STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEON NEELY,

Defendant-Appellant.

UNPUBLISHED
August 27, 1996

No. 177841
LC Nos. 93-127864-FH
93-127865-FH

Before: Sawyer, P.J., and Bandstra and M.J. Talbot,* JJ

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of uttering and publishing, MCL 750.249; MSA 28.446, and one count of false pretenses with the intent to defraud over $100, MCL 750.218; MSA 28.415. Additionally, defendant was convicted as a habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant was sentenced to five to thirty years' imprisonment as a fourth habitual offender. We affirm in part and vacate in part.

Defendant first argues that the evidence was insufficient to support his conviction of uttering and publishing for the April 29, 1993, incident. We disagree. In reviewing a claim of insufficient evidence, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992). At trial, several witnesses' testified that defendant presented a forged receipt to the store clerk. The receipt was printed in black ink, as opposed to blue ink, and there were no perforations on it. Moreover, defendant's intent to defraud was properly inferred from the facts and circumstances established beyond a reasonable doubt. *People v Kimble*, 60 Mich App 690, 695; 233 NW2d 26 (1975). We note that defendant's subsequent act of fraud on May 8, 1993, could properly have been considered by the jury as evidence of defendant's intent to commit uttering and publishing on April 29, 1993. See *People v Worden*, 27 Mich App 179, 180; 183 NW2d 381 (1970). We are of the opinion that, upon viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented to support defendant's

* Circuit judge, sitting on the Court of Appeals by assignment.

conviction for uttering and publishing beyond a reasonable doubt. Therefore, no reversal is warranted on this issue.

Defendant next argues that he was twice placed in jeopardy in violation of both the Michigan and United States Constitutions. US Const, Am V; Const 1963, art 1, § 15. Defendant claims that he was improperly convicted of both uttering and publishing and false pretenses based upon a single transaction. We agree.

In determining the scope of the double jeopardy protection against multiple punishments for the same offense, courts are "confined to a determination of legislative intent." *People v Sturgis*, 427 Mich 392, 400; 397 NW2d 783 (1986). In *People v Davis*, 146 Mich App 282, 285; 380 NW2d 82 (1985), this Court held that the Legislature did not intend to permit multiple punishment for both forgery, MCL 750.248; MSA 28.445, and false pretenses, MCL 750.218; MSA 28.415. This Court reasoned that "[t]he the Legislature intentionally increased the penalty for the more serious conduct of the person who originally creates the false document or other instrument." *Davis, supra*, 146 Mich App 286. Similarly, we find that the Legislature most likely intended that a defendant should be punished more severely if he/she chose to *pass a forged instrument* over utilizing a different type of " false pretense." Based on the facts of this case, defendant was shown to have committed only *on*e criminal act on May 8, 1993, e.g., the defrauding of the complainant through the use of a forged document. Indeed, defendant could not have committed the crime of false pretenses without committing the crime of uttering and publishing. Consequently, defendant need only be punished for uttering and publishing a forged document, with its fourteen-year maximum penalty, rather than under both uttering and publishing and false pretenses, which carries an additional ten-year maximum penalty.

In light of the foregoing analysis, the trial court violated the constitutional prohibitions against double jeopardy by convicting defendant of both false pretenses and uttering and publishing. Therefore, defendant's conviction for false pretenses is vacated. *People v Harding*, 443 Mich 693, 713, 735; 506 NW2d 482 (1993).

Defendant next argues that the trial court improperly admitted testimony concerning crimes committed by persons other than defendant. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Hurt*, 211 Mich App 345, 350; 536 NW2d 227 (1995). In this case, the refund vouchers used by "Jackie Smith" and "Anthony Wilson" were identical to the fraudulent voucher that defendant used at Hudson's on May 8, 1993. The fact that other people were using a replication of *the exact same refund voucher* that defendant had used shows some relationship among the perpetrators, even if defendant was not directly involved in the "Jackie Smith" or "Anthony Wilson" transactions. Accordingly, the use of the identical refund voucher by others made it more probable that defendant actually defrauded the complainant. See MRE 401. Therefore, we find that no error exists as to the admission of testimony concerning crimes committed by persons other than defendant.

Lastly, defendant argues that evidence taken from his briefcase should have been suppressed because the briefcase had been illegally searched and seized in violation of the Fourth Amendment. US

Const, Am IV; Const 1963, art 11, § 11. However, defendant failed to object at trial to the admission of the briefcase's contents on constitutional grounds. Rather, defendant only objected to the admission of the evidence on relevancy grounds. Generally, error cannot be claimed unless a motion to suppress evidence is timely made in the court below. *People v Newcomb*, 190 Mich App 424, 431; 476 NW2d 749 (1991). If, however, an important constitutional question is raised regarding the admissibility of evidence and it is decisive to the outcome of the case, appellate review is appropriate. *Id.* We find that the admission of the briefcase evidence was not decisive to the outcome of this case, e.g., its exclusion would not have meant acquittal for defendant. Therefore, this issue is not preserved for appellate review.[1]

We vacate defendant's false pretenses conviction, and affirm his uttering and publishing convictions. Because we are affirming defendant's uttering and publishing convictions, defendant's convictions as a fourth habitual offender are affirmed, and no resentencing is necessary.

Affirmed in part and vacated in part.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Michael J. Talbot

[1] Moreover, even if the admission of the briefcase evidence had been decisive to the outcome of this case, defendant's allegation of error still fails on the merits. In *People v Neely*, unpublished opinion per curiam of the Court of Appeals, rel'd 2/13/96 (Docket No. 170678), this Court reviewed the constitutionality of the admission of the exact same briefcase evidence, which had been admitted in a different lower court case (lower court no. 93-126348). This Court held that the search of the briefcase was proper as being incident to defendant's arrest. Therefore, we affirm our holding in *Neely*, *supra*, and find that no constitutional error exists as to the admission of the briefcase in this case.