

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACEY ANN PIERCE,

Defendant-Appellant.

UNPUBLISHED

May 13, 2008

No. 274869

Jackson Circuit Court

LC Nos. 05-001355-FH;

06-003014-FH

Before: Wilder, P.J., and O’Connell and Whitbeck, JJ.

PER CURIAM.

This case involves embezzlement and forgery charges against defendant Tracey Pierce relating to two organizations for which she was the treasurer: the Napoleon Summer Baseball League (the League) (LC No. 05-001355-FH), and Together In Education (TIE) for Ezra Eby Elementary School (LC No. 06-003104-FH). Pierce was charged in LC No. 05-001355-FH with embezzlement between \$1,000 and \$20,000¹ for conduct between March 9, 2004, and June 11, 2004, as well as two counts of forgery,² regarding checks allegedly signed by Pierce and Tanya Lester. She was separately charged in LC No. 06-003014-FH with embezzlement between \$1,000 to \$20,000 for conduct between July 29, 2002, and February 10, 2004, as well as one count of forgery regarding a check allegedly signed by Pierce and Pamela Barnes. The cases were consolidated for trial, and a jury convicted Pierce of two counts of forgery in LC No. 05-001355-FH, as well as embezzlement between \$1,000 and \$20,000 in both cases. The trial court sentenced Pierce to five years’ probation, with the first 270 days to be served in jail. Pierce now appeals as of right, and we affirm.

I. Basic Facts And Procedural History

John Witte, vice-president of the League, testified that he had been the League’s vice-president since Fall 2004. He stated that he wanted to be elected to find out what was going on with the League’s finances. He said that sponsors first began to ask questions that summer about where the League’s money was going because there were no awards for the second place team. He stated that he shared the questions with League president Thomas Trudeau and asked Pierce about them. Pierce stated that there were no second place awards because there was no money

¹ MCL 750.1744(a).

² MCL 750.248.

left. Witte testified that he then began to ask Pierce a lot of financial questions at the board meetings and asked for the financial records. Pierce said she would bring them to the next meeting. According to Witte, Pierce told him this at the next three meetings. At the fourth meeting, in January 2005, Pierce stated that the records were not public knowledge. Witte testified that after this meeting, he contacted Detective Pittman about the League's options.

Detective Duane Pittman testified that the League made a formal complaint within a few days and also brought to his attention that TIE may have had problems. Detective Pittman had the League's bank records subpoenaed in late January 2005 and discovered what appeared to be discrepancies. Based on information obtained from Trudeau, Witte, and TIE representative Jodi Heselschwerdt, Detective Pittman obtained a search warrant for Pierce's home. He did not confront Pierce about any of the apparent discrepancies before he executed the search warrant. Detective Pittman and Detective Sergeant Wayne Bisard executed the warrant in early February 2005, and seized evidence related to the League and TIE. The seized items were placed in Detective Pittman's car. Deputy Bradley Reed testified that he did not know how much material was placed in Detective Pittman's car, but it was probably accurate that they filled the trunk and back seat.

Detective Sergeant Bisard gave Detective Pittman permission to secure the seized items in his car at his residence overnight because it was late in the day. Detective Pittman stated that the evidence was secured in his car in his garage until he took it to the police station the following morning. Detective Pittman testified that at the station, he photocopied all the evidence that he believed was relevant to the investigation, such as bank records, checks, receipts, memos, meeting minutes, etc. He could not say how many receipts he saw for each year. He guessed there were more than 40. He said the non-relevant material included flyers, a bank bag, a lock box, and a binder that pertained to a different organization. Detective Pittman guessed that ten percent of the seized materials was irrelevant. He testified that none of the material that he deemed irrelevant was financial in nature.

Several days after the seizure, Detective Pittman returned the originals to the organizations. Trudeau and Witte reviewed the evidence at Detective Pittman's house on the day it was returned to them and then Trudeau left with the materials. According to Detective Pittman, Trudeau and Witte met at his house because their work hours made it difficult for them to come to the station during his work hours. He denied that Trudeau was at his house on the night the search warrant was executed. Detective Pittman further testified that he made photocopies of the evidence for the prosecutor and defense counsel. He testified that he did not destroy any documents seized in the search and made a good-faith effort to photocopy all documents he believed were relevant.

Tanya Lester, who had been the League's secretary since 2002, testified that all board members were co-signers on the League's checking account. She said that she co-signed checks, but never had possession of the checkbook. Lester stated that she never signed a blank check or gave Pierce permission to sign her name. Lester testified that she did not sign her name on the checks in evidence and that she did not recall discussing either check with Pierce.

Thomas Riley, a forensic document examiner, testified that there were indications that Tanya Lester did not write her own name on two checks. However, he was unable to offer any opinion regarding whether Pierce signed Lester's name.

Pamela Barnes, principal of Ezra Eby Elementary School, testified that Pierce became treasurer for TIE in 2001. Pierce resigned as treasurer in February 2005, when TIE began to have concerns with Pierce's bookkeeping. Barnes stated that in the fall of 2003, Steven Doerr, a parent, began asking questions about TIE's finances. She said that Pierce usually gave nervous responses such as, "I'll bring it next time," "I don't have it," or "I'll look into it." Barnes stated that Pierce provided TIE with records she had prepared, but not the bank statements.

Barnes testified that an internal investigation began in 2004. She became aware of the formal investigation when questioned in 2005 by Detective Pittman, who asked her to review TIE checks. She became concerned when she reviewed the checks because they appeared to be payments for unapproved items.

Pierce moved for a directed verdict on the forgery charges. She argued that the prosecution presented no evidence that she signed Barnes' or Lester's names on the checks. The prosecutor argued that there was sufficient circumstantial evidence to send the charges to the jury. The trial court agreed and denied Pierce's motion for a directed verdict.

A jury convicted Pierce of forgery and embezzlement. Pierce now appeals.

II. Destruction Of Evidence

A. Standard Of Review

Pierce argues that the police improperly destroyed documents, specifically receipts that were seized from Pierce's home and that were crucial to her defense. She asserts that this evidence would have enabled her to substantiate the checks at issue in these cases. Because Pierce did not raise this issue in an appropriate motion in the trial court, it is unpreserved. We review unpreserved issues for plain error affecting substantial rights.³ A plain error is one that is "clear or obvious."⁴

B. Analysis

"Failure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown."⁵ "Absent the intentional suppression of the evidence or a showing of bad faith, a loss of evidence which occurs before a defense request for its production does not require reversal."⁶ Stated another way, if the defense has requested the evidence, the careless destruction of the evidence does not require reversal unless the defendant can show that the police acted in bad faith.⁷ Even when the

³ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁴ *Id.* at 763.

⁵ *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993).

⁶ *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

⁷ *People v Amison*, 70 Mich App 70, 78-79; 245 NW2d 405 (1976).

destruction is intentional (for example, as part of a routine departmental policy), as long as the purpose is not to destroy evidence before the trial, reversal is not required.⁸

The crux of this issue is whether the receipts ever existed. Detective Pittman testified at trial that he photocopied all documents seized from Pierce's home that he deemed relevant, which included all documents that were financial in nature. Because the League's representatives worked during the same hours as Detective Pittman, he allowed them to view the seized League materials at his home, which was near where they lived. Detective Pittman stated that the copies of the seized materials that he gave to the defense were from his photocopies and originals that he retrieved from the League and TIE. The League's materials were then returned to it. To Detective Pittman's knowledge, the TIE materials were still at the police station because TIE did not want them back. Pierce, however, testified that the number of photocopied receipts that she received paled in comparison to what was in her files before they were seized.

Even if Detective Pittman's procedures could be considered questionable, Pierce has failed to show that evidence was actually destroyed. Significantly, Pierce did not attempt to obtain the originals from TIE or the League to compare to the photocopies that she received. Given Detective Pittman's testimony that he photocopied all documents that were financial in nature, that copies of those documents were provided to the defense, that all originals were returned to the respective organizations, and that Pierce did not attempt to obtain the originals to compare them with what she received, there is no clear or obvious basis in the record for concluding that any evidence was destroyed. Therefore, we conclude that Pierce's argument is without merit.

III. Exclusion Of Evidence

A. Standard Of Review

Pierce also argues that the trial court abused its discretion by excluding from evidence a cellular telephone bill that she sought to admit. Pierce argued below that the bill was admissible under MRE 803(6). On appeal, however, she argues that the telephone bill was admissible under MRE 901(a). An objection on one ground is insufficient to preserve a challenge on appeal on a different ground.⁹ Therefore, the issue Pierce presented is unpreserved, and we review it for plain error.¹⁰

B. Analysis

Pierce argues that the telephone bill should have been admitted because it was authenticated under MRE 901(a). Authentication of evidence is the process of determining that evidence is what it purports to be.¹¹ Authentication does not eliminate the need to show that the

⁸ *People v Hardaway*, 67 Mich App 82, 87; 240 NW2d 276 (1976).

⁹ *People v Bulmer (After Remand)*, 256 Mich App 33, 35; 662 NW2d 117 (2003).

¹⁰ *Carines*, *supra* at 763-764.

¹¹ *People v Jenkins*, 450 Mich 249, 259; 537 NW2d 828 (1995).

content of a writing is admissible under a hearsay exception.¹² A memorandum, report, or other evidence of hearsay can be admitted if the testimony of the “custodian or other qualified witness” shows that it was made and kept as a regular practice of the business.¹³ At trial, Pierce offered only her own testimony to show that the telephone bill was kept in the regular course of business. However, Pierce was not associated with the phone company and, therefore, was not a “qualified witness” under MRE 803(6). Accordingly, the trial court’s exclusion of the evidence was not plain error.

IV. Motion For A Directed Verdict

A. Standard Of Review

Pierce also argues that the trial court erred in denying her motion for a directed verdict with respect to the forgery charges pertaining to the League checks. We review the evidence that the prosecution presented up to the time the motion for directed verdict was made “in a light most favorable to the prosecution in order to ‘determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.’”¹⁴

B. Analysis

The elements of forgery are (1) an act that results in the false making or alteration of an instrument (which makes an instrument appear to be what it is not) and (2) a concurrent intent to defraud or injure.¹⁵ Tanya Lester testified that the signatures on the two checks at issue were not of her making. A casual review shows that Lester’s first name is misspelled in the signature on these two checks. The evidence also showed that Pierce, as the treasurer, had exclusive possession of the checkbook. The evidence was sufficient to enable the jury to find Pierce guilty of forgery. Therefore, the trial court properly denied Pierce’s motion for a directed verdict.

V. Sufficiency Of The Evidence

A. Standard Of Review

Pierce argues that the evidence was insufficient to support her embezzlement convictions. In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.¹⁶

¹² *Id.* at 260.

¹³ MRE 803(6); *People v McLaughlin*, 258 Mich App 635, 652; 672 NW2d 860 (2003).

¹⁴ *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006), quoting *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003).

¹⁵ *People v Kaczorowski*, 190 Mich App 165, 171; 475 NW2d 861 (1991).

¹⁶ *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

B. Analysis

The elements of embezzlement, as charged in these cases, are:

(1) the money in question must belong to the principal, (2) the defendant must have a relationship of trust with the principal as an agent or employee, (3) the money must come into the defendant's possession because of the relationship of trust, (4) the defendant dishonestly disposed of or converted the money to his own use or secreted the money, (5) the act must be without the consent of the principal, and (6) at the time of conversion, the defendant intended to defraud or cheat the principal.^[17]

Pierce asserts that the prosecutor failed to prove that she wrongfully took money from the League and TIE with the intent to defraud the organizations. Questions of credibility and intent should be left to the trier of fact to resolve.¹⁸ Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence of intent is sufficient.¹⁹ "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."²⁰

The prosecutor presented evidence that Pierce repeatedly deposited TIE and League checks payable to cash or herself into her personal accounts. Several checks appeared to be for fictitious or exaggerated expenses and most did not have supporting documentation. At least part of three TIE checks, according to the memo line, purported to be for a mailbox that Pierce admitted was donated to TIE. Numerous witnesses also testified that Pierce was evasive when asked direct questions regarding how organizational money was spent or when asked to specifically account for monies. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that Pierce embezzled money from the League and TIE.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

¹⁷ *People v Leuth*, 253 Mich App 670, 683; 660 NW2d 322 (2002).

¹⁸ *People Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

¹⁹ *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005).

²⁰ *Carines*, *supra* at 757, quoting *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).