

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID M. SCHUHARDT,

Defendant-Appellant.

UNPUBLISHED

June 13, 2000

No. 210719

Wayne Circuit Court

LC No. 97-501607

Before: Gribbs, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of fraudulent retention or use of building contract funds, MCL 570.152; MSA 26.332. Defendant was sentenced to a term of eighteen months' probation and ordered to pay restitution. We affirm and remand for further proceedings.

Defendant, a licensed builder, was known to Howard Dow and Lori Dow as the sole owner of Consolidated Building Contractor and Designers, Inc. In 1995, the Dows entered into a contract with Consolidated for the design and construction of a residential home. Pursuant to the contract, the Dows paid defendant by checks, made out to and endorsed by Consolidated, totaling \$127,000 as construction deposits. By the end of 1995, the Dows were concerned that defendant was misusing their construction funds; little work had been performed, and that one of the subcontractors, Faust Corporation, had not received payment from Consolidated.

In December 1995, the Dows and defendant entered into an agreement indicating that defendant had "restructured" his corporate organization, and that defendant was now "agent and principle [sic] owner of Barrington Home Corporation." The agreement provided that, "until and subsequent to" Barrington's procurement of a building license, "[defendant], individually will be responsible for all building management and all funds received to date" by the Dows. The agreement further required defendant to "provide satisfactory evidence of payment to all suppliers" and to "pay from [the Dows'] deposits all suppliers for work performed to date, including but not limited to, Faust for piling work."

When Faust eventually put a lien on the Dows' house, the Dows paid Faust \$12,500 for the release of the lien. The Dows also paid another subcontractor, Charter Building Group, \$8,500 that was owing from Consolidated. In September 1996, the Dows gave defendant another "advance" which was never returned or accounted for. When the Dows confronted defendant about his management of the construction funds, he told them that he had "used [their] money someplace else," and that all the money was "gone." The Dows then terminated defendant's involvement in the construction project and hired Charter to proceed as the general contractor. Defendant was subsequently charged with and convicted of violating the Michigan builders' trust fund act (MBTFA), MCL 570.151 *et seq.*; MSA 26.331 *et seq.*

On appeal, defendant argues that the evidence presented both at the preliminary examination and at trial was insufficient to establish that he was a "contractor" under the MBTFA. There is no merit to this claim.

The MBTFA provides for both a civil and a criminal remedy. *People v Whipple*, 202 Mich App 428, 432; 509 NW2d 837 (1993); *Weathervane Window, Inc v White Lake Construction Co*, 192 Mich App 316, 325; 480 NW2d 337 (1991). Because it is a remedial statute, the MBTFA is construed liberally for the advancement of the remedy. *Whipple, supra* at 433; *Miller, supra* at 343.

We review bindover challenges, in general, to determine whether the district court abused its discretion in finding probable cause that the defendant committed the charged offense. *People v Brown*, ___ Mich App ___; ___ NW2d ___ (Docket No. 208355, issued 2/25/00), slip op p 2; *People v Carlin (On Remand)*, 239 Mich App 49, 63; ___ NW2d ___ (1999). When reviewing a challenge to the sufficiency of the evidence to support a conviction, this Court examines the evidence in a light most favorable to the prosecution to 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, 515-516; 489 NW2d 748 (1992); *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). Questions of statutory construction are reviewed de novo. *Brown, supra*, slip op p 2.

Defendant contends that the corporate entities Consolidated and Barrington were the "contractors" in the instant case, and that defendant cannot be held criminally liable for the acts of the corporations. Accordingly, defendant argues that he should not have been bound over for trial or convicted under the MBTFA.

There is no merit to this claim. Regardless of the existence of either Consolidated or Barrington as corporate entities, and regardless of whether defendant acted on behalf of these corporations as an officer, director, agent or employee, he was a "contractor" under the MBTFA and was therefore subject to criminal penalties under the Act. While no definition of contractor is provided in the MBTFA, the term is defined in § 103 of the Michigan Construction Lien Act, MCL 570.1101 *et seq.*; MSA 26.316(101) *et seq.*, as "a person who, pursuant to a contract with the owner or lessee of real property, provides an improvement to real property." MCL 570.1103(5); MSA 26.316(103)(5). Defendant clearly meets this definition of contractor. Defendant signed all of the relevant contracts, he held himself out to the Dows as a licensed builder, and he contracted with the Dows to provide an improvement to their property. Moreover, the December 1995 contract clearly identifies defendant as

“the Builder,” and states that he is to be “individually . . . responsible” for the Dow construction project. The evidence was sufficient to support a finding that defendant was, in his individual capacity, a contractor under the MBTFA at the time he signed the December 1995, agreement.

Moreover, even if Consolidated and Barrington were, in fact, corporations, for which defendant acted in a merely representative capacity, he was nevertheless properly held criminally accountable for the misappropriation of the Dows’ funds under the MBTFA. See *Brown, supra*, slip op at 2-3. Accordingly, “ ‘regardless of whether [defendant was] acting on [his] own behalf or on behalf of a corporation,’ ” *Id.*, quoting *Joy Management Co v City of Detroit*, 183 Mich App 334, 340; 455 NW2d 55 (1990), he was properly bound over and tried on criminal charges under the MBTFA.

Defendant also argues that insufficient evidence was presented at trial to support a finding that he acted with “intent to defraud” under § 2 of the MBTFA, and that his conviction must therefore be reversed. We disagree.

Intent generally may be inferred from the facts and circumstances of a case. *In re People v Jory*, 443 Mich 403, 419; 505 NW2d 228 (1993); *People v Phillips*, 385 Mich 30, 37; 187 NW2d 211 (1971). Additionally, §3 of the MBTFA provides that a contractor’s appropriation “of any moneys paid to him for building operations before the payment by him of all moneys due or so to become due laborers, subcontractors, materialmen or others entitled to payment, *shall be evidence of intent to defraud.*” MCL 570.153; MSA 26.333 (emphasis supplied). Here, there was evidence established that, throughout the two years that defendant acted as general contractor of the project, he mismanaged the Dows’ deposits to such an extent that he did not have sufficient funds to pay for completed work or to make further progress on the project. Additionally, there was testimony that defendant admitted that he spent the Dows’ money on things other than on the Dow construction project. There was ample evidence to support the trial court’s conclusion that defendant’s sworn statement regarding how he spent the Dows’ money was “misstated intentionally, and that the defendant did intend to cheat the Dows out of their money, or at least the temporary use of their money, while the building was going to go on.”

Moreover, defendant’s sworn statement indicates that he used some of the Dows’ deposits to pay Barrington for “supervision,” “processing” and “general administration” fees before first paying all of the costs of the construction. Pursuant to MCL 570.153; MSA 26.333, these payments, made before subcontractors had been paid, are “evidence of intent to defraud.” Furthermore, the evidence demonstrated that, at the time defendant appropriated the Dows’ funds, he had knowledge that he and/or his corporation were experiencing financial difficulties. See *Brown, supra*, slip op pp 4-5. Viewing all the evidence in a light most favorable to the prosecution, we find that a rational trier of fact could find that the prosecution proved beyond a reasonable doubt that defendant acted with the intent to defraud. *Wolfe, supra* at 515-516; *Marsack, supra* at 370.

Defendant also contends that the Legislature did not intend the MBTFA to be applied in a case such as the one at bar, and that the prosecution utilized the MBTFA in this case to avoid application of the Bankruptcy Code. We find this argument to be meritless. The decision whether to initiate criminal

charges is within the discretion of the prosecutor, *People v Gilmore*, 222 Mich App 442, 457; 564 NW2d 158 (1997); *People v Phillips*, 219 Mich App 159, 164; 555 NW2d 742 (1996), and any motivation the Dows might have had for failing to institute civil proceedings against defendant is simply immaterial to the propriety of the prosecutor's charging defendant with a crime. Moreover, the MBTFA clearly provides for both a civil and a criminal remedy. *Whipple, supra* at 432; *Weathervane, supra* at 325. The MBTFA was designed "to prevent contractors from juggling funds between unrelated projects" and to "ensure[] that funds for a particular project will be used for that project alone." *Miller, supra* at 342. It is a remedial statute which is construed liberally for the advancement of the remedy. *Whipple, supra* at 433; *Miller, supra* at 343. Accordingly, there is no merit to defendant's claim that the MBTFA does not contemplate the type of conduct he exhibited in his dealings with the Dows' construction money.

Finally, defendant argues that the trial court failed to comply with the statutory procedure in determining the amount of restitution to which the Dows were entitled. We disagree. A defendant serving a probationary sentence must pay restitution to the victim of the defendant's illegal conduct. MCL 771.3(1)(e); MSA 28.1133(1)(e); *People v Collins*, 239 Mich App 125, 135; ___NW2d ___(1999). If a defendant's offense causes the victim loss of property, the trial court must order the defendant to "make full restitution to any victim" of the defendant's crime. MCL 769.1a(2); MSA 28.1073(2); MCL 780.766(2); MSA 28.1287(766)(2); *Collins, supra*; *People v Ho*, 231 Mich App 178, 192; 585 NW2d 357 (1998).

To the extent that defendant argues that the trial court erred in failing to hold a separate evidentiary hearing concerning the proper amount of restitution to be ordered, this issue is not preserved for appellate review. Although defendant disputed the amount of loss claimed by the Dows, he did not request an evidentiary hearing to resolve the issue. Therefore, he waived his right to such a hearing. See *People v Gahan*, 456 Mich 264, 276 n17; 571 NW2d 503 (1997).

Nevertheless, because defendant objected to the amount of loss claimed by the Dows, the trial court was required to resolve the dispute by a preponderance of the evidence. MCL 780.767(4); MSA 28.1287(767)(4); *People v Grant*, 455 Mich 221, 243; 565 NW2d 389 (1997). We find that the trial court properly considered the evidence received at trial and the arguments presented at the sentencing hearing and determined that the prosecution had proven, by a preponderance of the evidence, that the Dows were entitled to restitution in the amount of \$60,000. Although the court did not make explicit findings concerning this amount, nothing in the language of MCL 780.767; MSA 28.1287(767) requires a sentencing court to state on the record explicit findings. Rather, the court is required to "consider the amount of the loss sustained" by the victims and to resolve any dispute concerning the amount of loss "by a preponderance of the evidence." MCL 780.767(1), (4); MSA 28.1287(767)(1), (4). It is apparent from the record that the court complied with the statutory requirements.

Affirmed and remanded for further proceedings. While this matter was pending, the lower court granted defendant's motion to stay execution of the ordered restitution. On remand, the trial court is ordered to lift the stay and prepare a new schedule for defendant's restitution. We do not retain jurisdiction.

/s/ Roman S. Gibbs

/s/ Joel P. Hoekstra

/s/ Jane E. Markey