STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM LOUIS MOONAN,

Defendant-Appellant.

UNPUBLISHED
September 10, 2020

No. 350102
Genesee Circuit Court
LC No. 18-042456-FH

Before: CAVANAUGH, P.J., and BORRELLO and TUKEL, JJ.

PER CURIAM.

Following a bench trial, the court found defendant guilty of embezzlement by an agent or employee of $1,000 or more but less than $20,000, MCL 750.174(4)(a), and sentenced him as an habitual offender, fourth offense, MCL 769.12, to a prison term of 32 to 60 months. The trial court denied defendant's "motion for acquittal/motion for new trial." Defendant appeals as of right and for the reasons set forth in this opinion we affirm.

I. BACKGROUND

Scot Brown, the owner of Kendall Printing, hired defendant as a salesperson beginning February 28, 2017, on a salary/draw basis. Shortly after hiring defendant, Brown noticed that defendant stopped coming in to the office to get his paycheck and requested that another employee bring his paycheck to him. By early spring that year, Brown learned that defendant was doing work on the side and that he had stopped promoting Kendall Printing's business.

In late May or early June, Brown discovered that some of defendant's accounts were past due, including Bowen Electric and Mike's Cars. Brown contacted the businesses and learned that both businesses had paid the balance due on their accounts, but not to his business. Rather, payments had been made to defendant. With regard to Bowen Electric, defendant collected a check to Kendall Printing for an order for decals. Bowen Electric placed a second order for decals from Kendall Printing when defendant visited the business on a subsequent occasion. Jim Bowen, the owner of Bowen Electric, testified that he was in a hurry that day and that he asked defendant to whom he should make out the check. On May 29, 2017, he wrote a check for the decals to G's Signs as defendant directed. Defendant did not provide an invoice to Bowen at the time, but told

him that the cost for the decals was $440. The check was cashed by G's Signs. Bowen received the decals from Kendall Printing. Kendall printing never received the amount due on the account.

With regard to Mike's Cars, defendant collected a $500 deposit for Kendall Printing to create a large double-sided roadside sign. After the sign was printed and one side of the sign had been installed by Kendall Printing employees, Brown told defendant that Kendall Printing needed more money before finishing installation of the $3,500 job. He directed defendant to go to Mike's Cars to collect more money. Terry Jones, the manager at Mike's Cars, testified that he had met with defendant more than 10 times in regard to the sign that Kendall Printing was making for Mike's Cars. On June 21, 2017, defendant returned to Mike's Cars and asked for the remaining balance of $3,000 in cash. Jones testified that he did not want to give defendant cash and so he wrote two checks for the remaining balance on June 21, 2017. One check in the amount of $2,000 was dated June 21, 2017, and the other check in the amount of $1,000 was dated June 30, 2017. Jones wrote the checks to G's Signs at defendant's request. Defendant told Jones that he had covered the costs of the sign for Kendall Printing and, therefore, the money was owed to him. Kendall Printing never received the balance owed on the Mike's Cars account and the sign installation was not completed. Jones contacted defendant, who was his only contact at Kendall Printing, and threatened to contact the police. Approximately one week later, defendant personally delivered a cashier's check from G's Signs in the amount of $3,000.

The $440 check from Bowen Electric and the two checks from Mike's Cars in the aggregate amount of $3,000 were deposited into accounts opened by Tammy Stover and June Garcia at defendant's request. Both women met defendant around January 2017 and both were requested by defendant to file paperwork to establish d/b/a businesses and open bank accounts in their names for the d/b/a businesses. Defendant told the women that he wanted to get back on his feet and that he could not open the accounts in his own name because of credit issues. Stover opened up an account at Chase Bank d/b/a/ G's Services and deposited checks from Mike's Cars. She later obtained a cashier's check at defendant's request in the amount of $3,000 payable to Mike's Cars using cash provided by defendant. Defendant told her that he was doing a job for Mike's Cars that was originally a Kendall Printing job and that he needed to refund the money to Mike's Cars so that Kendall Printing could finish the job. Garcia opened up an account at Dort bank d/b/a/ G's Signs and Things and deposited a $440 check from Bowen Electric.

The trial court found defendant guilty and sentenced him as indicated above. Thereafter, defendant filed a motion for acquittal/motion for new trial in which he argued that his conviction must be vacated because the evidence of his status as an "agent, servant, or employee" of Kendall Printing at the time he received $3,000 from Mike's Cars was not proven beyond a reasonable doubt. Defendant argued that his employment was terminated from Kendall Printing on June 19, 2017, and, therefore, could not have been an "agent, servant, or employee" of Kendall Printing when he collected the checks for $3,000 from Mike's Cars.

In response, the prosecutor argued defendant was an agent or employee of Kendall Printing during the time of each fraudulent transaction. The prosecutor argued that the projects that defendant started with Bowen Electric and Mike's Cars happened before defendant's termination as a salaried employee on June 19, 2017 and that it did not matter whether defendant was a salaried employee or working on commission because defendant received monies for projects that Bowen

Electric and Mike's Cars had with Kendall Printing and used his position at Kendall Printing to commit the offense.

Following an August 5, 2019 hearing on the motion, the trial court issued a written order denying defendant's motion for acquittal or for a new trial. This appeal ensued.

II. ANALYSIS

On appeal, defendant argues that the evidence was insufficient support his conviction. Embezzlement by an agent or employee is prohibited under MCL 750.174(1), which provides:

> A person who as the agent, servant, or employee of another person, governmental entity within this state, or other legal entity or who as the trustee, bailee, or custodian of the property of another person, governmental entity within this state, or other legal entity fraudulently disposes of or converts to his or her own use, or takes or secretes with the intent to convert to his or her own use without the consent of his or her principal, any money or other personal property of his or her principal that has come to that person's possession or that is under his or her charge or control by virtue of his or her being an agent, servant, employee, trustee, bailee, or custodian, is guilty of embezzlement.

Proof of embezzlement under MCL 750.174 requires proof of the following 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 the conversion, the defendant intended to defraud or cheat the principal." [*People v Schrauben*, 314 Mich App 181, 198; 886 NW2d 173 (2016), quoting *People v Lueth*, 253 Mich App 670, 683; 660 NW2d 322 (2002).]

Defendant was convicted of embezzlement by an agent or employee of money or property having a value of $1,000 or more but less than $20,000, MCL 750.174(4)(a).

Defendant challenges only the sufficiency of the evidence with respect to the second element—that the defendant must have a relationship of trust with the principal as an agent or employee. Defendant argues that the evidence established that his employment with Kendall Printing was terminated on June 19, 2017, when Brown sent him notice of change in pay schedule and changed his status from a salaried employee to a commission-only employee. He argues that the evidence showed only that he was offered a position as a commission-only employee, not that he was a commission-only employee.

In evaluating a challenge to the sufficiency of the evidence in a bench trial, this Court reviews the evidence de novo to assess whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Evidence is examined in the light most favorable to the prosecution. *Id*. "This Court will not interfere with the trier of fact's role of determining the

weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "All conflicts in the evidence must be resolved in favor of the prosecution." *Id*. Circumstantial evidence and reasonable inferences derived from such evidence may constitute sufficient proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). This Court will reverse a trial court's finding of fact only if "this Court is left with a definite and firm conviction that a mistake has been made." *People v Brown*, 205 Mich App 503, 505; 517 NW2d 806 (1994).

In making his argument, defendant relies on Brown's testimony that he informed defendant on June 19, 2017, that he would no longer be paid a salary but would be paid on a commission-only basis. Defendant contends that the "commission sales relationship never began." However, there was no evidence that Brown terminated defendant's employment or that defendant quit his employment. Rather, Brown simply informed defendant that his pay structure was being altered. The fact that defendant did not make any sales after June 19, 2017, is not dispositive of whether he was an agent. Similarly, defendant's act of filing for unemployment benefits did not alter the relationship. Viewed in a light most favorable to the prosecution, Brown's testimony sufficiently supported a finding that defendant was an agent or employee of Kendall Printing when he collected $3,000 from Mike's Used Cars for the balance owed to Kendall Printing for the sign job.

In the alternative, defendant argues that the great weight of the evidence does not support a finding that defendant was an employee of Kendall Printing when he collected the $3,000 from Mike's Used Cars for the balance owed to Kendall Printing for the sign job. A challenge to the great weight of the evidence is reviewed for whether "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). Defendant argues that the great weight of the evidence supported a finding that defendant was offered commission-only employment and did not accept the offer. Again, Brown's communication with defendant was a notification of a change in pay structure, not an offer of employment as defendant had an existing employment relationship with Kendall Printing. The evidence in support of a finding that defendant was an employee of Kendall Printing when he collected the $3,000 in payments from Mike's Cars for the sign job did not preponderate so heavily against the verdict as to constitute a miscarriage of justice. Accordingly, defendant is not entitled to relief on this issue.

Defendant next argues that the trial court erred by scoring 15 points for offense variable (OV) 10. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Brooks*, 304 Mich App 318, 319-320; 848 NW2d 161 (2014) (quotation marks and citation omitted). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438.

Offense variable 10 considers "exploitation of a vulnerable victim." MCL 777.40(1). The court must assess 15 points for OV 10 when "[p]redatory conduct was involved." MCL 777.40(1)(a). " 'Predatory conduct' means preoffense conduct directed at a victim, or a law enforcement officer posing as a potential victim, for the primary purpose of victimization." MCL

777.40(3)(a). "Predatory conduct" includes forms of "preoffense conduct," which are commonly understood as predatory in nature, such as lying in wait and stalking, as opposed to purely opportunistic criminal conduct or "preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection." *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011). In other words, " '[p]redatory conduct' under the statute is behavior that precedes the offense, directed at a person for the primary purpose of causing that person to suffer from an injurious action or to be deceived." *People v Cannon*, 481 Mich 152, 161; 749 NW2d 257 (2008). To aid trial courts in determining if predatory conduct occurred under OV 10, the Michigan Supreme Court has set forth the following inquiries:

> (1) Did the offender engage in conduct before the commission of the offense?
>
> (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
>
> (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct? [*Id*. at 162.]

"If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40." *Id*.

Here, the record establishes that defendant engaged in preoffense conduct when he developed relationships with Stover and Garcia and discussed his desire to "start over," and informed them of his personal circumstances that purportedly prevented him from opening up a d/b/a and a bank account in his name for the d/b/a. Shortly after meeting the women, defendant preyed on his relationships with Stover and Garcia, making it easier for him to entice them to open up a bank account in their own name so that he could deposit checks that he instructed customers of Kendall Printing to make payable to the d/b/a's into the bank accounts that Stover and Garcia opened for him. Stover and Garcia were susceptible to defendant's temptations as a result of the relationships he formed with them and they responded precisely as he desired them to respond. A preponderance of the evidence supports the trial court's finding of predatory conduct. Accordingly, the trial court did not err by assessing 15 points for OV 10.

In a Standard 4 brief, defendant lists a number of items that he claims should have been presented at his trial. To preserve an evidentiary issue for review, a party must object at trial. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Defendant did not seek to present any of the evidence that he contends should have been presented at trial. This issue is not preserved. Unpreserved evidentiary issues are reviewed for plain error. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Requirements for reversal under the plain-error rule are: "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. An error affects substantial rights when "the error affected the outcome of the lower court proceedings." *Id*. The defendant bears the burden to demonstrate that an error occurred, that the error was clear or obvious, and that the error affected his or her substantial rights. *Id*. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or

public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Defendant provides a list of evidence that was not presented at trial. He fails to offer any argument, reference to the lower court record, or citation to legal authority. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). An issue is abandoned if an appellant "fail[s] to properly address the merits of his assertion of error." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). This issue is abandoned.

Nonetheless, with respect to defendant's evidentiary challenge, defendant does not explain how the evidence was relevant, and he fails to explain how failure to present the evidence affected the outcome of the trial. Defendant's failure to properly argue the merits of this assertion of error precludes appellate review. *Harris*, 261 Mich App at 50. Because defendant has failed to meet his burden of establishing plain error, much less plain error that affected his substantial rights, this claim of error fails.

Defendant also argues that he was denied the effective assistance of counsel at trial. To preserve a claim of ineffective assistance of counsel for appellate review, a defendant must move the trial court for a new trial or for a *Ginther* hearing. *People v Lopez*, 305 Mich App 686, 693; 854 NW2d 205 (2014); see *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Defendant did not move for a new trial in the trial court on the ground of ineffective assistance of counsel, nor did he move for a *Ginther* hearing. Defendant's ineffective assistance of counsel claim is not preserved. Therefore, review is limited to mistakes apparent in the existing record. *People v Foster*, 319 Mich App 365, 390; 901 NW2d 127 (2017). Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019). This Court reviews questions of law de novo and a trial court's findings of fact for clear error. *Id*. "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Thompson*, 314 Mich App 703, 720; 887 NW2d 650 (2016).

"Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matter of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Further, "[d]efense counsel's failure to present certain evidence will only constitute ineffective assistance of counsel if it deprived defendant of a substantial defense." *People v Dunigan*, 299 Mich App 579, 589; 831 NW2d 243 (2013). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Defendant merely lists the evidence and the witnesses that his counsel failed to present and call, and has provided no argument, analysis, or citation to legal authority. Defendant fails to explain the relevance of the evidence and fails to discuss the admissibility of the evidence. He also fails to explain how not offering the evidence at trial deprived him of a defense. Defendant has also failed to support his claim that counsel was ineffective by failing to call four witnesses. Defendant has failed to support this claim with any evidence, affidavit, or offer of proof of the substance of these witnesses' purported testimony. Defendant has also failed to offer any evidence that their testimony would have benefited him and

that the absence of their testimony prejudiced him. On this record, defendant has failed to overcome the presumption that he received the effective assistance of counsel.

Defendant also argues that the trial court erred in its calculation of defendant's sentence credit. Because defendant did not preserve his challenge to the sentence credit, this Court reviews whether defendant is entitled to additional sentence credit for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Defendant argues that he is entitled to an additional four months of sentence credit. He asserts that he was arrested on October 10, 2017, and remained in jail until March 8, 2018, when he was "sent to MDOC." He noted that he had a personal recognizance bond "for my appending [sic] charges, but however because of a probation violation, Judge Fullerton gave me no bond, so I was held aprox 16 months and only credited for 12 months." Defendant does not provide any citation to the record for his factual assertions, and his factual assertions are not consistent with the dates in the lower court record.

The probation agent calculated sentence credit of 341 days. The presentence information report (PSIR) calculated credit for two days—February 11, 2017, the date of defendant's arrest in this case, to February 12, 2017, when defendant was released after signing a $10,000 personal recognizance bond. The PSIR reflects that a pretrial hearing in this case was held on February 5, 2018, and that on that date a bond was not furnished, so defendant received sentence credit from February 5, 2018 until the original sentencing date of January 10, 2019. The January 10, 2019 sentencing hearing was adjourned to February 5, 2019. At sentencing on February 5, 2019, defense counsel requested an additional 26 days of jail credit because of the adjournment, for a total of 367 days. The judgment of sentence reflects that defendant was given sentence credit of 367 days.

At a pretrial hearing on February 5, 2018, defense counsel asked the trial court to cancel the bond because defendant was being held on a probation violation in another case. Defense counsel agreed that defendant was not entitled to receive jail credit for the time period he had been released on the personal recognizance bond—February 12, 2017 to February 5, 2018. Accordingly, defendant received credit for two days for December 11 and 12, 2017, 341 days for the period of February 5, 2018 to January 10, 2019, and 26 days for the period of January 10, 2019 to February 5, 2019. Defendant has failed to establish error in the calculation of sentence credit.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello
/s/ Jonathan Tukel