STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JEFFREY GLENN MACK,

Defendant-Appellant.

UNPUBLISHED
March 30, 2006

No. 256834
Oakland Circuit Court
LC No. 2003-193193-FH

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for uttering and publishing, MCL 750.249. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to two to twenty years' in prison. We affirm defendant's conviction because sufficient evidence existed in the record to support it. And, we vacate defendant's sentence and remand for resentencing pursuant to *People v Francisco*, ___ Mich ____; ___ NW2d ___ (2006).

I

Defendant argues that the prosecution presented insufficient evidence to convict him of uttering and publishing, MCL 750.249. Defendant specifically asserts that the record evidence fails to establish that defendant had knowledge the check he presented on October 27, 2003 was false or forged because the evidence cannot establish that (1) defendant had knowledge the checks presented for payment on October 25, 2003 were forged or altered, (2) defendant was the person who prepared the checks, and (3) defendant was the person who presented the checks for payment. In determining whether the prosecution introduced sufficient evidence to support the verdict, this Court views the evidence de novo and in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

"The elements of uttering and publishing are: (1) defendant's knowledge that the instrument was false, (2) an intent to defraud, and (3) presenting the forged instrument for payment." *People v Knowles*, 256 Mich App 53, 58; 662 NW2d 824 (2003). Circumstantial evidence and reasonable inferences from the evidence can be sufficient to support a conviction. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Further, minimal

circumstantial evidence is sufficient to show a defendant's state of mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Rodney and Karen Harris, a married couple, held a bank account at Oxford Bank. Rodney Harris received a call from the bank informing him that there was problem with his account. Shortly after, Rodney Harris realized his checkbook was missing. Rodney Harris's brother, Russell Harris, lived with Rodney and Karen Harris for a period of time. Russell Harris's wife, Tina Harris, also stayed with Rodney and Karen Harris intermittently. Rodney Harris testified at trial that he believed Russell and Tina Harris stole his checkbook. Rodney Harris also testified that he did not grant permission to anyone to write checks on his bank account and that he had never met defendant. The testimony of Sondra Hale, an assistant branch manager at Oxford Bank's Clarkston office, indicated that both Tina Harris and defendant had separately endorsed a number of checks presented for payment from the account at issue. Bank tellers Cindy Madsen and Peggy Griffiths, testified at trial that defendant presented the check at issue for payment on October 27, 2003.

Our review of the record reveals that a rational trier of fact could reasonably infer from the evidence presented that defendant, acting in concert with Tina Harris, knew the check at issue was falsely endorsed because neither Rodney Harris nor his wife had actually signed the check. Further, the record reflects that defendant had the requisite intent to defraud Rodney and Karen Harris when he presented the check for payment while knowing the check was falsely endorsed. And, the record evidence shows that plainly, defendant presented the forged instrument for payment at Oxford Bank on October 27, 2003. The prosecution presented sufficient evidence to convict defendant of uttering and publishing, MCL 750.249.

II

Next, defendant argues that the trial court abused its discretion in scoring twenty-five points on offense variable 13 (OV 13) because defendant did not commit three felonies against a person in the five years preceding the current offense for which defendant is being sentenced. At sentencing, the trial court scored OV 13 at twenty-five points. From the relevant exchange at defendant's sentencing hearing, it is apparent that the trial court based its scoring of OV 13 on multiple armed robberies defendant committed in 1990.[1] Because the sentencing offense occurred in 2003, defendant's armed robberies occurred more than five years before the instant uttering and publishing conviction.

Defendant specifically contends that, properly understood, MCL 777.43(2)(a) limits scoring under OV 13 to patterns of criminal behavior falling within the five-year period preceding the offense for which a defendant is being sentenced. Defendant asserts that his three prior convictions for armed robbery occurred over ten years ago and that he had not committed

[1] The exchange at the sentencing hearing referred to defendant having three armed robbery convictions in 1990. The presentence report lists defendant as having three armed robbery convictions with an offense date of February 10, 1990, and one armed robbery conviction with an offense date of January 27, 1990.

three crimes against a person in the five years preceding the sentencing offense as required for scoring twenty-five points for OV 13. Conversely, the prosecution contends MCL 777.43(2)(a) allows a trial court to consider crimes committed by a defendant within any five-year period regardless of how distant that period is from the offense for which the defendant is being sentenced. This Court reviews a sentencing court's scoring decision for an abuse of discretion. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). This Court reviews questions of statutory interpretation de novo. *Id*.

A court must score twenty-five points for OV 13 where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). MCL 777.43(2)(a) provides that in scoring OV 13:

> [a]ll crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

Our Supreme Court in *People v Francisco*, ___ Mich ____; ___ NW2d ___ (2006) adopted the dissent in *People v McDaniel*, 256 Mich App 165; 662 NW2d 101 (2003) deciding this exact issue. Concluding that "only those crimes committed during a five-year period that encompasses the sentencing offense can be considered" our Supreme Court quoted the dissent in *McDaniel*, *supra*:

> The language at issue states that 'all crimes within a 5-year period, *including the sentencing offense*, shall be counted.' MCL 777.43(2) (a). Because the word 'shall' is used, I find it is impossible for any five-year period that does not include the sentencing offense to be considered. Contrary to the majority's interpretation of the statute, my reading of the statutory language clearly precludes consideration of a five-year period that does not include the sentencing offense. [*Francisco, supra*, slip op p 4 quoting *McDaniel, supra* at 174 (Donofrio, J., dissenting).]

Because the sentencing offense occurred in 2003, and defendant's armed robberies occurred more than five years before the instant uttering and publishing conviction, we vacate defendant's sentence and remand for resentencing pursuant to MCL 777.43(2)(a) and *Francisco, supra.*

We note that defendant also suggests that MCL 777.43(2)(a) is unconstitutionally vague with regard to the five-year period to be considered in scoring OV 13. In light of *Franciso*, defendant's argument is moot.

III

Finally, defendant argues that the trial court violated the principles set forth in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), when it sentenced defendant. In *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), our Supreme Court indicated that *Blakely* is inapplicable to Michigan's sentencing system. We are bound by that decision. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005); see also *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005).

IV

In sum, sufficient evidence existed to support defendant's conviction for uttering and publishing, MCL 750.249. Defendant is entitled to resentencing for his conviction pursuant to *Francisco, supra*. We vacate defendant's sentence and remand for resentencing.

Affirmed in part, vacated in part, and remanded.

/s/ Bill Schuette
/s/ Christopher M. Murray
/s/ Pat M. Donofrio