

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARRY JAMES HILL, JR.,

Defendant-Appellant.

UNPUBLISHED

April 20, 2006

No. 259717

Wayne Circuit Court

LC No. 04-002754-01

Before: Murphy, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of embezzlement of \$20,000 or more, MCL 750.174(5)(a). The trial court sentenced defendant to serve five years’ probation, the first year to be served in jail with work release, and to pay restitution. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

The prosecutor’s theory was that defendant, while serving as volunteer president of the Canton Community Junior Baseball and Softball Association, embezzled approximately \$169,000 from the league by writing himself approximately 70 checks drawn against an account intended to pay the league’s vendors. The defense did not dispute that defendant had written checks to himself for such amounts, but maintained that in so doing he was in fact partially reimbursing himself for expenses he had personally covered on the league’s behalf.

On appeal, defendant challenges the sufficiency of the evidence to support his conviction, and alternatively argues that he was convicted without the benefit of effective assistance of counsel.

I. Sufficiency of the Evidence

At the close of the prosecutor’s proofs, the trial court denied defendant’s motion for a directed verdict. The motion was argued on the ground that the prosecutor had failed to prove that the league was a person for purposes of functioning as the principal in an embezzlement case. On appeal, defendant challenges the sufficiency of the evidence solely on the ground that the evidence was not sufficient to prove that he acted with the intent to defraud or cheat the

league, which is an element of embezzlement by agent. See *People v Lueth*, 253 Mich App 670, 683; 660 NW2d 322 (2002) (“at the time of conversion, the defendant intended to defraud or cheat the principal”), citing MCL 750.174.¹

When reviewing the sufficiency of evidence in a criminal case, we must view the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

The league’s vice president in charge of equipment, who other than defendant was the only authorized signer of league checks for the time in question, testified that defendant had induced her to sign and leave in his possession many blank checks, that she had never signed one that was already made out to defendant, and that she had no knowledge that defendant was writing checks to himself. She further testified that defendant never indicated that he was collecting from the league monies owed to him.

The league’s director and vice president for lower baseball testified that defendant eventually admitted taking money from the league, with the explanation, “I had a tough year. I needed the money.” This witness testified that defendant acknowledged having taken \$110,000, and promised to repay it, but never did so.

The evidence that defendant initially took the league’s money secretly, that he complained of needing money because of bad times, and that he promised to pay back much of the amount at issue, was sufficient to persuade a reasonable trier of fact that defendant took the league’s money for personal reasons unrelated to any putative indebtedness of the league to him.

Defendant asserts, without citation, that the evidence showed that he had contributed significant sums to the league, and that when the league became financially stable, he began to withdraw sums he believed the league owed to him. Although there was some evidence that defendant had indeed lent the league money from his own pocket, there was certainly none to indicate that he did so through the use of sufficient documentation, and other formalities, that would have established his entitlement to repayment as an indisputable matter of fact and law. Instead, defendant’s theory, and the evidence that supported it, left a question for the jury to consider. Because the jury rejected that theory, it cannot be revived on appeal. “Credibility is a matter for the trier of fact to ascertain. We will not resolve it anew.” *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

The question is not whether defendant presented a plausible theory and supporting evidence in his defense, but rather whether the prosecution presented sufficient evidence to prove its own theory. “Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime.” *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). It is sufficient if the prosecution proves its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defense may produce; it is not necessary for the

¹ Defense counsel in fact conceded the other elements in his opening statement.

prosecution to disprove every reasonable theory of innocence. See *People v Hardiman*, 466 Mich 417, 424; 646 NW2d 158 (2002); *People v Johnson*, 137 Mich App 295, 303; 357 NW2d 675 (1984).

Moreover, “An actor’s intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.” *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted). In this case, the jury had a sufficient basis for accepting the prosecutor’s theory of intent, and for rejecting defendant’s.

II. Assistance of Counsel

The United States and Michigan Constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. “In reviewing a defendant’s claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel’s performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel’s defective performance.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel’s poor performance, the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). A defendant pressing a claim of ineffective assistance of counsel must overcome a strong presumption that counsel’s tactics were matters of sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

Because defendant did not move for a new trial or a *Ginther*² hearing below, our review of a claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Defendant notes that defense counsel below came to the case only after an earlier trial had resulted in a hung jury, and argues that successor counsel failed to conduct a sufficient investigation and to seek a continuance for that purpose. A defendant alleging that counsel failed to prepare for trial must show that such a lack of preparation resulted in counsel remaining ignorant of substantially beneficial evidence that accordingly did not get presented. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). In this case, defendant asserts that defense counsel should have brought as witnesses previous treasurers of the league to show that defendant had made loans to it. Defendant additionally complains that had defense counsel familiarized himself with the proceedings of the previous trial, counsel would have been better prepared to cross-examine prosecution witnesses.

Defendant neither names any specific witness who might have attested to his having lent the league money, nor otherwise explains why witness testimony would effectively substantiate a theory of financial transactions for which he could provide no documentation. Defendant similarly fails to explain just what came about in the earlier trial of which defense counsel might

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

have made capital for purposes of strengthening his performance in the instant trial. Defense counsel's decisions concerning the choice of witnesses or theories to present are presumed to be exercises of sound trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). In this case, defendant fails to offer specific enough argument to overcome the presumption that defense counsel saw no strategic advantage in presenting earlier league treasurers, or reviewing the transcripts of the earlier trial.

Defendant additionally points out that defense counsel was still in the process of assembling exhibits for submission to the jury while deliberations were in progress. However, defendant fails to detail precisely what these exhibits were, let alone why their submission to the jury would have caused it to believe that he had acted on the honest belief that the money he took from the league was money the league owed him.

In sum, defendant's general arguments concerning how defense counsel might have been more effective only invite speculation. Because defendant has failed to meet his burden of proving either a serious deficiency on counsel's part, or that the result would otherwise likely have been different, we must reject his argument that he did not have constitutionally effective assistance of counsel at trial.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Christopher M. Murray