STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 27, 2013
v	No. 309677 Macomb Circuit Court
LASHANDA CHANTILL KELLEY, Defendant-Appellant.	LC No. 2011-002252-FH

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant of embezzlement from a vulnerable adult ($1,000 or more but less than $20,000), MCL 750.174a(1) and MCL 750.174a(4)(a), and illegal use of a financial transaction device (debit card), MCL 750.157q. The trial court sentenced defendant to 12 to 90 months' imprisonment for the embezzlement conviction, and one to four years' imprisonment for the illegal delivery, sale, or circulation of a financial transaction device conviction. Defendant appeals by right. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues there was insufficient evidence to support her conviction of embezzlement from a vulnerable adult. We disagree

We review de novo a claim that the evidence is insufficient by viewing it in a light most favorable to the prosecution to determine whether a rational trier of fact could find that all essential elements of the crime were proved beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). Circumstantial evidence and reasonable inferences may be used to prove the elements of the crime. *Id*. at 196.

MCL 750.174a provides, in relevant part:

> (1) A person shall not through fraud, deceit, misrepresentation, coercion, or unjust enrichment obtain or use or attempt to obtain or use a vulnerable adult's money or property to directly or indirectly benefit that person knowing or having reason to know the vulnerable adult is a vulnerable adult.
>
> * * *

(15) As used in this section:

* * *

(c) "Vulnerable adult" means that term as defined in section 145m, whether or not the individual has been determined by the court to be incapacitated.

MCL 750.145m(u)(*i*) defines a vulnerable adult as, "[a]n individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently."

The prosecutor presented sufficient evidence to prove, beyond a reasonable doubt, that one of the victims, Norman Reitmeyer, was a vulnerable adult. At the time of trial, Norman was 82. Norman testified that he began hiring someone to help him around the house and with caring for his 76 year-old wife Francesca about five years before hiring defendant. Defendant helped Norman put on his socks in the morning. A Chase Bank investigator, Melissa Martin, testified that Norman seemed fragile. Norman also testified that although he used to look at his bank statements every month, he stopped looking at them because he was getting older. At the time of trial, he had started to depend on his grandson to look after his finances and to do things around the house. Furthermore, the prosecutor called Norman to testify, which allowed the jury to determine Norman's level of infirmity. Therefore, there was sufficient evidence that Norman required supervision because of his advanced age.

The prosecutor also presented sufficient evidence to prove, beyond a reasonable doubt, that defendant, through fraud, deceit, misrepresentation, coercion, or unjust enrichment, obtained the second victim's money. First, Francesca Reitmeyer was named on the trust account from which defendant was taking money. Second, there was sufficient evidence that defendant used fraud, deceit, misrepresentation, coercion, or unjust enrichment to obtain the money from the account. Defendant withdrew money from the account on multiple occasions. Although she claimed that Norman had authorized the withdrawals, he testified that he did not and would not have allowed defendant to withdraw money from the account. There is also evidence that defendant forged several checks from this account. Defendant gave her landlord, Dorothy Dombal, a check drawn on the account for $1,500 in back rent. Norman denied that he wrote this check. Therefore, there was sufficient evidence that defendant used fraud, deceit, misrepresentation, coercion, or unjust enrichment to obtain the money. MCL 750.174a(1).

II. OTHER ACTS EVIDENCE

Defendant next argues the trial court should have excluded Ruby Walter's other acts testimony pursuant to MRE 404(b)(1) and MRE 403. We disagree.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). But this Court reviews de novo whether a rule of evidence precludes admission of the evidence. *Id.* The trial court abuses its discretion by admitting evidence that is inadmissible as a matter of law. *Id.*

The requisites for admission of other acts evidence are: (1) it is offered to prove something other than character or propensity; (2) the evidence is relevant, and (3) the probative

value of the evidence is not substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). "[T]he trial court, upon request, may provide a limiting instruction under MRE 105." *Id*. The prosecution bears the initial burden to establish the first two elements of admissibility. *Id*. Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the action more probable or less probable than it would be without the evidence." MRE 401. The evidence must be excluded if its only relevance is to show the defendant's character or the defendant's propensity to commit the crime. *Knox*, 469 Mich at 510.

Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. Unfair prejudice exists when there is a danger that the jury will give the evidence undue or preemptive weight or when it would be inequitable to admit the evidence.

> Assessing probative value against prejudicial effect requires a balancing of factors, including the time necessary to present the evidence and the potential for delay, whether the evidence is cumulative, how directly the evidence tends to prove the fact in support of which it is offered, how important the fact sought to be proved is, the potential for confusion or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. [*People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).]

The balancing required by MRE 403 is best left to the trial court's "'contemporaneous assessment of the presentation, credibility and effect of testimony.'" *Id*., quoting *People v VanderVliet*, 444 Mich 52, 81; 508 NW2d 114 (1993).

A. RELEVANCE OTHER THAN FOR PROPENSITY

"[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand*), 463 Mich 43, 63; 614 NW2d 888 (2000). But general similarity between the charged and other acts does not alone establish a plan, scheme, or system used to commit the acts. *Id*. at 64.

Here, the trial court properly determined that the other acts were sufficiently similar to the conduct charged in this case "to support an inference that they are manifestations of a common plan, scheme, or system." *Id.* at 63. Walter testified that she hired defendant to come into her home as a caregiver. Defendant used her job as a caregiver to access Walter's debit card and withdraw money from an automatic teller machine (ATM) without Walter's permission. Similarly, in the charged case, the Reitmeyers hired defendant to provide caregiving services. She used this relationship to gain access to Norman's debit card. She then used the debit card without permission to withdraw money from ATMs. Defendant argues that there is a difference between the two incidents because Walter was not mentally impaired, just temporarily physically disabled. Nonetheless, the incidents involve defendant's common plan, scheme, or system to

gain access to the victims' debit cards by acting as a caregiver to an incapacitated older person. Therefore, the incident with Walter is sufficiently similar to be relevant.

B. PROBATIVE VALUE VERSUS PREJUDICIAL EFFECT

The trial court did not abuse its discretion when it determined that the risk of unfair prejudice was not substantially outweighed by the probative value of Walter's testimony. On appeal, defendant simply argues that Walter's testimony was prejudicial because it constituted propensity evidence. But, as discussed above, Walter's testimony was actually probative of a common plan, scheme, or system of using a relationship as a caregiver to a vulnerable adult to access the victim's debit card. Therefore, defendant's argument fails.

III. PROSECUTORIAL MISCONDUCT

Defendant argues in her supplemental brief on appeal that the prosecutor committed misconduct because he withheld voicemails, recordings, and letters that defendant gave to him before the trial that may have proven that defendant was innocent. We disagree.

This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). This Court will reverse only if the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Defendant appears to be arguing that the prosecutor either had a duty to present potentially exculpatory evidence on behalf of defendant at trial or not to object to defendant's introduction of the evidence. To support this contention she cites to case law discussing *Brady*[1] violations. A *Brady* violation would require defendant to prove, among other things, that she did not possess the evidence, nor could she have obtained it with any reasonable diligence. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). The cases defendant cites discuss a prosecutor's duty to *produce or disclose* exculpatory evidence to the defense. *Id*. at 281-282. Because defendant admits that she possessed the evidence, there can be no *Brady* violation.

Furthermore, defendant does not cite any case law that supports the proposition that a prosecutor has an affirmative duty to present potentially exculpatory evidence or to stipulate to its admission, where, as here, the evidence is in the possession of the defendant. "[T]he failure to cite any supporting legal authority constitutes abandonment of an issue." *Ackerman*, 257 Mich App at 450. Therefore, this issue is abandoned.

IV. FAIR AND JUST TREATMENT

Next, defendant argues in her supplemental brief on appeal that the police violated her constitutional right to fair and just treatment in the course of its investigation. We disagree.

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[1] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

Defendant failed to preserve this issue by raising it in the trial court. Our review is therefore limited to determining whether plain error affected defendant's substantial rights. *People v Cameron*, 291 Mich App 599, 617-618; 806 NW2d 371 (2011). Further, to warrant reversal, the plain error must have resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.* at 618.

Const 1963, art 1, § 17, states in relevant part, "[t]he right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed." The convention comment explains the fair and just treatment clause by stating:

> [t]he second sentence incorporates a new guarantee of fair and just treatment in legislative and executive investigations. This recognizes the extent to which such investigations have tended to assume a quasi-judicial character.
>
> The language proposed in the second sentence does not impose categorically the guarantees of procedural due process upon such investigations. Instead, it leaves to the Legislature, the Executive and finally to the courts, the task of developing fair rules of procedure appropriate to such investigations. It does, however, guarantee fair and just treatment in such matters. [2 Official Record, Constitutional Convention 1961, p 3364.]

Our Supreme Court in *House Speaker v Governor*, 443 Mich 560, 577; 506 NW2d 190 (1993) set forth three general rules for construing constitutional provisions: (1) use the most obvious, commonly-understood meaning that most reasonable people would give it; (2) consider the circumstances surrounding the adoption of the constitutional provision and its purpose, *id*. at 580; and (3) avoid an interpretation, if possible, that creates a constitutional invalidity, *id*. at 585.

Defendant argues that she should have had an opportunity to tell her side of the story to investigators; however, the convention comment specifically states that the fair and just clause does not categorically impose the guarantees of procedural due process on executive investigations. Therefore, we decline to read into the fair and just treatment clause of Const 1963, art 1, § 17 specific guarantees of the manner in which a police agency conducts an investigation. Indeed, we do believe that the common understanding of most ordinary people at the time of the ratification of our Constitution would have been to read this provision as applying to ordinary police investigations, i.e., so many other specific constitutional protections, not to mention the Due Process Clause, protect individual liberty and guarantee a person accused of a crime a fair trial by a jury of the accused's peers. See e.g., *People v Hill*, 429 Mich 382, 391-392; 415 NW2d 193 (1987) (declining to apply the fair and just treatment clause to police interrogations), and *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 39-40; 703 NW2d 822 (2005) (the fair and just treatment clause did not apply to "a run-of-the-mill tax audit").

Furthermore, the police investigation was fair and just. The police assigned to the case gathered significant evidence to show defendant committed the crimes. Detective Barbera knew that defendant had previously pleaded guilty to similar acts. Barbera also testified that based on his previous experiences with defendant, she was not likely to offer him any useful information. Additionally, Detective Barbera was not obligated to believe Norman when at first he attempted

to defend defendant. There is no evidence in the record that Detective Barbera concocted any evidence, and defendant's argument in this respect is speculative. Finally, defendant was able to present her argument to the jury that Detective Barbera coerced Norman to testify the way he did. The jury, however, rejected this argument.

For the foregoing reasons, we conclude that defendant has failed to establish that plain error affected her substantial rights. *Cameron*, 291 Mich App at 617-618

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues in her supplemental brief on appeal, that both trial and appellate counsel provided defendant with ineffective assistance of counsel. We disagree.

To establish that trial counsel was ineffective, "defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different, and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Furthermore, "there is a strong presumption of effective assistance of counsel when it comes to issues of trial strategy." *Id*. This Court will not use the benefit of hindsight to second-guess counsel regarding matters of strategy. *Id*.

A. FAILURE TO INVESTIGATE AND PRESENT EVIDENCE

Defendant argues that trial counsel failed to properly investigate and present the voicemails, recordings, and letters from Norman. The failure to make an adequate investigation or present evidence is ineffective assistance of counsel only if it deprives the defendant of a substantial defense and undermines confidence in the trial's outcome. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Here, trial counsel was aware of the voicemails, recordings, and letters that defendant complains of and attempted to introduce them into evidence. The trial court ruled the evidence was inadmissible on hearsay grounds. Trial counsel is not required to argue a meritless position. *Ericksen*, 288 Mich App at 201.

Defendant also argues that trial counsel failed to determine how much money Norman agreed to pay her. The record does not support defendant's claim. Trial counsel questioned defendant about her understanding of what Norman was paying her. Further, trial counsel argued to the jury that defendant had stopped working for Norman because there was a disagreement about the pay. Therefore, trial counsel appears to have sufficiently investigated and used, to the best of his ability, the evidence that defendant alleges he ignored.

B. FAILURE TO CALL AND QUESTION WITNESSES

Trial counsel's failure to call all of the witnesses that defendant named, and his questioning of witnesses comprised trial strategy. "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defendant admits in her brief that her sons were unavailable to testify. Furthermore, she admits that trial counsel told her that it was not necessary and may have been harmful to have too many of her friends and

family testify on her behalf. In sum, defendant has not "overcome the strong presumption that counsel engaged in sound trial strategy." *Id.*

Next, the trial court's aiding trial counsel in formulating a question in such a way to avoid the prosecution's speculative and hearsay objection was not outcome-determinative error. Defendant was able to answer the question to the extent that the testimony was admissible. Furthermore, there is no indication that trial counsel struggled to properly question the witnesses at other points during the trial.

C. FAILURE TO TRANSCRIBE THE RECORDINGS

Trial counsel's failure to transcribe the recordings did not affect the outcome of the trial. The trial court ruled that the recordings or letters could only be used as impeachment evidence because no exception to the hearsay rule permitted their admission as substantive evidence. Defendant summarized the discussions from the recordings that she found relevant. According to defendant, she made a recording of her conversation with Norman stating that he had told the police that he had allowed her to use his debit card, that he needed to protect her from the unjust treatment of the police, and that he referenced a girlfriend. But the trial court correctly ruled the evidence did not impeach Norman's testimony because Norman admitted he had flirted with and initially wanted to protect defendant from prosecution. Therefore, even if trial counsel had transcribed the recordings, the trial court would have excluded them as hearsay.

D. FIRST DAY OF TRIAL AND DIRECTED VERDICT MOTION

Trial counsel's failure to attend the scheduled first day of trial had no affect on the outcome of the trial. The next day, trial counsel apologized for his absence, and the trial court responded, "I know it wasn't intentional, not a problem." In context, it appears that trial counsel had a scheduling conflict, and the trial court adjourned the trial to the following day.

Trial counsel's argument for directed verdict was not objectively unreasonable. Counsel argued that Norman was not a vulnerable adult and that defendant did not take any money from Francesca. Then, later, after the trial court denied the motion for a directed verdict, trial counsel again argued that the prosecution had not proven that Norman was vulnerable simply because he could not put on his own socks. The trial court again denied trial counsel's argument.

E. PRESENTENCE INVESTIGATIVE REPORT (PSIR)

Trial counsel's alleged failures regarding the PSIR did not fall below an objective standard of reasonableness. In fact, defense counsel objected to several inaccuracies in the PSIR. Furthermore, after these corrections, defendant stated on the record that the PSIR was factually accurate. Waiver is the intentional relinquishment of a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A defendant's waiver extinguishes any error, and she may not seek appellate review of the claimed deprivation. *Id.* Therefore, defendant's claims of ineffective assistance of trial counsel are both waived and without merit.

F. APPELLATE COUNSEL

The test for ineffective assistance of appellate counsel is the same as that for trial counsel. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). It is not ineffective assistance for appellate counsel to winnow out weaker arguments to focus on stronger ones. *Id*.

No reasonable probability exists that but for appellate counsel's failure to deliver the trial and preliminary examination transcripts earlier and send defendant a complete copy of his brief on appeal the first time, this appeal would have been successful. Defendant received the trial transcripts a month before the deadline for the filing of her supplemental brief. In her supplemental brief she cites to the trial transcripts, attached specific portions, and used her appellate attorney's statement of facts. Defendant has not indicated how having a copy of the preliminary examination transcript would have made her supplemental brief any stronger, even if there were discrepancies between the witnesses' testimony. Defendant's failure to properly address the merits of this alleged error constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

We affirm.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Michael J. Riordan