

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 17, 2012

v

KEVIN DERRICK TALLEY,

Defendant-Appellant.

No. 297581
Oakland Circuit Court
LC No. 2009-226548-FH

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Kevin Derrick Talley appeals as of right his jury trial conviction of one count of embezzlement by an agent of \$1,000 or more, but less than \$20,000.¹ He was sentenced to 18 months' probation with five days credit. We affirm.

Talley, a bank teller at Charter One Bank in Beverly Hills, Michigan, was charged in two separate cases with making unauthorized withdrawals from the accounts of bank customers. The cases were consolidated for trial. In the first case, a check for \$6,200² was deposited into the account of Valerie and Kevin Ewing on October 18, 2008. Two cash withdrawals totaling \$5,000 were processed from that account three days later, and Talley handled the withdrawal transactions at the bank's branch in Beverly Hills.

In the second case, two withdrawals totaling \$4,650 were made on December 15, 2008, from an account belonging to Linda Rhodes and Marion Horton. The withdrawals were made three days after inquiries were made on that account through the bank's computers. Those transactions occurred at the bank's branch in Bloomfield Township, where Talley had been temporarily assigned to work. The evidence showed that the registered account holders neither participated in nor authorized the transactions. At trial, the prosecutor introduced documentary evidence of the bank's computer records showing the activity for the accounts in question, as well as video recordings of the unauthorized customer transactions. The jury acquitted Talley of

¹ MCL 750.174(4)(a).

² The check was later dishonored because it was written on a closed account.

the charge relating to the Ewings' account, but convicted him of the charge relating to the Rhodes/Horton account.

Talley first argues that his right to a fair trial was violated when the prosecutor failed to correct the false testimony of bank investigator, Courtney Peck. We disagree. This issue is unpreserved. Unpreserved issues of prosecutorial misconduct are reviewed to determine "whether plain error affected defendant's substantial rights."³

During its case-in-chief, the prosecutor presented multiple bank records relating to the accounts at issue. Exhibit 7 was a database record of activity relating to the Ewings' account, and exhibit 14 was a database record of activity relating to the Rhodes/Horton account. Exhibit 14 showed that balance inquiries of the Rhodes/Horton account were made shortly before the unauthorized withdrawals at the Beverly Hills and Bloomfield Township branches on days when Talley was working. The records for that account, however, also showed that inquiries were made by unknown individuals in Ohio and Vermont.

During defense counsel's cross-examination of Peck, counsel referred to exhibit 14 when questioning Peck about the Ewings' account, even though exhibit 14 actually related to the Rhodes/Horton account. Peck did not correct the apparent mistake and answered counsel's questions in the context of referring to the Ewings' account. This apparent confusion continued during the prosecutor's redirect examination of Peck. Talley now argues that Peck's testimony regarding the Ewings' account was false as it was based on the records relating to the Rhodes/Horton account, and that the prosecutor's failure to correct the false testimony requires reversal.

It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment. If a conviction is obtained through the knowing use of perjured testimony, it "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."⁴

"[A] conviction will be reversed and a new trial will be ordered, but only if the tainted evidence is material to the defendant's guilt or punishment."⁵ As such, "it is the 'misconduct's effect on the trial, not the blameworthiness of the prosecutor, [which] is the crucial inquiry for due process purposes.'"⁶

The error in this case did not involve the use of false evidence, but rather confusion over evidence that had already been accurately presented. The jury was accurately informed that exhibit 7 related to the Ewings' account and that exhibit 14 related to the Rhodes/Horton

³ *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

⁴ *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009) (citation omitted).

⁵ *Id.* at 390.

⁶ *Id.* (citation omitted).

account. The fact that subsequent testimony confused the two exhibits does not alter the fact that the jury was correctly informed of the true nature of the documents. Further, it is not reasonably likely that Peck erroneously linking the Vermont inquiry to the Ewings' account instead of the Rhodes/Horton account affected the result of the case, as the prosecutor did not rely on that inquiry to support its case.

Talley suggests that the jury likely acquitted him of the charge relating to the Ewings' account because his attorney argued that someone from Vermont had accessed that account. Thus, the jury may have similarly acquitted him of the charge relating to the Rhodes/Horton account if it was accurately told that the Vermont inquiry related to that account. As indicated previously, the jury initially was correctly advised that the Vermont inquiry related to the Rhodes/Horton account. To the extent that there was a conflict between the testimony and the exhibits, the conflict was for the jury to resolve.⁷

Talley's reliance on *People v Anderson*⁸ is misplaced. In that case, the prosecutor discredited a defendant's claim that he recently withdrew money from a bank by presenting a bank employee's testimony that there was no record that the defendant had an account with the bank.⁹ After the defendant was convicted, records were obtained to show that the defendant had an account at the bank and had withdrawn money as he claimed.¹⁰ In *Anderson*, the false testimony was never corrected at trial and was used as the principal basis for discrediting the defendant's theory of defense.¹¹ The jury here was informed of the true nature of the documents on which Peck's testimony was based, and the disputed testimony was not critical to the prosecutor's case. In addition, the evidence in this case showed that others were involved in committing the unauthorized transactions. Therefore, even though the Vermont inquiry could not be linked directly to Talley, that did not mean that he did not knowingly participate in the offense involving the Rhodes/Horton account. For these reasons, this case is distinguishable from *Anderson*.¹²

As the jury was correctly informed of the true nature of the documentary evidence and the confused testimony was not critical to the prosecution's case, the fact that subsequent testimony confused the evidence does not necessitate reversal and a new trial is not required.¹³

Talley next asserts that his right to a fair trial was violated when the prosecutor improperly elicited opinion testimony from two bank investigators that Talley was involved in

⁷ See *People v Artman*, 218 Mich App 236, 239; 553 NW2d 673 (1996).

⁸ *People v Anderson*, 44 Mich App 222; 205 NW2d 81 (1972).

⁹ *Id.* at 226.

¹⁰ *Id.* at 226-227.

¹¹ *Id.* at 229.

¹² *Anderson*, 44 Mich App 222.

¹³ *Aceval*, 282 Mich App at 390.

the unauthorized withdrawals. We disagree. This issue is unpreserved, so our review is limited to whether there was plain error affecting Talley's substantial rights.¹⁴

Talley correctly observes that it is generally improper for a witness to give an opinion or an interpretation of the facts because doing so invades the jury's province.¹⁵ Even if it was improper for the prosecutor to ask the investigators whether they believed Talley committed the offenses, he has not shown that his substantial rights were affected. The jury was informed that Talley was fired from his position at the bank because of his role in the unauthorized transactions. Thus, it would not have been surprising for the jury to hear that the bank believed that he was involved in the transactions. Additionally, defense counsel used the opinion testimony to Talley's benefit to support his assertion that the bank's focus on Talley caused it to fail to conduct a full and thorough investigation. The jury also was instructed that they were to decide what the facts of the case were, and we presume that the jury followed its instructions.¹⁶ Moreover, the jury acquitted Talley of the charge relating to the Ewings' account, which demonstrates that the investigators' opinion testimony did not cause it to suspend its own power of judgment in deference to the investigators' opinions. As such, Talley's right to a fair trial was not violated.

Talley further contends that the trial court erred in allowing the prosecutor to question him during cross-examination about whether he was investigated by the bank regarding two robberies that occurred while he was working as a teller. We disagree. "This Court reviews for an abuse of discretion a trial court's determination of evidentiary issues."¹⁷ An abuse of discretion occurs when the trial court chooses an outcome falling "outside the range of principled outcomes."¹⁸

Talley testified on direct examination that he was fired from his bank position in February 2009, and that his firing was related solely to the charged offenses. On cross-examination, the prosecutor asked Talley whether he was also investigated for his possible role in two bank robberies that occurred while he was working as a teller. Talley denied being investigated in connection with any robberies. In rebuttal, the prosecutor called a bank investigator who testified that he investigated the bank robberies and interviewed Talley about the robberies in February 2009.

We conclude that the prosecutor's limited inquiry was a proper subject of cross-examination.¹⁹ Talley testified that he was fired only because of the unauthorized withdrawals.

¹⁴ *Brown*, 279 Mich App at 134.

¹⁵ *People v Smith*, 158 Mich App 220, 230-231; 405 NW2d 156 (1987); *People v Drossart*, 99 Mich App 66, 79-80; 297 NW2d 863 (1980).

¹⁶ *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

¹⁷ *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007).

¹⁸ *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010) (citation omitted).

¹⁹ MRE 611(c).

His testimony suggested that the unauthorized withdrawals were the only matters that affected his standing with the bank. It was not improper for the prosecutor to explore the issue on cross-examination and show that there were other concerns about Talley's work activity. The evidence that a bank investigator questioned Talley in February 2009 about his possible role in the robberies was probative of Talley's standing with the bank.

Additionally, the probative value of the evidence was not substantially outweighed by its prejudicial effect.²⁰ The testimony was limited to showing that Talley was questioned about the robberies, and no evidence was presented suggesting that he was found to be involved. Moreover, defense counsel elicited testimony that Talley was not accused of committing the robberies. As such, the questioning was proper.

We reject Talley's argument that it was improper to call the bank investigator to impeach his testimony that he was not investigated for his role in the bank robberies. It was defense counsel who argued below that the prosecutor should be required to "bring in another witness to establish" that Talley had been investigated. Talley may not now claim on appeal that doing so was improper, as it would allow him to "harbor error as an appellate parachute."²¹

Finally, Talley argues that the trial court erred when it allowed Peck to offer testimony regarding what she observed, when she originally observed a digital recording of one of the withdrawal transactions associated with the Ewings' account. We disagree. A preserved nonconstitutional error is not grounds for reversal unless "it is more probable than not that the error was outcome determinative."²²

The challenged testimony related to a transaction involving the Ewings' account and was offered after technical problems arose with the DVD copy of the transaction, resulting in gaps in the recorded footage. Talley asserts that Peck's testimony violated the "best evidence rule."²³ Because the testimony did not involve the Rhodes/Horton account, any alleged error was harmless as Talley was acquitted of the charge associated with the Ewings' account. As such, it is not more probable than not that the error was outcome determinative.²⁴

Affirmed.

/s/ Christopher M. Murray

/s/ Michael J. Talbot

/s/ Deborah A. Servitto

²⁰ MRE 403; *People v Pickens*, 446 Mich 298, 337; 521 NW2d 797 (1994).

²¹ *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

²² *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

²³ MRE 1002.

²⁴ *Lukity*, 460 Mich at 495-496.