S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 17, 2005
v	No. 251370 Macomb Circuit Court
EVELYN MARIE LEHNER, Defendant-Appellant.	LC No. 2003-000204-FH

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals by right her conviction following a jury trial of embezzlement by an agent of $1,000 or more but less than $20,000, MCL 750.174(4)(a). She was sentenced as an habitual offender, third offense to four to ten years' imprisonment with credit for twenty-three days served. This case arose when shortages were discovered in deposits entrusted by Walgreens to Total Armored Car at which defendant was employed. We affirm defendant's conviction but remand for resentencing.

Defendant first argues that the prosecutor did not present sufficient evidence to convict her of embezzlement by an agent of $1,000 or more but less than $20,000. We disagree.

An appeal based on a claim of insufficient evidence is reviewed de novo. *People v Lueth,* 253 Mich App 670, 680; 660 NW2d 322 (2002). "A court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson,* 460 Mich 720, 723; 597 NW2d 73 (1999), citing *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979). To prove embezzlement by an agent beyond a reasonable doubt, the prosecutor must prove (a) the money belonged to the principal, (b) the defendant maintained a relationship of trust with the principal as the principal's agent, (c) the defendant gained possession of the money as a result of the relationship, (d) the defendant converted the money to personal use or concealed the money, (e) the principal did not consent, and (f) the defendant intended at the time of the conversion to defraud the principal. *People v Collins,* 239 Mich App 125, 131; 607 NW2d 760 (1999). Defendant argues that the evidence presented by the prosecutor did not establish that she was the one who converted the money. Defendant does not challenge the other elements of embezzlement by an agent.

The prosecutor did not provide any direct evidence that defendant converted the money. However, an element of a crime may be established by circumstantial evidence and the reasonable inferences that can be drawn from it. *People v Carines,* 460 Mich 750, 757; 597 NW2d 130 (1999). With respect to the June 3, 2002 deposit, the prosecutor presented evidence that the only people who had access to the deposit bag before the missing cash was discovered were defendant, Zatyracz, Ghazarian, and Wenzel. Zatyracz, Ghazarian, Wenzel, Johnson, and Zimmer testified that the Walgreens safe could not be opened without two keys – one of which was kept by Walgreens management, and one of which was kept by Total Armored Car; thus, Ghazarian and Wenzel did not have access to the deposit before the messenger from Total Armored Car arrived for the pickup. Under the new security measures employed by Walgreens, Ghazarian and Wenzel were both present at the pickup, and each recounted the individual bills in the bundles before depositing them in the deposit bag; thus, they provided an alibi for each other. Moreover, Zatyracz, Zimmer, and Nichols confirmed the new counting procedure, which gave credence to Ghazarian's and Wenzel's testimony. Ghazarian and Wenzel both testified that they had never taken money from Walgreens.

Zatyracz and Zimmer both testified that the messenger went inside each stop and delivered change and picked up deposits. Therefore, the only time the driver and messenger were separated, the messenger was actively moving about. An inference could be made that it was unlikely the messenger would be trying to fish money out of deposit bags while inside a stop. Inside the stops the messenger filled out a receipt book for the deposit. The messenger also had paperwork to fill out. The paperwork responsibilities showed that the messenger did not have very much time to steal money from deposits. Nothing prevented the driver from accessing the bins of money in the truck while the messenger was inside a stop. Thus, during the only time the driver and messenger were separated, the driver had the opportunity to take the money. Zimmer's testimony corroborated Zatyracz's, which lent credibility to Zatyracz's version of events. Zatyracz and Zimmer stated that they never took money from a Walgreens deposit bag. If believed, their testimony would establish that they had not committed the crime. It is the jury's responsibility to determine the credibility of witnesses. *People v Fletcher,* 260 Mich App 531, 561; 679 NW2d 127 (2004).

Therefore, of the possible suspects with respect to the June 3, 2002 deposit, only defendant did not testify that she never stole from Walgreens. The other suspects were not present on at least one of the loss incidents. From the fact that defendant was the only common factor in all the loss incidents, it could be inferred by process of elimination that she committed the offense. "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 Hardiman,* 466 Mich 417, 428; 646 NW2d 158 (2002). Because conflicts in evidence must be resolved in the prosecutor's favor, *People v Terry,* 224 Mich App 447, 452; 569 NW2d 641 (1997), the prosecutor presented evidence that no suspect other than defendant had access to the money on every occasion, and all reasonable inferences and credibility choices must be made in favor of the jury verdict, *People v Nowack,* 462 Mich 392, 400; 614 NW2d 78 (2000), we conclude that the prosecutor presented sufficient evidence to convict defendant of the offense beyond a reasonable doubt.

Defendant next argues that the prosecutor made improper remarks that prejudiced defendant by injecting issues broader than guilt or innocence into the trial. We disagree.

This Court reviews de novo claims of prosecutorial misconduct. *People v Pfaffle,* 246 Mich App 282, 288; 632 NW2d 162 (2001). However, this Court reviews for plain error affecting a defendant's substantial rights the claimed instances of prosecutorial misconduct that were not preserved. *Id.* Defendant gives one specific example of challenged misconduct. "Facts stated must be supported by specific page references to the transcript." MCR 7.212. It is not the responsibility of this Court to search for the factual support of an appellant's claim. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Therefore, we decline to address the remainder of defendant's claims.

With respect to the properly presented claim, defendant appears to argue that the prosecutor vouched for defendant's guilt. A prosecutor may not express an opinion or use the prestige of his office to influence a jury's decision with respect to guilt or innocence. *People v Stacy,* 193 Mich App 19, 36-37; 484 NW2d 675 (1992), habeas corpus den 234 F3d 1270 (CA 6, 2000). Defendant argues that the prosecutor's statement was similar to the statement in *People v Boske,* 221 Mich 129, 133; 190 NW 656 (1922), in which the prosecutor argued to the jury that the sheriff "knew he had the guilty man." The statement in *Boske* was condemned because "[i]t was the duty of the jury to pass upon the facts and decide the question of guilt or innocence uninfluenced by the opinions of others." *Id.* at 134. However, the challenged statement in the instant case was not an opinion but a statement of facts – the prosecutor's office reviewed the evidence and it brought charges. While it could be inferred that the prosecutor brought charges because the prosecutor believed defendant was guilty, the same inference can be made in every criminal prosecution. The question with respect to improper vouching is whether the prosecutor implied he had some special knowledge of facts not presented to the jury indicating a defendant's guilt. *People v Bahoda,* 448 Mich 261, 276-277; 531 NW2d 659 (1995) (vouching for credibility of witness). The prosecutor's comments here were not of this magnitude.

Defendant next challenges the scoring of offense variables (OVs) 9, 10, 12, and 13. We agree with respect to OV 10.

Unpreserved sentencing error is reviewed under the plain error rule of *Carines, supra* at 763, if the error resulted in the imposed sentence being outside the appropriate guidelines. *People v Kimble,* 470 Mich 305, 310, 312; 684 NW2d 669 (2004). MCL 777.22(2) provides that OVs 9, 10, 12, and 13 should be scored for all crimes against property. According to MCL 777.16i, MCL 750.174(4), is a class-E felony, is a crime against property, and has a maximum sentence of five years' imprisonment. In the case at hand, the trial court sentenced defendant to 4 to 10 years in prison. The guidelines' scoring resulted in an OV score of 36 points (level IV) and a PRV score of 75 points (level F), leading to a recommended minimum sentence range of 19 to 38 months. However, where a defendant is being sentenced for the conviction of a third or subsequent felony, the high range (38 in the case at hand) is increased by fifty percent pursuant to MCL 777.21(3)(b) – here, 57 months.

Defendant first claims that the trial court erred by attributing ten points to OV 9. MCL 777. 39(1) provides that OV 9 is to be scored ten points if there were two to nine victims. Defendant argues that MCL 777.39(2) precludes a finding of any victims because nobody was placed in danger of injury or loss of life. MCL 777.39(2) states in relevant part, "[c]ount each person who was placed in danger of injury or loss of life as a victim." Defendant's argument presumes that injury refers only to physical injury. However, injury has not been interpreted so narrowly by this Court. In *People v Knowles,* 256 Mich App 53, 62; 662 NW2d 824 (2003), this

Court found that danger of injury included financial injury where the credit union was directly harmed by the defendant's act. Here, Walgreens clearly suffered financial injury. Moreover, Total Armored Car lost a client as a direct result of defendant's actions, and three Walgreens managers and two Total Armored Car messengers were placed under suspicion and were in danger of losing their jobs as a direct result of defendant's actions. Therefore, OV 9 was properly scored.

Defendant next challenges the ten points scored for OV 10. MCL 777.40(1)(b) provides that ten points must be attributed to OV 10 where the victim's physical disability, mental disability, youth or agedness was exploited, where a domestic relationship was exploited, or where the offender abused her authority status. "'Abuse of authority status' means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher." MCL 777.40(d). There was no indication that the victims feared or deferred to defendant, and no evidence was introduced that would indicate the victims had a physical, mental, or age disability or domestic relationship with defendant. Therefore, the trial court erred in attributing points to OV 10.

Defendant next challenges the one point scored for OV 12. MCL 777.42(1)(f), (g) provides that a point should be scored if "one contemporaneous criminal act involving any other crime was committed." Although she was not charged with felony-firearm, MCL 750.227b(1), evidence was presented indicating that defendant carried a gun on duty. Therefore, OV 12 was properly scored. "A trial court may consider the evidence admitted at trial as an aggravating factor in determining the appropriate sentence." *People v Gould,* 225 Mich App 79, 89; 570 NW2d 140 (1997), citing *People v Shavers,* 448 Mich 389, 393; 531 NW2d 165 (1995).

Defendant next argues that OV 13 was improperly scored ten points and should have been scored no points. MCL 777.43(1)(c) provides that ten points must be scored if "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property." Given the fact that losses occurred on seven different occasions over a six-month period, defendant was the only common factor among the seven occurrences, and the method used to extract money through a small hole was the same in at least three of the occurrences, there was sufficient evidence to support a finding that a pattern of felonious criminal. *Gould, supra* at 89, citing *Shavers, supra* at 393.

As previously mentioned, OV 10 should not have been scored ten points. Without the ten points, defendant's OV level (26 points) is reduced to level III (25-34 points). Because defendant did not challenge her PRV level, it remains at level F. This would lead to an enhanced guideline range of 14 to 43 months. Defendant's minimum sentence – 48 months – falls outside of the appropriate guidelines range. Our Supreme Court recently noted that when a variable is improperly scored, it constitutes clear error, and when a defendant receives a sentence "in excess of that permitted by the properly scored sentencing guidelines," the defendant suffers prejudice and the fairness, integrity, and public reputation of judicial proceedings is affected. *Kimble, supra* at 309, 312-313. Therefore, defendant has established clear error affecting her substantial rights, and she is entitled to resentencing.

Affirmed but remanded for resentencing.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens