

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL POWELL,

Defendant-Appellant.

UNPUBLISHED

September 23, 2010

No. 293434

Wayne Circuit Court

LC No. 08-010799-FH

Before: WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

Defendant Michael Powell appeals as of right his jury conviction of deserting or abandoning his minor children without providing necessary and proper support (child desertion). See MCL 750.161(1). The trial court sentenced defendant to serve five years on probation and ordered him to pay \$67,968 in restitution. The primary issues on appeal are whether the trial court erred when it permitted the prosecution to present evidence concerning Powell's history of child support payments and whether the trial court exceeded the scope of its authority to order restitution by ordering Powell to pay back child support for periods outside the charging period. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In 2006, the prosecution charged Powell with two counts of child desertion. The first count alleged that Powell failed to provide necessary and proper support for his minor daughters, Gabrielle and Elizabeth, from January 1, 1990 through July 4, 1991. The second count alleged that Powell failed to provide necessary and proper support for Elizabeth, who was still a minor, from January 1, 1992 through January 23, 1995.

Jessie Allen testified that she was Powell's former wife and that they were married from 1967 through early 1980. Allen stated that she and Powell had two children: Gabrielle, who was born in 1974, and Elizabeth, who was born in 1978.

Powell injured his back in late 1978 or early 1979 while at work. Allen said that Powell left her in 1979, but that she would still see him on occasion. In 1979, Powell had surgery to correct his back injury and Allen learned that Powell had a girlfriend when she ran into her at the hospital. Allen filed for divorce in late 1979 and the court entered a judgment of divorce in 1980. As part of the judgment of divorce, the court ordered Powell to pay \$54 per week in child

support for Gabrielle and another \$54 per week for Elizabeth. The court also ordered Powell to purchase health insurance for the girls.

Allen testified that Powell did not visit the children from the time he left until he resumed contact with the children on July 5, 1991. She also said that, during this period, Powell provided no care in any fashion for his children: he provided no money, no shelter, no food, no clothing, no medical care, and no health insurance. She also stated that, although Powell promised to pay her a portion of his worker's compensation settlement, he did not. Indeed, she stated that, after a child support payment he told her that he "wouldn't pay a penny." She said he also never contacted the girls on birthdays, Christmas, or other holidays during this period. Allen testified that she was forced to obtain various forms of state provided welfare in order to provide for her children throughout this period.

In July 1991, Powell reestablished contact with his daughters. Thereafter, Gabrielle and Elizabeth would visit with their father about twice per year; they would visit once in the summer and again around Christmas. Allen admitted that Powell began to send her weekly checks for \$108 in June of 1992 and that some of those checks had child support written in the memo line. Starting in October 1992, which was after Gabrielle turned 18, Powell began sending checks for \$54, which continued through December 1992 or January 1993. Thereafter, she received some child support payments from Powell through the Friend of the Court system.

Dean Garber testified that he was an investigator and record keeper with Wayne County Friend of the Court. He stated that he was familiar with the child support records for this case and that the records indicated that Powell did not make any child support payments in 1990. Garber said that Powell made \$826 in payments in 1991, but received credit for around \$1100 after Powell's tax refund was intercepted. He said that Powell made no payments to the Friend of the Court in 1992, but was aware that Powell made \$1944 in direct payments. Garber stated that Powell should have paid \$4400 in 1991 and another \$4400 in 1992. As of the end of 1992, Powell should have made \$65,000 in payments, which did not include surcharges. Garber said that Powell also paid \$2496 in 1993, \$2731 in 1994, and \$2012 in 1995.

Elizabeth Becker testified that she was Powell's daughter by Allen. Becker stated that she had no contact with her father until she was 11. She said that her father and his newest wife came to visit her in 1991 and that, thereafter, she would visit her father a couple of times per week. When she visited her father, he would not take time off and she would end up spending 95% of the time with his wife. She said her father played no role in her life from the time he left until she turned 18 and did not attend her graduation or wedding. She admitted that, after they reconnected in 1991, she would occasionally call and ask him for money or clothing. She explained that she wanted to wear the current styles that those worn by her friends, but that her mother could not afford to buy such clothing. She stated that he would sometimes send the requested money or clothing.

Lisa Powell testified that she was Powell's third wife and that they were married from 1986 to 2006. She stated that, although she had no records, she did send checks for child support to the Friend of the Court on her husband's behalf. She said she made the payments from 1986 onward, but that the bank only kept checks for seven years. In 1991, she began to send the checks directly to Allen, but discontinued this practice after her and her husband's income tax

refund was intercepted. She stated that they spent time with the girls after 1991 and that they took the girls shopping and bought them clothing and things for school.

Powell testified that Gabrielle and Elizabeth were his daughters. He stated that for a time after his injury he could not pay support, but that after 1986 he regularly paid child support to the Friend of the Court except for a time where he paid Allen directly. He stated that, after he reconnected with his daughters in 1991, he would spend time with them, which included shopping and participating in activities.

At the close of proofs, the jury found Powell guilty of deserting Gabrielle and Elizabeth from January 1, 1990 through July 4, 1991, but found him not guilty of deserting Elizabeth from January 1, 1992 through January 23, 1995.

The trial court later sentenced Powell to serve five years on probation and to pay \$65,968 in restitution.

Powell now appeals.

II. EVIDENTIARY ERRORS

A. STANDARDS OF REVIEW

Powell first argues that the trial court erred when it permitted the prosecution to present evidence that Powell failed to pay the child support ordered by the court after his divorce from Allen. Specifically, Powell argues that the failure to pay child support is actually a violation of MCL 750.165 and, because the period of limitations for that offense had passed, the prosecution could not present any evidence of that offense. This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Yost*, 278 Mich App 341, 352; 749 NW2d 753 (2008). However, because this claim of error was not properly preserved on the record, this Court will review the claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. ANALYSIS

The statutes setting out periods of limitation for criminal offenses do not govern the admission of evidence at trial; rather, the rules of evidence govern the proper admission of evidence. MRE 101; MRE 1101. Generally, all relevant evidence is admissible at trial. MRE 402; *Yost*, 278 Mich App at 355. Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

In this case, the prosecution had to prove that Powell deserted and abandoned Gabrielle and Elizabeth when they were under 17 years of age, that he did so "without providing necessary and proper shelter, food, care, and clothing for them," and that he had "sufficient ability" to provide the necessary and proper shelter, food, care, and clothing. MCL 750.161(1). One way that a parent can provide necessary and proper shelter, food, care, and clothing is by providing financial support to the person or persons who have custody of the child. And a support order is presumably for an amount that will cover the basic needs of the child on whose behalf the order

is made. If Powell had been complying with the court's order of support during the relevant charging period, that compliance would have been substantial evidence that he was providing the necessary and proper care. Thus, in order to meet its evidentiary burden, the prosecution had to present evidence that, for the period at issue, Powell either did not make the child support payments that had been ordered or made insufficient payments to provide his children with the necessary and proper shelter, food, care, and clothing. Accordingly, the evidence concerning Powell's child support payment history was quite relevant and, for that reason, admissible. MRE 401; MRE 402.

We also do not share Powell's belief that the prosecution's decision to pursue charges under MCL 750.161 was unjust because the prosecution was otherwise time-barred from pursuing charges under MCL 750.165. With these two criminal statutes, the Legislature sought to penalize related but distinct wrongs: with MCL 750.165, the Legislature criminalized the failure to make full and timely child support payments as ordered by a court, whereas with MCL 750.161 the Legislature criminalized the failure to provide necessary and proper support for one's children without regard to whether the parent had been ordered to do so. Indeed, the failure to make a single child support payment could give rise to a conviction under MCL 750.165 even though the person ordered to make child support payments otherwise provided the necessary and proper support for his or her children. See MCL 750.161(1). Hence, there is nothing manifestly unjust about charging a parent with child desertion premised in part on a parent's failure to pay child support over a period of time without charging the parent with the failure to pay child support. Moreover, this Court has recognized that prosecutor's have broad discretion in determining what charges to bring where a defendant's conduct could plausibly support multiple charges. See *People v Barksdale*, 219 Mich App 484, 487; 556 NW2d 521 (1996). And, although this Court does have a limited ability to review such discretionary decisions, Powell's subjective belief that it was unfair for the prosecutor to bring charges under MCL 750.161 after the passage of the applicable period of limitation for a charge under MCL 750.165 is not a sufficient basis for review. *Id.* at 489 (noting that the defendant's argument that it was "unfair" under the circumstances for the prosecutor to bring felony charges rather than misdemeanor charges was not the type of unconstitutional, illegal, or ultra vires conduct that would justify review of the prosecutor's exercise of discretion).

The trial court did not err in permitting the admission of evidence concerning Powell's history of child support payments.

III. RESTITUTION

A. STANDARDS OF REVIEW

Powell next argues that the trial court erred when it ordered him to pay restitution in the amount of \$67,968. Specifically, Powell argues that the trial court could only order him to pay restitution for unpaid support for the period of desertion actually found by the jury—that is, for the desertion of Gabrielle and Elizabeth from January 1, 1990 through July 4, 1991. This Court reviews de novo the proper interpretation of a statute. *People v Martin*, 271 Mich App 280, 286-287; 721 NW2d 815 (2006). However, this Court reviews a trial court's order for restitution for an abuse of discretion. *People v Bell*, 276 Mich App 342, 345; 741 NW2d 57 (2007).

B. ANALYSIS

Under MCL 769.1a(2), a trial court must order, “in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant’s course of conduct that gives rise to the conviction or to the victim’s estate.” See also MCL 780.766(2). Because restitution is mandatory, the trial court had to order Powell to pay restitution to any victim who suffered losses as a result of the “course of conduct” that gave rise to Powell’s conviction. *Bell*, 276 Mich App at 347 (noting that restitution is mandatory and, for that reason, not subject to negotiation or plea bargaining). On appeal, Powell argues that the course of conduct must be limited to the specific crime for which he was found guilty—namely, the desertion of his children from January 1, 1990 through July 4, 1991. However, our Supreme Court has already rejected this narrow understanding of the phrase “course of conduct.”

In *People v Gahan*, 456 Mich 264, 270; 571 NW2d 503 (1997), our Supreme Court addressed whether the trial court properly ordered restitution for all the victims of the defendant’s criminal conduct, even though some of the “specific losses were not the factual predicate for the conviction.” In that case, the defendant had been involved in a scheme whereby he sold trailers or vehicles on consignment and then told the consignor that he had sold the item for less than he actually sold it and kept the difference between the actual selling price and that told to the consignor. *Id.* at 266-267. A jury later convicted the defendant of embezzlement with regard to one victim. *Id.* at 267. At sentencing, a probation officer stated he had spoken to 16 victims and explained that there were originally thought to be as many as 48 victims. *Id.* at 268. On the basis of this information, the trial court ordered the defendant to pay \$25,000 in restitution to the known victims and provided that the Parole Board “should determine what each victim should receive” and “should seek additional restitution if warranted.” *Id.* at 269. On appeal, this Court vacated the restitution award because it determined that the trial court could only order restitution “with respect to a loss caused by the very offense for which [the] defendant was tried and convicted” *Id.*

In analyzing the issue, our Supreme Court noted that resolution depended on the proper construction of the phrase “course of conduct” under MCL 780.766(2). The Court stated that this phrase had developed a unique meaning under the common law and that this meaning carried over to the interpretation of subsequent statutes dealing with the same subject:

Because there was no indication from the Legislature that the common-law meaning was not being incorporated, this phrase “course of conduct” should be given the broad meaning the courts had earlier stated. Thus, the defendant should compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction. [*Id.* at 272.]

The Court then concluded that, because the defendant’s scheme “to defraud his customers in the same or similar manner” fell “within the broad meaning of ‘course of conduct’ contained in the statute,” the trial court did not err when it ordered the defendant to pay restitution to all his victims. *Id.* at 273.

In this case, there was evidence from which the trial court could conclude by a preponderance that Powell engaged in a scheme to avoid his obligation to support his own children and, in that way, forced others—the taxpayers of this state and his former wife—to bear the burden of supporting his children through to adulthood. See *id.* at 275-276 (noting that the proper standard of proof for restitution is a preponderance of the evidence). Accordingly, there was sufficient evidence to support an order of restitution for the total losses incurred by the state and Powell’s former wife.¹ Further, because the losses were occasioned by his “course of conduct” in committing the offense for which he was convicted, the trial court had the authority to order restitution for all the losses notwithstanding that some of the losses occurred outside the charging period for his specific conviction. See MCL 769.1a(2); MCL 780.766(2); *Gahan*, 456 Mich at 277.

We also reject Powell’s contention that this Court must follow the holding in *People v Becker*, 349 Mich 476; 84 NW2d 833 (1957), and limit the restitution to the losses occasioned by the very offense for which he was convicted. Our Supreme Court addressed a similar argument in *Gahan* and determined that *Becker* did not control. *Gahan*, 456 Mich at 274. The Court first noted that the holding in *Becker* was not authoritative because it was a plurality decision. *Id.* The Court then went on to distinguish *Becker* on the basis that the facts in that case showed that the losses were occasioned by negligent conduct rather than the course of conduct giving rise to the criminal conviction. *Id.* at 274-275. As was the case in *Gahan*, the facts in this case demonstrate that the losses at issue were caused by Powell’s scheme to desert his children—that is, all the losses were occasioned by Powell’s course of conduct in deserting his children. Therefore, the trial court had the authority to order restitution for all those losses.²

¹ We note that there was evidence to support losses in excess of \$120,000, but that the trial court determined that the amount of restitution should be set at \$67,968. On appeal, Powell argues that the trial court erred to the extent that it ordered restitution in that amount on a variety of grounds. However, the arguments concerning the amount were not properly raised in the questions presented, see MCR 7.212(C)(5), and are deficient in both terms of the proffered analysis and the factual and legal support. Therefore, to the extent that Powell argues that the trial court erred in setting the amount, we conclude that that argument has been abandoned on appeal. *Martin*, 271 Mich App at 315.

² We also do not agree with Powell’s statement that the trial court lacked the authority to order him to pay restitution for the charging period at issue with regard to the charge for which he was found not guilty. The burden of proof for restitution is substantially lower than the burden of proof necessary to convict a defendant of a crime. Thus, although the jury could reasonably find that the prosecution failed to prove that Powell deserted Elizabeth from January 1, 1992 through January 23, 1995, the trial court could just as reasonably find by a preponderance that Powell’s criminal course of conduct led to losses in the same period. See *Gahan*, 456 Mich at 275-276.

There were no errors warranting relief.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly