STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2016
v	No. 328500 Wayne Circuit Court
CURTIS JOEL WINNIE, Defendant-Appellant.	LC No. 14-006921-02-FH

Before: JANSEN, P.J., and MURPHY and RIORDAN, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of conspiracy to commit false pretenses over $20,000, but less than $50,000, MCL 750.218(5)(a) and MCL 750.157a, and he was sentenced to three years' probation. Defendant was also ordered to pay $28,899.48 in restitution. Subsequently, the court denied defendant's motion for a new trial and his amended motion for a new trial. Defendant appeals as of right. We affirm.

I. BACKGROUND

In 2006, Cheryl Ball contacted Doug Anderson, whom she had seen on television, and expressed a desire to sell her home in Detroit. According to Ball, there were no mortgages or liens on the property. She signed a power of attorney in favor of Anderson. Ball and Anderson agreed that the listing price for the home would be $60,000. Ball stated that Anderson subsequently informed her that because the market was very bad in Detroit, "all he could get is $20,000." Ball agreed to sell the house for $20,000. After the sale, Ball received $18,194. However, when she received the closing documents, she discovered that the house was actually sold for $60,000. During an ensuing investigation, Wayne County Sheriff Deputy Corporal Allen Cox discovered that the house was bought by a man named Eugene White. Defendant was the mortgage broker at the closing. Cox confirmed that Ball was paid $18,194.74.

In addition, Cox testified that the settlement statement listed a mortgage payoff to Valasae Estates in the amount of $20,000, and another payoff to Northstar Financial in the amount of $13,437.12. When Cox checked the Register of Deeds, he found out that there were no recorded mortgages or liens on the property before the sale that were connected to either entity. Further investigation revealed that Valasae was set up by White, and White testified that defendant advised him to do so. White admitted that Ball did not owe him or the company any

money. Additionally, it was discovered that Northstar was established by Paul Schoenherr. According to Schoenherr, when he sought defendant's opinion on prospective business ventures, defendant advised him to set up Northstar. Schoenherr also admitted that he never met Ball and she did not owe him or Northstar any money. Ultimately, a check for $14,402.12 was drawn on Northstar's bank account with defendant as the payee, and defendant gave Anderson two checks in the amounts of $5,600 and $2,659.12, with the words "6445 Globe," which is the address of the property at issue, written on the memo line of the checks.

II. ANALYSIS

A. SUFFICIENCY OF EVIDENCE

Defendant first contends that the prosecutor failed to present sufficient evidence to support his conviction. We disagree.

We review this issue de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). "We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt." *Id*.

"A criminal conspiracy is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense." *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011). There must be a specific intent to combine in order to pursue the criminal objective, and the offense of conspiracy is complete when the agreement is formed. *Id*. "The intent, including knowledge of the intent, must be shared by the individuals." *Id*. "Thus, there must be proof showing that 'the parties specifically intended to further, promote, advance, or pursue an unlawful objective.' " *Id*. (citation omitted). Direct proof is not required, and, instead, the proof may be derived from the circumstances of the case, as well as the acts or conduct of the parties. *Id*. The defendant does not need to take an overt action to further the conspiracy, and since "the crime is complete upon the conspirators' agreement, the prosecution need not prove that 'the purpose contemplated by the unlawful agreement was accomplished.' " *People v Seewald*, 499 Mich 111, 117; 879 NW2d 237 (2016) (citation omitted). To convict a defendant of the crime of larceny by false pretenses, a prosecutor must prove the existence of " '(1) a false representation as to an existing fact, (2) knowledge by the defendant of the falsity of the representation, (3) use of the false representation with an intent to deceive, and (4) detrimental reliance by the victim on the false representation.' " *People v Webbs*, 263 Mich App 531, 532 n 1; 689 NW2d 163 (2004) (citation omitted).

In this case, there was sufficient evidence to show that defendant conspired to deceive Ball and obtain $40,000 from the sale of her house. Ball testified that she initially agreed to sell her house for $60,000, but Anderson convinced her that she needed to accept an offer of $20,000. Subsequently, she discovered that the house actually sold for $60,000. Ball also testified that before she agreed to sell the property, there were no mortgages or liens on the property. Cox testified, however, that the settlement statement listed a mortgage payoff to Valasae in the amount of $20,000, and another payoff to Northstar in the amount of $13,437.12. Additionally, he testified that no mortgages in favor of either Valasae or Northstar were recorded

with the Register of Deeds. Cox characterized the payoffs to these companies without evidence of existing liens as "red flags."

Although defendant was not directly involved with Ball, reasonable inferences drawn from the evidence showed that he was involved in the scheme. A November 21, 2006 purchase agreement identified defendant as the buyer of the house for $20,000. Schoenherr testified that he had conducted other real estate transactions before the sale of the property in issue, and Anderson was the agent on many of those transactions. He stated that defendant referred him to Anderson. Additionally, Schoenherr testified that defendant advised him to establish Northstar.

White testified that when he informed defendant that he wanted to buy Ball's property, defendant and Anderson met him at the property so that White could look at the interior. White also testified that defendant advised him to register Valasae and open a bank account for the company. Further, White insisted that it was defendant who gave him the money from the fake lien and convinced him that it represented the equity from the home. Schoenherr testified that he did not know Ball and had no knowledge regarding why Ball had to pay $13,437.12 to Northstar. Further, it was established that after the payoff to Northstar, a check for $14,402.12 was drawn on Northstar's bank account, and defendant was identified as the payee. Schoenherr was unsure why he made out the check to defendant. He stated that the check was "probably for a property," clarifying later that it was "[m]ore than likely for the property" in issue.

Additionally, defendant was the mortgage broker at the closing. A single ledger balance report showed that Zenith Mortgage, defendant's mortgage company, received $2,700 at the closing. Moreover, after the closing, defendant gave Anderson two checks in the amounts of $5,600 and $2,659.12, with the words "6445 Globe" written on the memo line of the checks.

When the evidence is viewed in the light most favorable to the prosecution, there was sufficient evidence at trial to show that defendant conspired with several others to convince Ball that her house was only worth $20,000 and induce her to accept a $20,000 offer on the property, when in fact defendant and his coconspirators planned to purchase the house for $60,000 and keep the remaining profits. Thus, defendant and his coconspirators planned to falsely represent the sale of the property to Ball, with knowledge of the true price of the sale and the intent to deceive Ball, so that defendant and his coconspirators could obtain approximately $40,000 in profits from the sale that were owed to Ball. Accordingly, the prosecution presented sufficient evidence of conspiracy to commit false pretenses over $20,000, but less than $50,000.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that trial counsel was ineffective for failing to investigate two witnesses, calling a particular witness, failing to admit a key piece of evidence, and failing to meaningfully cross-examine the prosecution's witnesses as a result of the attorney's other failures. We disagree.

"The question whether defense counsel performed ineffectively is a mixed question of law and fact; [we review] for clear error the trial court's findings of fact and review[] de novo questions of constitutional law." *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012). "In order to obtain a new trial, a defendant must show that (1) counsel's performance

fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *Id*. at 51. With regard to the objective standard of reasonableness prong of the test, the defendant must overcome a strong presumption that counsel's performance stemmed from a sound trial strategy. *Id*. at 52. "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012).

Defendant contends that trial counsel was ineffective by failing to communicate with two expert witnesses that defendant had made known to counsel, and by failing to call them during trial. A defense attorney's decision regarding whether to call or question a witness is presumed to be a matter of trial strategy. *Russell*, 297 Mich App at 716. " '[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.' " *Id*. (citation omitted; alteration in original). " 'A substantial defense is one that might have made a difference in the outcome of the trial.' " *People v Chapo*, 283 Mich App 360, 271; 770 NW2d 68 (2009) (citation omitted).

In his amended motion for a new trial, defendant attached the affidavits of real estate agents Adam Deyonker and Richard Pefley. In his affidavit, Deyonker stated that property prices in Detroit started dropping in late 2006 and 2007 until the market hit rock bottom in 2009 and 2010. He explained that during the era of nonconforming mortgage loans, creative financing, which involved appraising the property for a higher value than what the home was worth, was used to help people with low credit purchase homes they could not afford. He stated that a loan officer would then engage in what came to be known as "upsales," which involved imputing a higher purchase amount and submitting the inflated appraisal for the bank's approval. He stated that it was typical to give the buyer, "who had borrowed money above and beyond the actual sales agreement," the difference between the loan amount and the actual agreed upon sales price. He stated that what occurred in this case was an upsale. Deyonker opined that the value of the property was actually lower than $20,000 at the time it was sold to White.

In his affidavit, Pefley stated that he located 16 sales of comparable homes that occurred between December 2006 and March 2007, and that the sale prices ranged from $2,500 to $38,000. Pefley averred that the house that sold for $38,000 was built in 1942, and had three bedrooms and a fireplace, while Ball's property was built in 1925, with two bedrooms and no fireplace. He stated that the rest of the comparable homes sold for $20,000 or less, which supports the inference that the property was worth "around $20,000." Like Deyonker, Pefley concluded that a review of the documents showed that what occurred in this case was creative financing or upselling. Pefley opined that "[t]he $60,000 sales price listed in the HUD-1 does not reflect the value of the property. In my professional opinion, I feel the appraisal was manipulated and the real value of the home would be no more than $16,000. The seller . . . was fortunate to receive the $20,000 sale price."

Both real estate agents attest that it was common practice during the relevant period to overstate the value of property in order to obtain loans for otherwise ineligible borrowers. However, neither explained why defendant and his coconspirators told Ball that her property was sold for $20,000, when in fact it was sold for $60,000. Their averments do not explain why Ball was kept in the dark about any possible creative financing. Further, neither expert offered any

explanation for the fake liens that were attached to the property and allegedly paid off during closing. They did not indicate that the creation of nonexistent liens was a technique used in "creative financing." Finally, the experts do not explain the $14,402.12 check written to defendant.

Testimony at trial established that Northstar was paid $13,437.12, and that Schoenherr executed a check payable to defendant for $14,402.12. The trial court's reasoning on the question is sound:

> The fact that it may have been commonplace for certain appraisers to overstate the value of properties to obtain (presumably also under false pretenses) "creative financing" for otherwise ineligible premises is inconsequential to a determination of Defendant's guilt in this case. The record clearly reveals a payoff of mortgage in the amount of $20,462.36 payable to Valasae Estate and a second payoff in the amount of $13,437.12 payable to Northstar Financial. Therefore, as Defendant proffers no evidence that the two aforementioned debits were bona fide liens on the subject property, or that the true nature of the transaction was disclosed to the seller in the course of the transaction, Defendant's argument must fail.

There is no indication that calling the two expert witnesses to testify would have made a difference in the outcome of the trial. Accordingly, defendant fails to establish that the failure to call these two witnesses deprived him of a substantial defense, and, consequently, he fails to demonstrate ineffective assistance of counsel. See *Russell*, 297 Mich App at 716.

Defendant also argues that trial counsel was ineffective for calling as a witness real estate broker Harold Hoyt. Defendant contends that Hoyt's testimony did not shed light on the facts surrounding the transaction because he did not have the listing documents, did not understand the Detroit real estate market, and did not testify that what occurred in this case was a common practice of creative financing or upselling. Hoyt admitted that he had no expertise in the Detroit real estate market. He stated that he reviewed the MLS listing for the property in preparation for trial and noted that the property was first listed for $60,000 in "2006, 2007," before it was subsequently reduced to the "fifties" and "thirties." From this testimony, defense counsel could establish that the expectations on what could be realized from the sale of the property were steadily, not abruptly, being lowered before the sale. This allowed counsel to argue that the $20,000 offer "would have clearly been aligned with what the value of the property was." Counsel's decision to call Hoyt was trial strategy, and defendant has failed to overcome the presumption that the strategic decision was a sound one. See *Trakhtenberg*, 493 Mich at 52.

Defendant also argues that counsel failed to submit the listing history for the home as an exhibit during trial. Defendant contends that the listening history would have shown that the price of the home was reduced to $34,900 before defendant was aware of the property and that the property was initially listed for sale on September 8, 2006. However, the listing history for the home would not account for the difference between the price for which the home sold and the amount Ball received from the sale, and it would not have explained why money was paid from the sale price to satisfy two nonexisting liens, or why defendant and his coconspirators received thousands of dollars through the sale of the home. Finally, there was testimony at trial that the

price of the home was reduced. Therefore, defendant fails to establish that defense counsel's failure to admit the listing history into evidence fell below an objective standard of reasonableness or that there is a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different. See *Trakhtenberg*, 493 Mich at 51.

C. PROSECUTORIAL MISCONDUCT

Finally, defendant argues that the prosecutor engaged in misconduct. We disagree.

Because defendant did not object in the trial court to the alleged instances of misconduct, the issue is not preserved. See *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *Id*. If plain error is shown, reversal is only warranted when it resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of defendant's innocence. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, and the issue is decided on a case-by-case basis. *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007).

Defendant first alleges that the prosecutor engaged in misconduct by focusing on the alleged unrecorded liens. Although he characterizes this as an issue of prosecutorial misconduct, it is really a challenge to the sufficiency of the evidence. Again, the conviction is supported by sufficient evidence. Defendant also argues that the prosecutor engaged in misconduct by not producing Anderson as a witness and not preserving his testimony, which resulted in the admission of irrelevant testimony during trial. Defendant does not identify the irrelevant testimony he is referring to or show how Anderson's testimony would have impacted the proceedings. Defendant does not assert that he sought assistance in producing Anderson. In sum, defendant cannot show that the prosecutor's actions denied him of a fair trial, or that the presumed misconduct affected the outcome of the lower court proceedings. Further, he does not establish that any misconduct resulted in the conviction of an actually innocent defendant or impacted the fairness, integrity, or public reputation of the judicial proceedings independent of defendant's innocence. See *Carines*, 460 Mich at 763. Accordingly, his prosecutorial misconduct argument is without merit.

Affirmed.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Michael J. Riordan