STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DANIEL CHARO,

Defendant-Appellant.

UNPUBLISHED

No. 163186
LC No. 92-001177

Before: Markey, P.J., and Holbrook, Jr., and M.J. Matuzak,* JJ.

HOLBROOK, Jr., J., *concurring.*

I concur in the result reached by Judge Matuzak. While I agree with Judge Markey that the only relevant question—given the single theory advanced by the prosecutor and the instructions given the jury—is whether sufficient evidence was presented during the prosecutor's case-in-chief to establish defendant's *forfeiture* of the bond, I disagree with her conclusion that defendant's intent to forfeit was properly inferable from the mere fact that he was not present when his case was called.

A felony prosecution for forfeiture of a bond requires a minimal showing that a defendant "recklessly neglected or disregarded a known obligation to appear and defend." *People v Rorke,* 80 Mich App 476, 478-479; 264 NW2d 30 (1978). Here, the only evidence presented by the prosecution on the scienter element of the offense was defendant's presence in the courthouse at 2:30 p.m., when the preliminary exam was scheduled, and his absence from the courthouse at 3:20 p.m., when his case was actually called. In *In re People v Jory,* 443 Mich 403; 505 NW2d 228 (1993), our Supreme Court considered the issue whether a defendant could be found guilty of obtaining money under false pretenses for the mere failure to disclose a known encumbrance to the purchaser of certain property. The Court noted that, where the intent to defraud is a necessary ingredient of the offense and no proof of intent is presented, a defendant's conviction must be reversed. *Id.* at 419. The Court explained the important distinction between proving a defendant's criminal intent via affirmative acts or conduct and proving such intent via a defendant's omission or failure to act:

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

> Intent generally may be inferred from the facts and circumstances of a case. *People v Phillips*, 385 Mich 30, 37, 187 NW2d 211 (1971). "Where a defendant's acts are of themselves commonplace or equivocal, and are as consistent with innocent activity as they are with criminal, it will be necessary for the government to adduce objective facts to establish criminal intent." *Seeney v United States*, 563 A2d 1081, 1083-1084 (DC App, 1989). [*Jory, supra* at 419.]

The Court reversed the defendant's criminal conviction because the mere failure to disclose the existence of an encumbrance was insufficient to support an inference beyond a reasonable doubt that the defendant had acted with the intent to defraud. *Id.* at 425.

Likewise, an element of the statutory offense of forfeiting bond in a criminal proceeding, MCL 750.199a; MSA 28.396(1), is that the defendant "recklessly neglected or disregarded a known obligation to appear and defend." *Rorke, supra*; see also CJI2d 13.16. Here, because the mere fact of defendant's failure to be present when his case was called was "as consistent with innocent activity as . . . with criminal," it was necessary for the prosecutor to adduce *objective facts* to establish defendant's criminal intent to forfeit his bond. *Jory, supra*. The prosecutor's case-in-chief was wholly lacking in such objective evidence, therefore, defendant's conviction must be reversed.

/s/ Donald E. Holbrook, Jr.