STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL D. NEWHOUSE,

Defendant-Appellant.

UNPUBLISHED
September 17, 1996

No. 166456
LC Nos. 91-112993;
91-112994; 91-112995;
91-112996; 91-112997;
91-112998; 91-112999;
91-113000; 91-113001

Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock,* JJ.

PER CURIAM.

Defendant was convicted in a jury trial of nine counts of embezzlement, MCL 750.174; MSA 28.371. The trial court sentenced him to three years' probation for each conviction. Defendant appeals as of right. We affirm.

I

Defendant argues that he was denied the effective assistance of counsel. We disagree. To establish that the right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Failure to call a witness constitutes ineffective assistance of counsel only if the failure deprived the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). Because defendant has provided neither the names of any alleged witnesses nor the substance of their potential testimony, we cannot say that defendant was deprived of a substantial defense. *Id*; p

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

711; contrast *People v Johnson*, ___ Mich ___; ___ NW2d ___ (Docket No. 102949, issued 4/2/96) slip op pp 2-3.

Although defendant claims that counsel did not allow him to testify, the record does not reveal either that defendant wished to testify or that counsel advised him not to do so. In addition, defendant has not apprised this Court of the substance of his proposed testimony or explained how this testimony would have strengthened his defense. See *People v Conn*, 171 Mich App 55, 67; 429 NW2d 839 (1988), vacated on other grounds 432 Mich 916; 441 NW2d 420 (1989). Similarly, defendant has not shown a reasonable probability that had counsel consulted him before resting, the result of the proceeding would have been different. See *People v Lavearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant argues that counsel was ineffective because he was "not prepared for trial." For this argument to succeed, it must be shown that this failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Defendant does not explain how the issuance of a bench warrant and his arrest for failure to send in an arraignment on the information form prejudiced him to the extent that he was denied a fair trial. In addition, defense counsel asserted without contradiction that he filed a motion to dismiss based on defendant's right to a speedy trial in October, 1992, but that both the motion and trail were adjourned for six months. The trial court denied this motion not on the basis of timeliness, but on the basis of docketing congestion and defendant's requests for adjournment. See *People v Wickham*, 200 Mich App 106, 110-111; 503 NW2d 701 (1993). Accordingly, defendant has not shown prejudice. *Lavearn*, *supra*, p 216.

Defendant has not shown prejudice because his counsel suggested that he thought that the prosecution would rest its case a day later than it did. See *id.* Finally, viewing the evidence in a light most favorable to the prosecution, the elements of embezzlement were satisfied. *People v Wood*, 182 Mich App 50, 53; 451 NW2d 563 (1990). Defense counsel was not obligated to argue a meritless motion for directed verdict. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

II

Defendant argues that the prosecutor improperly commented on the fact that he (defendant) would not be testifying on his own behalf. Because defendant did not object, appellate review is foreclosed unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1995). When viewed in context, the prosecutor's remark was a comment that the other managers' testimony would reveal that they had not taken any money. Although the point could have been expressed better, a curative instruction would have eliminated any prejudicial effect caused by this isolated remark. *Id.*

III

Defendant argues that evidence of a pattern of late deposits was improperly admitted. We disagree. This evidence was not introduced to show propensity to commit the crime, but was introduced to show "scheme, plan or system." See MRE 404(b). In addition, the evidence was relevant since it could have plausibly led to the inference that defendant, through his scheme of late deposits escalating to missing deposits, intended the ultimate acts of taking the restaurant's money. See MRE 401. Finally, although probative evidence of guilt is always prejudicial, defendant has not shown that this evidence was so inflammatory or prejudicial that the jury would have given it preemptive weight. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995); *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993). The trial court did not abuse its discretion in admitting evidence of a pattern of late payments. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

Affirmed.

/s/ Marilyn Kelly
/s/ Myron H. Wahls
/s/ M. Richard Knoblock