

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CONSTANCE MARIE GRIMMER,

Defendant-Appellant.

UNPUBLISHED

March 17, 2011

No. 295271

Berrien Circuit Court

LC No. 2008-401356-FH

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendant appeals as of right from her convictions by a jury of two counts of forgery, MCL 750.248; false pretenses involving a value of \$1,000 or more but less than \$20,000, MCL 750.218(4)(a); and attempted false pretenses involving a value of \$1,000 or more but less than \$20,000, MCL 750.92; MCL 750.218(4)(a). The trial court sentenced her to two days in jail, with credit for two days served, and to community service and 18 months' probation. We vacate defendant's forgery convictions and affirm in all other respects.

This case arose after defendant used false pretenses – specifically, false letters containing purported details about her compensation package – to obtain money as part of her job with the Humane Society of Southwestern Michigan.

Defendant first argues that the evidence was insufficient to support her forgery convictions because the letters that she allegedly forged were not “orders” or any other instrument for purposes of the forgery statute. We agree. We apply a de novo standard of review when reviewing a sufficiency of the evidence claim. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We examine the evidence in the light most favorable to the prosecution and determine whether a rational juror could have concluded that the essential elements of the crime were proven beyond reasonable doubt. *Id.* We resolve evidentiary conflicts in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Circumstantial evidence and reasonable inferences arising from such evidence can be

satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

At the time of the alleged offense,¹ Michigan's forgery statute provided, in part:

Any person who shall falsely make, alter, forge, or counterfeit any public record, or any certificate, return, or attestation of any clerk of a court, public register, notary public, township clerk, or any other public officer, in relation to any matter wherein such certificate, return, or attestation may be received as legal proof, or any charter, deed, will, testament, bond, writing obligatory, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, or any *order*, acquittance of discharge for money or other property, or any waiver, release, claim or demand, or any acceptance of a bill of exchange, or indorsement, or assignment of a bill of exchange or promissory note for the payment of money, or any accountable receipt for money, goods, or other property, with intent to injure or defraud any person, shall be guilty of a felony, punishable by imprisonment for not more than 14 years. [MCL 750.248(1) (emphasis added).]

A person commits forgery when a person (1) falsely makes any writing enumerated in the statute (2) with the intent to deceive (3) in a manner that exposes another to loss. *People v Susalla*, 392 Mich 387, 393; 220 NW2d 405 (1974). The trial court instructed the jury that the letters defendant allegedly forged were orders. The term "order" for purposes of MCL 750.248(1) is not defined by statute. When interpreting a statute, we discern and give effect to the Legislature's intent. *People v Zujko*, 282 Mich App 520, 522; 765 NW2d 897 (2008). If a statute does not define a term, we assign the term its plain and ordinary meaning and may consult dictionary definitions. *TMW v Dep't of Treasury*, 285 Mich App 167, 172; 775 NW2d 342 (2009). The dictionary defines "order" as "an authoritative direction or instruction" and "a written direction to pay money or deliver goods, given by a person legally entitled to dispose of it." *Random House Webster's College Dictionary* (2000). Michigan case law regarding forgery indicates that, historically, the term "order" was most often used as part of a phrase that referred to an order to deliver goods or pay money to another. See e.g., *People v Brown*, 178 Mich 155, 156; 144 NW 477 (1913); *People v Palmer*, 127 Mich 383, 383; 86 NW 831 (1901); *People v Phillips*, 118 Mich 699, 699-700; 77 NW 245 (1898); and *People v Smith*, 112 Mich 192, 193-194; 70 NW 466 (1897).

The letters in this case were not "orders" under the statutory term's plain and ordinary meaning. The letters did not direct the Humane Society or anyone else to pay defendant money. Rather, they were addressed solely to defendant, offering her a salary of \$42,000 a year and informing her that she would receive ten percent of the income from each grant she wrote. Moreover, the letters did not constitute any of the other writings subject to forgery listed in MCL 750.248(1).

¹ The statute has since been amended, in respects that are immaterial to the present case.

We vacate defendant's convictions for forgery because there was insufficient evidence for a rational trier of fact to conclude that the essential elements of forgery were proven beyond a reasonable doubt.

Defendant also appears to argue that the evidence was insufficient to support the false pretenses and attempted false pretenses charges. She states that we should grant her a new trial on the charges of false pretenses and attempted false pretenses because the jury most likely relied on the "forgeries" to convict defendant on these counts. These issues are abandoned because defendant fails to explain or rationalize her position and fails to cite adequate supporting authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, we note that if evidence is insufficient to support a conviction, the remedy is to vacate that conviction, not grant a new trial. See *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). Nevertheless, we note that the two false pretenses convictions were proper.

For defendant to be convicted of false pretenses, the prosecution must have proved the following elements beyond a reasonable doubt: (1) defendant made a false statement or used a false pretense relating to a past or existing fact; (2) defendant knew of the falsity at the time; (3) defendant had the intent to defraud or cheat when she made the statement or used the pretense; (4) the victim detrimentally relied on the false pretense or false statement and suffered a loss of money; and (5) defendant obtained something from the victim valued at \$1,000 or more but less than \$20,000. MCL 750.218(4)(a); *People v Lueth*, 253 Mich App 670, 680-681; 660 NW2d 322 (2002).

There was testimony that neither Jeffrey Fries, the purported author of the letters in question, nor any Humane Society Board member promised defendant a \$42,000 salary. When Cynthia McCrory, and later Babette Smith and Dennis Dutoi, asked defendant for documentation of her claim to \$42,000 a year, defendant stated that she did not have any. However, after defendant resigned, Smith and Sue Burkhart found the salary letter in defendant's personnel file. The letter was purportedly from Fries to defendant on the Humane Society's letterhead, bore Fries's signature, and promised defendant a \$42,000 salary. Fries testified that he neither wrote nor signed the letter. Defendant testified that she had access to the Humane Society's letterhead. The Humane Society permitted defendant to take 104 hours of vacation time, amounting to \$2,000, in lieu of \$2,000 in salary. When defendant did not use this additional vacation time, she wrote a payroll check to herself in the amount of \$2,000; defendant received this amount. We find that this evidence was sufficient for a rational trier of fact to find that the prosecutor proved the elements of false pretenses beyond a reasonable doubt.

For defendant to be convicted of attempted false pretenses, the prosecution must have proved beyond a reasonable doubt that defendant (1) had the specific intent to commit false pretenses and (2) committed an overt act toward the commission of the crime beyond mere preparation. MCL 750.92; *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001). There was testimony that neither Fries nor any Board member promised defendant ten percent of the grant money she obtained. When Smith asked defendant for documentation of her claim to the grant-money commission, defendant stated that she did not have any. Nonetheless, defendant later presented to Smith an invoice for \$4,410 of the grant money, along with a letter that purportedly was from Fries to defendant; it was on the Humane Society's letterhead, bore Fries's signature, and promised defendant ten percent of the grant money. Fries testified that he did not

write or sign the letter and did not own or use a signature stamp bearing his signature. Defendant testified that she had access to the Humane Society's letterhead. We find that this evidence was sufficient for a rational trier of fact to find that the prosecution proved the elements of attempted false pretenses beyond a reasonable doubt.

Next, defendant contends that the trial court deprived her of the right to present a defense by erroneously excluding evidence. We disagree. Defendant did not raise the issue of her right to present a defense in the trial court, and we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) ("[a]n objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground"); *Carines*, 460 Mich at 763.²

"The right to present a defense is a fundamental element of due process, but it is not an absolute right." *People v Likine*, 288 Mich App 648, 658; ___ NW2d ___ (2010), lv granted ___ Mich ___; 790 NW2d 689 (2010). "The right only extends to relevant and admissible evidence." *Id.*

First, defendant contends that trial court improperly excluded as hearsay what would have been testimony regarding the contents of defendant's complaint with the Department of Labor. Even assuming that the court improperly denied this testimony, the desired information – that defendant filed a complaint with the Department of Labor for compensation she allegedly believed was due to her – was brought out through other witnesses. Accordingly, defendant's substantial rights were not affected. *Carines*, 460 Mich at 763; see also *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003) ("[a]n error in the admission or exclusion of evidence is not a ground for reversal unless refusal to take this action appears inconsistent with substantial justice"). Reversal is unwarranted.

Defendant also argues that the trial court improperly excluded as irrelevant defendant's testimony regarding her understanding regarding whether the Department of Labor would scrutinize her complaint. Defendant argues that the excluded testimony would have made it more probable than it would be without the evidence that defendant did not have the intent to deceive or defraud the Humane Society. Defendant argues that, if she knew that an agency of the state would scrutinize her claims that she was entitled to \$2,000 in additional salary and a ten percent commission from grant writing, then she would have been less likely to present a false complaint.

However, defense counsel made no offer of proof regarding whether defendant knew this scrutiny would take place. Accordingly, defendant's argument is unavailing. Even assuming that defendant *had* made a favorable offer of proof, the trial court nevertheless did not commit plain error affecting defendant's substantial rights by depriving her of her right to present a defense. *Carines*, 460 Mich at 763. The jury heard testimony that defendant submitted her

² We note that even if this issue were analyzed under the standard of review for preserved errors, we would nonetheless find no basis for reversal.

complaint to the Department of Labor and that the complaint accused the Humane Society of wrongly withholding \$2,000 in salary and ten percent in grant commissions. From this testimony, the jury could reasonably conclude that defendant felt entitled to the salary and grant commissions and that defendant expected the Department of Labor to review and investigate her complaint. Moreover, defendant could argue and the jury could reasonably infer from this testimony that if defendant knew that the Department of Labor was going to scrutinize her complaint, she would not have submitted a false complaint. This would tend to show that defendant likely did not have the intent to deceive or defraud the Humane Society and did not write the letters. Defense counsel, in closing, did in fact argue that defendant had intentionally invited the scrutiny of the state. In light of the evidence that *was* admitted and the inferences available from it, defendant was not prejudiced by the trial court's ruling. *McLaughlin*, 258 Mich App at 650.

Next, defendant claims that the prosecutor engaged in misconduct when he elicited rebuttal testimony regarding one witness's opinion of the untruthfulness of defendant's sister, Denise Potter, and a specific instance of conduct demonstrating Potter's untruthfulness. Defendant contends that the prosecutor improperly impeached Potter by extrinsic evidence. We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005).

Under MRE 608(a), a witness's credibility may be attacked by evidence "in the form of opinion or reputation," referring to the witness's character for untruthfulness. Under MRE 608(b), "[s]pecific instances of conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." However, in the discretion of the trial court, specific instances of conduct, if probative of truthfulness or untruthfulness, "may . . . be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." MRE 608(b).

Potter testified on direct examination for defendant that she was fired by the witness Holly Shaffer. On cross-examination, the prosecutor asked Potter why she was fired, and Potter responded that she was fired for lying to Shaffer, but Potter specifically denied lying to Shaffer. The prosecutor called Shaffer as a rebuttal witness. Shaffer testified that it was her opinion that Potter is dishonest. This was proper opinion testimony attacking Potter's character for truthfulness. MRE 608(a). The prosecutor then asked Shaffer about a specific instance of conduct involving the vaccination of a dog. Shaffer testified that Potter lied about the situation to her three times before finally admitting that she lied. This testimony was prohibited by MRE 608(b) because Shaffer's testimony was extrinsic evidence used to attack Potter's credibility. The prosecutor's questioning of Shaffer was not a cross-examination inquiry admissible under MRE 608(b). The prosecutor, in his appellate brief, concedes error in this regard.

Nonetheless, we agree with the prosecutor that reversal is not required. We conclude that defendant has not demonstrated plain error affecting her substantial rights. Defendant cannot show that whether Potter lied about the dog affected the jury's determination of the material facts in this case, especially because Shaffer had already properly testified regarding her opinion that

Potter was dishonest. Accordingly, we find that the prosecutor's conduct did not constitute plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

We reject also defendant's final argument regarding ineffective assistance of counsel. Although it was not objectively reasonable for counsel to allow the prosecutor to impeach defendant's witness through extrinsic evidence without objecting to the prosecutor's conduct, defendant has not demonstrated that counsel's performance was prejudicial to her defense. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant asserts that the jury imputed Potter's bad character onto defendant. This argument is speculative and in no way demonstrates that, but for the alleged error, defendant would have been acquitted. *Id.*

Defendant's forgery convictions are vacated; we affirm in all other respects.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Patrick M. Meter