STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 27, 2001
v	No. 215006 Oakland Circuit Court
ABED MOSA BAIDAS, Defendant-Appellant.	LC No. 98-158357-FH

Before: Zahra, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of writing or delivering a no-account check, MCL 750.131a(1); MSA 28.326(1)(1), and was sentenced, as a third habitual offender, MCL 769.11; MSA 28.1083, to one to four years' imprisonment and ordered to pay restitution in the amount of $1,867. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in denying his motion for adjournment on the day of the trial to allow him to locate an out-of-state witness. We will not reverse a trial court's decision on a motion for adjournment unless the decision constituted an abuse of discretion that resulted in prejudice to the defendant. *People v Norman*, 176 Mich App 271, 275; 438 NW2d 895 (1989). An abuse of discretion exists when the result is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999). In addressing whether adjournment was warranted, we consider whether defendant: (1) was asserting a constitutional right; (2) had a legitimate reason for asserting that right; (3) was negligent in asserting that right; (4) made prior requests for adjournments of trial; and (5) has demonstrated prejudice resulting from the trial court's abuse of discretion. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990)

Defendant claimed adjournment was necessary to allow an out-of-state witness to testify in his defense. According to defendant, the witness would have testified that defendant sold the business on which the check in question was drawn and transferred all business records to a third party. That purported testimony would have been irrelevant to the outcome of the trial because defendant was the only person authorized to use the bank account in question and the closed

account had not been transferred to another individual or entity. Given that the purported testimony would have been irrelevant, defendant has failed to show any prejudice resulting from the trial court's denial of his motion for adjournment. Moreover, it appears that the instant case was adjourned approximately two weeks before trial to allow defendant to obtain the presence of the same witness. Under these circumstances, we conclude that the trial court did not abuse its discretion in refusing to grant defendant an adjournment.[1]

II

Next, defendant claims that the trial court erred in denying his motion for a directed verdict of acquittal because there was insufficient evidence that he had the intent to defraud. We disagree.

When ruling on a motion for a directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). This Court reviews a motion for directed verdict by the same standard applicable to the trial court. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992).

In the present case, there was sufficient evidence that defendant had an intent to defraud. Defendant deposited a check from a business bank account he knew or should have known had previously been closed. The evidence indicated that the account was closed on March 19, 1996 because defendant had bounced eleven checks in March 1996. Further, the evidence established that defendant remained the only person authorized to use the closed account and that he had not transferred the account to another individual or entity. In addition, after depositing the check in the amount of $1,867 into a separate personal savings account, defendant immediately withdrew $300 and then made four separate withdrawals from account over the course of several days, receiving all but $1.38 of the original amount of the check. After defendant was notified of the no-account status of the business account, he failed to reimburse the bank that held his personal account despite receiving a "five-day notice." Under MCL 750.132; MSA 28.327, the failure to respond to the five-day notice was prima facie evidence of an intent to defraud. Despite repeated requests over a five-month period, defendant failed to reimburse the bank. When viewed in the

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[1] Also without merit is defendant's claim that he was denied due process when the trial court denied his motion for adjournment. Although defendant claims that his counsel was not prepared to present witnesses in the instant case on the scheduled date of trial because his counsel believed that another of the four cases in which defendant was involved was being tried first, the trial court pointed out that the order of the cases was "at the convenience of the court" and that "this is the trial date." There was no evidence that the trial court "forced a conviction" by changing the order of the four cases to be tried.

light most favorable to the prosecution, the evidence was sufficient to show defendant's intent to defraud.[2]

III

Based upon the above-discussed evidence, we also reject defendant's claim that his conviction was against the great weight of the evidence. The evidence does not preponderate heavily against the verdict. Rather, the evidence overwhelmingly preponderates in favor of the verdict. *People v Lemmon*, 456 Mich App 625, 640, 642; 576 NW2d 129 (1998).

IV

Next, defendant argues that the trial court abused its discretion by allowing the prosecutor to elicit testimony that defendant bounced eleven of twelve checks on the closed account in March 1996. On appeal, defendant argues that the trial court should not have allowed the testimony into evidence under MRE 404(b). However, the record establishes that defendant objected to the testimony only on the ground of relevancy. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Defendant has failed to show a plain error that affected his substantial rights because the testimony was properly admitted to show that defendant knew the check was drawn from a closed account. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Even assuming for the sake of argument that the evidence in question was other-acts evidence under MRE 404(b), defendant cannot show that the evidence was admitted for an improper purpose or that its probative value was substantially outweighed by any prejudicial effect. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998), citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). Finally, because the evidence was properly admitted, defendant was not denied the effective assistance of counsel when his trial counsel failed to object to the evidence or to request a cautionary instruction. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

V

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[2] Defendant's additional claim that the district court erred in binding him over to circuit court is equally without merit. Based upon the circumstantial evidence presented at the preliminary examination, and reasonable inferences therefrom, there was probable cause that defendant had the intent to defraud. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). But even assuming that the district court erred, any error was rendered harmless by the presentation at trial of sufficient evidence to convict him of the offense. *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989). Moreover, contrary to defendant's claim, there was sufficient evidence that defendant delivered the check to the bank when he deposited the check in his personal savings account. As the trial court properly observed, the "the same action" constituted both presenting and delivering the check. See *People v Peach*, 174 Mich App 419, 423; 437 NW2d 9 (1989).

We also conclude that defendant was not denied the effective assistance of counsel when his counsel failed to secure the presence of the out-of-state witness or obtain records that purportedly would have supported his contention that his business was sold. As previously stated, whether the business was sold was irrelevant to defendant's conviction of the instant offense. Thus, any error by trial counsel in failing to obtain the presence of the out-of-state witness or the records did not prejudice defendant. *Id.*

Defendant has also failed to show that his counsel was ineffective for failing to call defendant to testify in his own behalf. The decision whether to call defendant as a witness was a matter of trial strategy. *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). Defendant's failure to testify does not deprive him of a substantial defense. *Id.* As the prosecution points out, if defendant had taken the stand, he would have been impeached with evidence of his prior convictions (see Issue VII, *infra*).

VI

Next, defendant argues that his sentence must be vacated because the trial court based his sentence on its effect on potential immigration proceedings. There exists no competent evidence to support defendant's contention. In sentencing defendant as an habitual offender, the trial court noted that "there was a serious problem that you have with credibility and honesty based on your record." Moreover, we note that, in light of defendant's criminal history demonstrating his inability to conform his conduct to the law, his sentence, which was within the statutory limits, is proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

VII

The trial court did not abuse its discretion in ruling that defendant's two separate convictions in 1992, each for nonsufficient funds check over $200, were admissible to impeach him pursuant to MRE 609(a)(1). *People v Parcha*, 227 Mich App 236; 575 NW2d 316 (1997). Specifically, a conviction for insufficient funds check, MCL 750.131; MSA 28.326, requires (1) the intent to defraud; (2) the drawing of a check for the payment of money upon a bank; and (3) knowledge by the drawer of the check that the bank account has insufficient funds or credit for the payment of the check. *People v Chappelle*, 114 Mich App 364, 370; 319 NW2d 584 (1982). To establish a conviction for insufficient funds check, there must be a false representation incident to giving such a check with the intent to defraud. *People v LaRose*, 87 Mich App 298, 303; 274 NW2d 45 (1978), citing *People v Jacobson*, 248 Mich 639; 227 NW 781 (1929). In this case, defendant's two prior convictions for nonsufficient funds check were crimes in the nature of crimen falsi because they "did not merely imply dishonesty on the part of the perpetrator, but incorporated a dishonest act, such as active deceit or falsification, as an element of the offense itself." *Parcha, supra* at 243. Because defendant's prior convictions were for crimes that contained an element of dishonesty or false statement, they were admissible under MRE 609(a)(1) without consideration of the balancing test of MRE 609(a)(2)(B).

VIII

Defendant has also failed to show that prosecutorial misconduct denied him a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). First, there

is no merit to defendant's claim that the prosecutor engaged in misconduct by arguing that a bank official's testimony regarding defendant's withdrawals from his savings account indicated an intent to defraud. Moreover, to the extent the prosecutor argued facts not in evidence in closing argument by stating that defendant deposited the check in question on a Friday afternoon and withdrew most of the money on a Monday, any error in this regard does not require reversal because it is not probable that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1996).

Affirmed.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Hilda R. Gage