

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM FATE WARD,

Defendant-Appellant.

---

UNPUBLISHED

April 13, 2006

No. 258672

Macomb Circuit Court

LC No. 2004-000357-FH

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of counts of embezzlement over \$1,000 but less than \$20,000, MCL 750.174(4)(a), and was sentenced to 18 months' probation, costs, and restitution. He appeals as of right. We affirm.

I. Basic Facts

Defendant was convicted of embezzling bingo proceeds from St. Steven Decanski Church in April and August 2003. On the relevant dates, defendant was the chairman and bookkeeper for Tuesday night bingo. Zivan Jovic, the church president, explained that the chairman position is a paid position, and the duties include collecting the bingo proceeds, filling out the corresponding documents, and depositing the money into the church's bank account. In August 2003, the State of Michigan Lottery Bureau conducted an audit of the church's bingo, which disclosed that \$3,031 was collected at the April 22, 2003 bingo, but no corresponding bank deposit was made. Allison Woodruff, the auditor, explained that the chairperson is responsible for making the deposit, which must be made within 48 hours, and confirmed that, on April 22, 2003, defendant signed the relevant records as the chairman and record keeper. Helene Gvozdich, a church board member, testified that, after receiving the audit results, she examined certain documents, and discovered that an August 5, 2003, deposit was also missing. John Ristich, the church financial secretary, explained that the records indicated that \$2,768, in bingo proceeds was collected on August 5, 2003, but no corresponding deposit was reflected in the church's bank records. The pertinent August 5, 2003, records were signed by defendant as chairperson.

When Woodruff discussed the April 22, 2003, discrepancy with defendant, he claimed that he deposited the proceeds in a night deposit box, and that the discrepancy was a bank error. No bank error was revealed. Jovic and Gvozdich indicated that when they, along with the church

priest, asked defendant about the missing money, defendant told them that he may have misplaced it during a move, would check, and contact them. Defendant never contacted anyone. When initially questioned by the police, defendant explained that he inadvertently put the wrong account number on the April 22, 2003, deposit slip, and put it in the night deposit box, and that he was not responsible for deposits after May 2003. In a subsequent statement to the police, defendant stated that he put the money in a closet because Ristich had instructed him to do so, that Ristich had taken deposits in the past, and that Ristich had given him money from certain deposits in the past. Gvozdich explained that money is never to be placed in a closet, but the chairperson is to take the money home and deposit it within two days.

Defendant testified at trial and denied any wrongdoing. Defendant asserted, inter alia, that bingo proceeds are occasionally put in a closet in the bingo hall, and that anyone could have removed the money. Defendant also presented defense witnesses who testified concerning his veracity and character, the non-rigid procedures of handling bingo proceeds, and Ristich allegedly directing one witness to put bingo proceeds in a closet.

## II. New Trial

Defendant argues that the trial court abused its discretion by denying his motion for a new trial. We disagree. This Court reviews a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

### A. Right to an Impartial Jury and a Fair Trial

Defendant contends that he was denied his right to an impartial jury and a fair trial because, during deliberations, the trial court (1) had ex parte communications with a juror in violation of MCR 6.414(A), (2) impermissibly inquired into the numerical division of the jury, and (3) foreclosed any possibility of the jurors examining trial testimony in violation of MCR 6.414(H).

#### 1. Ex parte Communication

During deliberations, the jury requested a rereading of the reasonable doubt instruction. Before the jury was brought out for that purpose, the court officer advised the trial court that a juror wished to speak with it. The trial judge advised the attorneys that he would meet in chambers with the juror, and there was no objection to that course of action. After the brief meeting, the trial court advised the attorneys on the record that the juror indicated that the other jurors were "ganging up on him." The trial court advised the juror that he could not be excused on that basis and to vote his conscience. Defense counsel did not comment, or otherwise object to the court's handling of the matter despite the court's invitation.

Defendant correctly argues that a trial court's ex parte communication with a deliberating jury is prohibited by MCR 6.414(A).<sup>1</sup> See *People v France*, 436 Mich 138, 142; 461 NW2d 621 (1990). But a trial court's communication with the jury in violation of MCR 6.414(A) does not require automatic reversal. Rather, the determination whether reversal is required "centers on a showing of prejudice." *Id.* To determine the prejudicial effect, the communication must first be categorized into one of three categories: (1) substantive, (2) administrative, and (3) housekeeping. *Id.* at 142-143.

Substantive communication encompasses supplemental instructions on the law given by the trial court to a deliberating jury. A substantive communication carries a *presumption* of prejudice in favor of the aggrieved party regardless of whether an objection is raised . . . .

Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations. An administrative communication carries no presumption. The failure to object when made aware of the communication will be taken as evidence that the administrative instruction was not prejudicial . . . .

Housekeeping communications are those which occur between a jury and a court officer regarding meal orders, rest room facilities, or matters consistent with general "housekeeping" needs that are unrelated in any way to the case being decided. [*Id.* at 143-144 (emphasis in original).<sup>2</sup>]

We agree with the trial court that the communication falls squarely within the administrative category. The juror relayed his discomfort with the deliberation process and the other jurors and asked to be excused. The court instructed the juror to continue deliberations and to vote his conscience. The court specifically indicated that it did not inquire into the problem or otherwise discuss the case. As previously noted, an administrative communication carries no presumption of prejudice, and defendant's failure to object indicates that the communication was not prejudicial. On appeal, defendant has failed to persuasively demonstrate that he was prejudiced. Because the communication was not prejudicial, reversal is not warranted.

## 2. Coerced Verdict

---

<sup>1</sup> MCR 6.414(A) provides, in relevant part:

The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communication pertaining to the case between the court and the jury or any juror are made a part of the record.

<sup>2</sup> The *France* Court noted that the "three paragraphs provide examples of what may constitute substantive, administrative, or housekeeping communications. The examples included within each category are not intended to be an exclusive list of the communications that may be included within each category." *Id.* at 143 n 4.

Defendant argues that when the jury sent a note indicating that it was deadlocked, the court impermissibly inquired into the numerical division of the jury. Defendant contends that the trial court's inquiry, combined with its earlier ex parte discussion with one juror, resulted in a coerced verdict.

At 11:22 a.m., the jury sent a note, and the following exchange occurred:

*The court:* I have received your note, and it is kind of curious. I'm noting the wording here. I don't want you to disclose to me even in the courtroom the state of your deliberations from that standpoint. I was interested in what you have said here. We have a *hung juror*. Maybe you mean a hung jury because there is apparently one holding out. Is that correct Mr. Foreman?

*Jury foreperson:* Yes. [Emphasis added.]

The trial court then read the deadlocked jury instruction. Defendant did not object.

"Claims of coerced verdicts are reviewed on a case-by-case basis, and all of the facts and circumstances, as well as the particular language used by the trial judge, must be considered." *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989). In *People v Lawson*, 56 Mich App 100, 105; 223 NW2d 716 (1974), this Court explained that a trial court may not inquire into or attempt to discover the numerical division of the jury members because

[s]uch an inquiry . . . carries the improper suggestion that the numerical division at the preliminary stage of deliberation is relevant to what the final verdict will, or should, be. By establishing one viewpoint as the "majority view," the inquiry "has the doubly coercive effect of melting the resistance of the minority and freezing the determination of the majority." It places the trial court's imprimatur upon what was but a tentative result. [Citation and footnote omitted.]

Under the circumstances here, the trial court's inquiry and the foreperson's response do not require reversal. First, the jury's note seemingly volunteered the information that the jurors were deadlocked, eleven to one. After reading the jury's note, the trial court posed a question apparently intended to clarify the meaning of "*hung juror*."<sup>3</sup> After the foreperson responded to the trial court's inquiry, the court immediately read the deadlocked jury instruction, CJI2d 3.12, without any comment. Even if the trial court's inquiry could be considered unnecessary, defendant has failed to show that the nature of the inquiry was coercive. The trial court affixed no special significance to the jury's state of disagreement, and there was no indication which way the majority or minority had voted. In short, the record does not suggest that the trial court acted in a manner or gave any instruction that would have caused a juror to abandon his or her own conscientious opinion and defer to the decision of the majority solely for the sake of reaching a unanimous verdict.

---

<sup>3</sup> Even appellate counsel conceded during the hearing on defendant's motion for a new trial that "the jury came back with an unusual note saying that there was a hung juror."

### 3. Foreclosed Review of Testimony

During deliberations, the jury sent a note requesting the testimony of two police officers. The court responded that it was “unable to provide the transcript of that testimony,” and instructed the jury to use their collective memories for that testimony. Defendant did not object to the trial court’s handling of the matter.

A trial court cannot refuse a jury’s reasonable request to review testimony, MCR 6.414(J),<sup>4</sup> but it can instruct the jury to deliberate further without the requested review if the instruction does not foreclose the possibility of review in the future. *Id.* Contrary to defendant’s argument, the trial court’s response did not foreclose the possibility of future review and accurately advised the jury that a transcript was not available. Defendant did not object to the court’s statements to the jury. Under these circumstances, reversal is not warranted.

#### B. Right to Present a Defense – Mary Bates and Keith Hayton

Defendant argues that the trial court improperly precluded him from calling two defense witnesses, thereby denying him his right to present a defense. We disagree.

On the second day of trial, defendant asked that he be permitted to add as a witness Mary Bates, his current employer, to testify about her observing Ristich go to a closet where bingo proceeds are possibly kept on the Thursday before trial. After the prosecutor objected on relevancy grounds, the trial court allowed defendant to make an offer of proof. Outside the presence of the jury, Bates testified that she did not attend the church’s bingo in 2003, and was not in the bingo hall in 2003. She explained that on the Thursday before defendant’s trial, she was at the bingo hall for a different organization’s bingo, and saw Ristich “go into his cupboards” even though it was not the church’s bingo night. After hearing Bates’s proposed testimony, the trial court ruled that it was not relevant, that Bates had no knowledge about Tuesday night bingo, and that her testimony would confuse the jury.

This Court reviews the trial court’s decision to admit or exclude evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” MRE 401. But even if relevant, evidence may be excluded if its probative value is substantially outweighed by, inter alia, confusion of the issues, or waste of time. MRE 403.

A defendant’s constitutional right to present a defense and call witnesses in his defense is guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 137-138; 497 NW2d 546 (1993). But the right to present a defense

---

<sup>4</sup> This provision was formerly found at MCR 6.414(H) until it was renumbered.

is not absolute. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). The accused must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. *Hayes, supra*.

Defendant has not demonstrated that the trial court's evidentiary ruling constituted an abuse of discretion. *Watson, supra*. Defendant's defense was that he did not commit the charged crimes in 2003, and that, at times, bingo proceeds were placed in a cupboard or closet and could have been taken by anyone. It was undisputed that Bates had no personal knowledge of the charged embezzlement. In fact, she did not attend the church's bingo in 2003, nor was she even in the hall in 2003. Defendant failed to demonstrate that Bates's observation of Ristich opening a cupboard in August 2004, was relevant to whether defendant retained bingo proceeds in April and August 2003. MRE 401. The inferences defendant was trying to draw were tenuous at best and, as noted by the trial court, may have confused the issues. MRE 403.

We also reject defendant's claim that the trial court's evidentiary ruling deprived him of his constitutional right to present a defense. The trial court's ruling did not amount to a blanket exclusion of all evidence challenging the witnesses' credibility or otherwise limit defendant's opportunity to present a defense. Defendant testified at trial, presented numerous defense witnesses, and plainly presented his defenses. Moreover, contrary to defendant's implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 689; 106 S Ct 2142; 90 L Ed 2d 636 (1986). For these reasons, we are not persuaded that the trial court abused its discretion by excluding the challenged evidence.

We reject defendant's claim that he is entitled to a new trial because he was precluded from presenting Keith Hayton. During trial, defense counsel called Keith Hayton, but he was not present. Outside the presence of the jury, a detective explained the process for serving subpoenas and testified that Keith Hayton had been served. Defendant then proceeded without the witness. Given defendant's failure to request a continuance, or any other action from the court in relation to procuring the witness, he cannot now complain of an error. To hold otherwise would allow defendant to harbor error as an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Further, although defendant speculates and makes general observations concerning how the lack of the witness may have affected his overall defense strategy and the outcome of his case, he makes no specific claims regarding the actual effect of the missing witness. Under the circumstances, the trial court did not abuse its discretion by denying defendant's motion for a new trial on this basis. *Crear, supra*.

### C. Cumulative Error

We reject defendant's argument that the cumulative effect of several errors at trial deprived him of a fair trial. Because no cognizable errors warranting relief have been identified, reversal under the cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

## III. Sufficiency of the Evidence

Defendant argues that he is entitled to entry of a judgment of acquittal because the prosecutor did not present sufficient evidence to convict him of embezzlement by an agent of \$1,000 or more but less than \$20,000. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a 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. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of embezzlement by an agent, MCL 750.174(4)(a), 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. [*People v Lueth*, 253 Mich App 670, 683; 660 NW2d 322 (2002).]

Defendant challenges only the third and fourth elements.

Evidence was presented that defendant was the chairman for bingo when the two incidents occurred. On April 22, 2003, \$3,031 in proceeds was collected, and, on August 5, 2003, \$2,768 in bingo proceeds was collected. Testimony revealed that, as the chairman, defendant was responsible for collecting the bingo proceeds, completing the required financial paperwork, and depositing the money into the church's bank account within 48 hours. The evidence showed that no deposits were made in the church's bank account for the bingo proceeds collected on April 22, 2003, or August 5, 2003. When confronted, defendant offered different explanations regarding the missing money. From this evidence, viewed in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant had possession of the bingo proceeds because of his position as chairman, and "dishonestly disposed of or converted the money to his own use or secreted the money." *Lueth, supra* at 683.

Although defendant offered an explanation for the missing money, the trier of fact was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Furthermore, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). In sum, the evidence, viewed in a light most favorable to the prosecution, was sufficient to enable a rational jury to conclude beyond a reasonable doubt that defendant

committed the crimes. Consequently, the trial court did not err by denying defendant's motion for a judgment of acquittal.

Affirmed.

/s/ Karen M. Fort Hood

/s/ David H. Sawyer

/s/ Patrick M. Meter