based upon the evidence before the court and not based on her personal knowledge as to his veracity. Moreover, any prejudicial effect these comments may have had could have been remedied with a limiting or curative instruction, had one been requested. Thus, we do not find a miscarriage of justice. *Rivera*, *supra* at 651-652 (1996).

In addition to complaining about comments constituting improper vouching, defendant claims that the prosecutor denigrated defendant, including referring to him as a child, and that her conduct denied him a fair trial and improperly shifted the burden of proof to him. As with the previous complaints on appeal, no miscarriage of justice will result absent our review. The complained of remarks regarding defendant's credibility and character and about the lack of evidence to support defendant's theory of the case were made in direct response to defense counsel's remarks in closing. Therefore, they were not improper. *People v Dixon*, 217 Mich App 400, 407-408; 552 NW2d 663 (1996).

III.

Defendant next argues that his convictions must be reversed due to erroneous jury instructions. We find no error requiring reversal.

Jury instructions should fairly and adequately protect the defendant's rights, cover the basic and controlling issues in the case and not lead to a miscarriage of justice. *People v Mixon*, 170 Mich App 508, 517-518; 429 NW2d 197 (1988). Defendant argues that the trial judge erred by failing to give a jury instruction regarding the full benefit of Morberg's federal plea bargain. Rather than the requested instruction, the trial judge gave a modified version of CJI2d 5.4 which went into detail about Morberg's plea. The trial court's instruction properly and adequately protected defendant's rights. Therefore, no error requiring reversal is present. See *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

Defendant also argues that the trial judge erred by failing to give an instruction with regard to defendant's ability to amend his tax return and apply for extensions within which to file for and pay the unpaid taxes. The record does not indicate that defendant requested instructions encompassing statutes related to amending and filing extensions. Because the instruction was not requested, appellate review is foreclosed absent manifest injustice. *People v Drake,* 142 Mich App 357, 361; 370 NW2d 355 (1985). Here, there is no manifest injustice.

Finally, defendant claims that the jury instructions as a whole were poorly read; that mistakes were made and then corrected, leading to jury confusion; and that they did not "flow" so as to adequately inform the jury as to the applicable law. Our review of the record indicates that instructions fairly and adequately protected the defendant's rights, covered the basic and controlling issues in the case and did not lead to a miscarriage of justice. *Mixon, supra*.

IV.

Defendant next argues that the trial court erred in sentencing defendant where it failed to consider sentencing factors and standards and where it violated the principle of proportionality. We disagree. Our review of the record reveals that the trial judge considered proper criteria when sentencing defendant, see *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983); and the sentences imposed do not violate the principle of proportionality where they were proportionate to the offense and the offender, *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

V.

Finally, defendant argues that the trial court erred in ordering him to pay restitution to the State of Michigan. We agree. Under the statutes in existence at the time of defendant's crimes, the state was not a victim which could receive restitution under either MCL 769.1a; MSA 28.1073 or MCL 780.766; MSA 28.1287(766); *People v Chupp*, 200 Mich App 45, 47-49; 503 NW2d 698 (1993). The amended versions of those statutes cannot be applied retrospectively to defendant's crimes. *People*

v Slocum, 213 Mich App 239, 243-244; 539 NW2d 572 (1995). Because we hold that restitution was improperly ordered, it is not necessary to address defendant's remaining claim that the court erred in ordering restitution without consideration of the factors listed in MCL 780.767(1); MSA 28.1287(767)(1) and without holding an evidentiary hearing regarding restitution.

Affirmed in part and reversed in part, the order of probation requiring restitution being vacated.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Helene N. White

[1] We find disingenuous defendant's proposition that because there was no statute or regulation specifically prohibiting Morberg from taking funds from the imprest account and converting them for personal use, there has been no crime. We also note that contrary to defendant's assertion, MCL 750.175; MSA 28.372 applies to him as well as to Morberg. The statute prohibits embezzlement by "[a]ny such person holding public office in this state, or the agent or servant of such person . . . ." Although defendant was not the director of the HFA, he was employed as an agent or servant of the HFA director and thus, was covered by the statute. This is not relevant to the case at hand, however, because defendant was not charged as a principal under the statute.