

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW DAVID SHELDON,

Defendant-Appellant.

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UNPUBLISHED

August 21, 2007

No. 268659

Calhoun Circuit Court

LC No. 2005-000937-FH

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendant Andrew David Sheldon appeals as of right his jury trial conviction for obtaining money by false pretenses with the intent to defraud, \$1,000 or more but less than \$20,000, MCL 750.218(4)(a). Defendant was sentenced to 34 to 120 months' imprisonment as a habitual offender, third offense, MCL 769.11. We affirm.

Defendant first argues that there was insufficient evidence for a rational jury to find the elements of the crime of false pretenses. We disagree. We review de novo claims of insufficient evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In so doing, we view the evidence 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 charged crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The elements of the crime of false pretenses include: (1) a false representation concerning a past or existing fact, or the intention to perform a future act, (2) knowledge by the defendant of the inaccuracy of the representation, (3) use of the representation with intent to deceive the victim, (4) reliance on the defendant's false representation by the victim, and (5) in so relying, the victim suffers the loss of money, or some other valuable thing. MCL 750.218; *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997).

Defendant contends that there was insufficient evidence to show that he made a misrepresentation of fact. At trial, the prosecutor presented evidence that defendant told the victim that his daughter, Maggie, required surgery "very soon" to rectify blocked tear ducts, which were causing her pain. In addition, Maggie's mother testified at trial that, before defendant informed the victim about his daughter's surgery, she informed defendant that their daughter did not require surgery, and would not need surgery for roughly 16-18 months. Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence for the jury to find that defendant made a false representation of fact to the victim.

Defendant next argues that there was insufficient evidence of defendant's fraudulent intent to deceive the victim, because the evidence did not establish that defendant asked the victim for money. Contrary to defendant's assertion, there was evidence admitted at trial that defendant solicited \$2,500 from the victim. In addition, there was evidence that defendant misrepresented the necessity of his daughter's surgery and the pain she experienced. The victim testified that defendant informed him that Maggie "was in such pain because she couldn't cry." Detective Bush testified that defendant informed her that Maggie's surgery had to be arranged "as soon as it could be scheduled within the month." This testimony, along with evidence that defendant did not use the money provided by the victim for his daughter's surgery, demonstrated that defendant had a fraudulent intent to deceive.

Defendant next argues that there was insufficient evidence to show that the victim suffered a loss of property. Defendant asserted that the victim gave him \$2,500 with the expectation that defendant would repay the money. Defendant reasons that because the money provided by the victim constituted a loan, it cannot serve as a basis for a conviction for false pretenses because the victim did not incur a loss of property. We disagree. The evidence presented at trial showed that the victim willingly transferred both possession and title to the \$2,500, with "the expectation" that it would be used for Maggie's surgery and that defendant would give him \$2,500 in the future as repayment. Defendant suffered the loss of his money. MCL 750.218. See *People v Phebus*, 116 Mich App 416, 420; 323 NW2d 423 (1982) (The crime of false pretenses is completed when a victim relies upon a misrepresentation and passes title to a defendant.).

Defendant next argues that the trial court abused its discretion by allowing the prosecutor to impeach defendant with evidence of defendant's 1995 conviction for embezzlement by an agent, MCL 750.174. We disagree. We review a trial court's decision to allow impeachment with prior convictions for an abuse of discretion. *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005). An abuse of discretion occurs where a trial court's decision falls outside of the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under MRE 609(c), a prior conviction is automatically admissible if it occurred within the previous ten years or the defendant was released from a period of confinement within the previous ten years, and the prior conviction involved an element of dishonesty or false statement. *People v Allen*, 429 Mich 558, 596; 420 NW2d 499 (1988); MRE 609(a)(1).

For a prior conviction to contain an element of dishonesty or false statement, lying, deceit, misrepresentation, untruthfulness, falsification, or a lack of veracity must be an actual element of the crime. *Allen, supra* at 593. The elements of embezzlement by an agent, MCL 750.174, include: (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." *Lueth, supra* at 683. A necessary element of embezzlement by an agent is the intent to defraud or cheat the principle, an element that incorporates dishonesty or false statement. Furthermore, in *Allen, supra* at 586, 594 n 15, the Michigan Supreme Court quoted the United States House Conference Report, HR No 93-1597's definition of "dishonesty or false statement":

[B]y the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, *embezzlement*, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully. [Emphasis added.]

See also *Phebus, supra* at 420. It was not an abuse of discretion for the trial court to allow the prosecutor to impeach defendant with evidence of his prior conviction for embezzlement by an agent.

Defendant next argues that prosecutorial misconduct deprived him of his due process right to a fair trial. We disagree. Generally, we review claims of prosecutorial misconduct de novo, on a case-by-case basis, examining the prosecutor's remarks in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). However, in this case, the claims of alleged misconduct were not preserved by a contemporaneous objection and a request for a curative instruction. Thus, our review is for plain error that affected defendant's substantial right. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763, 774. Further, no error requiring reversal will be found where a curative instruction could have prevented any prejudicial effect. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003); *Watson, supra* at 586.

Defendant argued that the prosecutor impermissibly vouched for the credibility of the victim through the use of facts not in evidence by stating, during closing argument, that the victim could not get his money back and had "nothing to gain" by testifying against defendant. Defendant is correct that a prosecutor is not allowed to vouch for the credibility of a witness by asserting special knowledge that the witness is testifying truthfully. *Bahoda, supra* at 276. Defendant is also correct that a prosecutor may not introduce facts that are not in evidence. *People v McCain*, 84 Mich App 210, 215; 269 NW2d 528 (1978). But a prosecutor is allowed to comment on his own witnesses' credibility during closing argument, especially in cases where the jury's verdict will likely depend on which witnesses the jury believes. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Furthermore, a prosecutor is allowed to argue the evidence and all reasonable inferences arising from it as they pertain to the prosecutor's theory of the case. *Bahoda, supra* at 282.

The prosecutor did not argue that he had special knowledge of the victim's truthfulness, nor did he impermissibly place the prestige of his office behind the victim's testimony. *Bahoda, supra* at 276-277. Moreover, we don't find that the prosecutor's challenged argument was based on an unreasonable inference. The evidence at trial revealed that defendant had significant debt. It was a reasonable inference that the victim could not get his money back, regardless whether a restitution order could enter. In addition, defendant fails to show that the prosecutor's allegedly impermissible remarks were outcome determinative. Moreover, even if the prosecutor committed misconduct in making the challenged argument, reversal is not required. The trial court instructed the jury to base its verdict solely on properly admitted evidence, and it instructed the jury that "the lawyer's statements and arguments are not evidence." Jurors are assumed to

follow a court's instructions; therefore, any prejudicial effect of the prosecutor's closing argument would likely have been cured by the trial court's jury instructions. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). There was no plain error that deprived defendant of his due process right to a fair trial.

Finally, defendant argues that his sentence was the result of improper scoring, because the trial court scored ten points for Offense Variable (OV) 10, MCL 777.40, due to its determination that defendant exploited a vulnerable victim. Defendant's sentence is not appealable. MCL 769.34(10) provides, in relevant part:

“A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

“[I]f [a defendant's] sentence is within the appropriate guidelines sentence range, it is appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence *and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand.*” *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). A sentence outside of the appropriate guidelines is appealable regardless if the error is raised in the manner described in MCL 769.34(10). In this case, defendant's minimum sentence is within the appropriate guidelines whether OV 10 was scored improperly or not. Regardless of the scoring of OV 10, 34 months was within the recommended minimum sentence range under the legislative guidelines. Because defendant's 34-month minimum sentence is within the appropriate guidelines, it is not appealable where the issue was not raised in the manner required by MCL 769.34(10).

Affirmed.

/s/ William C. Whitbeck  
/s/ Michael J. Talbot  
/s/ Brian K. Zahra