STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER HOEHN,

Defendant-Appellant.

UNPUBLISHED
December 22, 2020

No. 352192
Wayne Circuit Court
LC No. 18-005853-01-FH

Before: CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of embezzlement of $50,000 or more but less than $100,000, MCL 750.174(6). Defendant was sentenced to 36 months' probation with the first year to be served in jail.[1] We affirm.

I. BACKGROUND

Robert Arlen (Robert) testified that he and his brother, Richard Arlen (Richard), entered into a business agreement with defendant in 2009. Robert and Richard owned a building located at 221 Main Street in Plymouth, Michigan. Defendant approached them with the opportunity to purchase a house located across the street that had been foreclosed on. The three decided to form an investment company, NELRA 1, in order to purchase the house at a discounted rate and then resell it. The plan was then to purchase additional foreclosed properties and resell them.

Robert, Richard, and defendant worked together with an attorney to create an Operating Agreement. The Operating Agreement was signed on September 15, 2009. The parties to the agreement were Robert, Richard, and defendant's wife, Rene Hoehn (Hoehn). All of the day-to-day operations were to be handled by defendant. Robert was an investor who supplied money for

[1] On January 16, 2019, the trial court entered an amended judgment of sentence. The amended judgment of sentence changed the jail time to time served because defendant paid $5,000 in restitution.

the business. Robert testified that Richard was the managing partner, but Richard denied this. Hoehn, Robert, and Richard were each to contribute $22,000 to the project, and Robert and Richard did so. Robert believed, but did not know if, Hoehn contributed $22,000.

The house was eventually sold on a land contract and money was deposited into the NELRA 1 bank account. Money was distributed from the bank account by defendant to his trust account, a company controlled by defendant, and to Hoehn. The Arlen brothers never gave defendant permission to remove money from the NELRA 1 bank account. Defendant never paid Richard or Robert anything. Defendant insisted that all of the withdrawals from the bank account were legitimate. Ultimately, defendant was convicted of embezzlement and sentenced as noted above. This appeal followed.

II. JUDICIAL IMPARTIALITY

Defendant first argues that a remark made by the trial judge regarding defendant's sophistication as a businessman pierced the veil of judicial impartiality and biased the jury against defendant as evidenced by the jury's short deliberations. We disagree.

Typically, the issue of whether judicial misconduct denied defendant a fair trial is reviewed de novo as a question of constitutional law. *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015). However, because defendant failed to preserve this issue it is reviewed for plain error affecting substantial rights. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763-764 (quotation marks and citation omitted).

"A trial judge's conduct deprives a party of a fair trial if the conduct pierces the veil of judicial impartiality." *Stevens*, 498 Mich at 164. "A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Id.* "In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors including, but not limited to, the nature of the trial judge's conduct, the tone and demeanor of the judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions, either at the time of an inappropriate occurrence or at the end of trial." *Id.*

Defendant argues that the trial judge's remark during the following exchange was improper and pierced the veil of judicial impartiality:

> *Q*. Where are [sic] the documentation supporting that – where is the documentation showing that you discussed that with either Richard Arlen, Robert Arlen, or [Hoehn]?
>
> *A*. There is none.
>
> *Q*. And you're the sophisticated businessman here?
>
> *[Defense Counsel]*: Objection.
>
> *[The Court]*: Well, let's not call him sophisticated. You can call him other things, but not sophisticated.

The trial court judge's comment was in response to an objection from defense counsel. The judge was not the first person to raise the issue of sophistication—the prosecution was. The judge's comment, while perhaps a bit condescending, did not rise to the level of creating the appearance of advocacy for the prosecution or partiality against defendant. Furthermore, the comment was brief, especially considering that it was one stray remark over the course of a two-day trial. The remark was an isolated incident. Defendant also focuses on the brevity of the jury's deliberations, but there is no way of knowing why the jury's deliberations were so brief. It is a stretch to assume that the trial judge's remark regarding defendant's sophistication somehow shortened what would have otherwise been lengthy deliberations or was otherwise so influential as to hasten a verdict from the jury.

Additionally, curative instructions at the end of trial weigh against a finding of judicial misconduct. *Id*. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Here, the trial court instructed the jury as follows:

> My comments, rulings, questions, summary of the evidence, and instructions of the law are also not evidence. It is my duty to see that the trial is conducted according to the law, and to tell you the law that applies to this case. However, when I make a comment or give an instruction, I'm not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts, and you should decide this case from the evidence.

The jury is presumed to have followed the court's instruction, and this instruction was more than sufficient to cure any minor appearance of partiality created by the judge's comment regarding defendant's sophistication.

III. SUFFICIENCY OF THE EVIDENCE

Second, defendant argues that the prosecution failed to present sufficient evidence from which the jury could find beyond a reasonable doubt that defendant intended to defraud NELRA 1. We disagree.

"We review de novo a challenge to the sufficiency of the evidence." *People v Savage*, 327 Mich App 604, 613; 935 NW2d 69 (2019). "We review the evidence in the light most favorable to the prosecution and determine whether the jury could have found each element of the charged crime proved beyond a reasonable doubt." *Id*. "Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of [a] crime." *Id*. (quotation marks and citation omitted). We also must draw all reasonable inferences and make all credibility choices in support of the verdict. *Id*. at 613-614. "It is for the trier of fact, *not the appellate court*, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Oros*, 502 Mich 229, 239; 917 NW2d 559 (2018) (quotation marks and citation omitted).

Embezzlement by an agent, MCL 750.174, requires proof of the following six elements:

> (1) the money in question must belong to the principal, (2) the defendant must have a relationship of trust with the principal as an agent or employee, (3) the money must come into the defendant's possession because of the relationship of trust, (4) the defendant dishonestly disposed of or converted the money to his own use or secreted the money, (5) the act must be without the consent of the principal, and (6) at the time of conversion, the defendant intended to defraud or cheat the principal. [*People v Schrauben*, 314 Mich App 181, 198; 886 NW2d 173 (2016) (quotation marks and citation omitted).]

Defendant only challenges element six, whether he intended to defraud or cheat NELRA 1. "An actor's intent may be inferred from all of the facts and circumstances and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 518-519; 583 NW2d 199 (1998) (citation omitted). Furthermore, "the failure, neglect, or refusal of the agent . . . to pay, deliver, or refund to his or her principal the money or property entrusted to his or her care upon demand is prima facie proof of intent to embezzle." MCL 750.174(10).

Defendant argues that he did not have an intent to defraud or cheat NELRA 1 because each transaction from NELRA 1's bank account was explained by defendant to be for a legitimate purpose. However, the jury clearly did not credit defendant's version of events. Instead, it appears to have credited the Arlen brothers' versions of the events, which is that defendant transferred funds from the NELRA 1 bank account to the PENSCO Trust account, which belonged to defendant, as well as to MSIC-Main, a company controlled by defendant, for defendant's personal gain.

Defendant was the individual who set up the investment opportunity. He was the one who approached Richard and Robert to join as members of NELRA 1. Defendant was also the only person who transferred funds out of the NELRA 1 bank account. Despite the fact that there were three members of NELRA 1, only Hoehn, defendant's wife, ever received a check after making the original investment to NELRA 1. Richard and Robert never received any money from NELRA 1 or defendant. In fact, the only money transferred out of the NELRA 1 bank account either went to entities controlled by defendant or Hoehn. Thus, based on the record before us, we conclude that the prosecution presented sufficient evidence at trial from which a reasonable jury could find beyond a reasonable doubt that defendant intended to defraud or cheat NELRA 1 and its members.

IV. SENTENCING

Finally, defendant argues that the trial court erred when it failed to consult the advisory guidelines range before sentencing defendant. We disagree.

Defendant failed to preserve this issue by raising it in the trial court. Unpreserved issues are reviewed for plain error affecting substantial rights. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, 460 Mich at 763. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id*. at 763-764 (quotation marks and citation omitted).

Although the sentencing guidelines are now advisory, " '[s]entencing courts must . . . continue to consult the applicable guidelines range and take it into account when imposing a sentence . . . [and] justify the sentence imposed in order to facilitate appellate review.' " *People v Steanhouse*, 500 Mich 453, 470; 902 NW2d 327 (2017), quoting *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). Here, defendant's sentencing information report indicates that defendant's minimum sentencing guidelines range was 0 to 17 months. Defendant was sentenced to three years' probation with the first year to be served in jail, along with $49,000 in restitution. This sentence was within defendant's minimum sentencing guidelines range of 0 to 17 months' imprisonment as defendant's range fell within an intermediate sanction cell and the court-imposed sentence was also an intermediate sanction.[2] Although, the trial court did not specifically mention the applicable guidelines range when sentencing defendant, the fact that defendant's sentence fell within the minimum sentencing guidelines suggests that the court did in fact review the applicable guidelines range before sentencing defendant.

Furthermore, "[w]hen a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information." *Schrauben*, 314 Mich App at 196, citing MCL 769.34(10). Defendant does not allege there was an error in scoring or that the trial court relief on inaccurate information. Accordingly, this Court must affirm defendant's sentence.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro

[2] See *Schrauben*, 314 Mich App at 195 ("In accordance with the broad language of Lockridge, under Subsection (4)(a), a trial court may, but is no longer required to, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less.").