

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NANCY LEE SCHUETTE,

Defendant-Appellant.

UNPUBLISHED

May 13, 1997

No. 187995

Recorder's Court

LC No. 94-007478

Before: Sawyer, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial conviction of embezzlement by an agent or trustee over \$100, MCL 750.174; MSA 28.371. The trial court sentenced defendant to a term of one to ten years' imprisonment for the conviction. We affirm.

I

Defendant argues that the trial court abused its discretion in allowing the prosecution to submit evidence that over a thousand improper transaction cancellations, or "voids," had been entered on the cash register at defendant's employer, the 34th District Court, resulting in a loss to the district court of \$270,000 over a nine-year period. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

We conclude that the trial court did not abuse its discretion in admitting the evidence. The evidence was admitted for the proper purpose of showing that defendant followed a plan or scheme in embezzling from the district court, and it was relevant to and probative of that plan. See *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). The evidence showed that defendant entered the voids into the register to hide the fact that she took money out of it or out of the court vault. No receipts for a legitimate mistake that the void was entered to correct were found, giving rise to an inference that defendant failed to generate receipts that would have allowed auditors to trace the voids to other transactions. The voids corresponded to dates on which defendant made substantial cash

deposits to her bank account, deposits that could not be accounted for by defendant's paycheck. Contrary to defendant's argument, the evidence was not unfairly prejudicial because the prosecution also submitted an overwhelming amount of evidence about defendant's behavior toward the district court's money before and on February 26, 1993, the date of the conviction offense, and about defendant's spending habits. Moreover, the trial court gave the jury a limiting instruction on the proper use of the evidence, even repeating the instruction during deliberations at the jury's request. See *id.*

II

Defendant next contends that the trial court deprived her of due process by allowing two counts of embezzlement that were not supported by sufficient evidence to go to the jury. Due process requires that the prosecutor introduce sufficient evidence to justify a reasonable trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). If sufficient evidence is not introduced, a directed verdict should be entered. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885 (1980).

We agree with defendant that the evidence submitted for the two counts was not sufficient to support a conviction on those counts, and the trial court erred in denying defendant's motion for a directed verdict. Nevertheless, defendant was not prejudiced by the submission of the charges to the jury because the jury failed to reach a verdict on those charges. Although defendant argues that the conviction on Count I was the result of prejudice, we find that the actual prejudicial effect of the error on the factfinder was negligible because the evidence that defendant embezzled over \$100 from the court was overwhelming.¹ Reversal is therefore not required. See *People v Mateo*, 453 Mich 203, 221; 551 NW2d 891 (1996).

Defendant contends that because there was insufficient evidence to support two counts, the prosecutor engaged in impermissible overcharging. We disagree. The prosecutor had wide discretion over what charges to file, and that discretion will not be disturbed absent a showing of clear and intentional discrimination based on an unjustifiable standard such as race, religion, or some other arbitrary classification. *People v Oxendine*, 201 Mich App 372, 377; 506 NW2d 885 (1993).

III

Finally, defendant argues that she was deprived of a fair and impartial trial because the prosecutor made a number of improper remarks during his closing argument. Defendant did not object at trial to the comments of which she now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as she asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

First, defendant points to the prosecutor's comment that defendant and her father, James Weems, who did part-time accounting work for the district court, ran a money-laundering scheme.

However, the prosecutor may draw reasonable inferences from the evidence presented at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Weatherspoon*, 171 Mich App 549, 557; 431 NW2d 75 (1988). Weems admitted that he wrote checks to defendant from an asset management account that were cashed at the court, that these checks often coincided with his payment from the court for his services, and that they were often in amounts of about half of what he had been paid. Furthermore, the checks often coincided with improper voids. In addition, Weems was paid several times what his services were worth. Weems did not have a written contract with the court for his services and claimed to have lost all the records of the work that he did. Based on this evidence, we conclude that the prosecutor's comment was not improper.

The prosecutor's comment that defendant was "stealing money hand over fist" was also not improper. The statement was supported by evidence that more than a thousand improper voids had been entered, resulting in a loss of \$270,000 to the court, coupled with the evidence of defendant's financial irregularities. See *Bahoda, supra*; *Weatherspoon, supra*.

Defendant also claims that the prosecutor's remarks to the jury that "you wouldn't be on the jury if I were not satisfied that you had the God-given common sense to figure this out," and that if they "were fools, [they] wouldn't be here" were improper appeals to the prestige of his office. We disagree. The prosecutor's appeal to the jurors' common sense was permissible. See *People v Lawton*, 196 Mich App 341, 355; 492 NW2d 810 (1992); *People v Laker*, 7 Mich App 425, 428; 151 NW2d 881 (1967). Similarly, the prosecutor's remark that the jurors included people with computer and actuarial experience was not improper because the prosecutor explained that the entire jury should use its training and individual experience to "calculate the odds of this happening by accident." Thus, the statement was merely an invocation to the jury to use its common sense and experience in evaluating the evidence, rather than an unfair appeal to certain jurors.

Finally, defendant asserts that the prosecutor injected an inflammatory comment into his closing argument by comparing defendant's spending habits to a cocaine addiction. However, we cannot say that defendant was prejudiced by this remark. The trial court stopped the prosecutor's argument, admonished him, and told the jury to disregard the "improper and inappropriate" remark. In addition, the trial court carefully instructed the jury that the lawyers' statements and arguments were not to be considered as evidence. We conclude that the statement did not lead to a miscarriage of justice, and defendant was not denied a fair and impartial trial. Cf. *People v Mooney*, 216 Mich App 367, 378-379; 549 NW2d 65 (1996).

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Mark J. Cavanagh

¹ Defendant was the district court's administrator with responsibility for overseeing the court's cashiers. Defendant was heard to say on February 26, 1993, that she was taking the money necessary to cash a personal check from the court vault. Defendant had a history of cashing personal checks at the district court, although court policy did not permit her to do so. Shortly after defendant cashed her check on February 26, 1993, an improper void was entered into the district court cash register for six hundred dollars. More than a thousand similar voids had been made over the preceding nine years, resulting in a loss of \$270,000 to the district court. The voids corresponded to dates on which defendant made substantial cash deposits to her bank account, deposits that could not be explained by defendant's paychecks. Defendant was deeply in debt. One of defendant's employees had often seen defendant taking twenty dollars from the vault, saying she needed it for lunch or to buy refreshments for the courthouse staff. When the employee challenged defendant, defendant snapped, "Hey, I'm queen bee here, honey. You don't question me. Nobody's going to throw me off my throne. You remember who the boss is."