

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 14, 2014

v

MARTIN ISAIAH LEWIS,

Defendant-Appellant.

No. 312568
Kent Circuit Court
LC Nos. 11-011545-FH;
11-011692-FH

Before: HOEKSTRA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Martin Isaiah Lewis appeals as of right his convictions of absconding or forfeiting bond, MCL 750.199a, and uttering and publishing, MCL 750.249. For the reasons stated in this opinion, we affirm.

With respect to the uttering and publishing charge, Peter DeBoer was working at Duthler’s Foods in downtown Grand Rapids when defendant entered the store and presented a Sweet Express company check. DeBoer believed that it was a false check because of the amount and appearance of the check and contacted the store director, Paul Maki. Maki asked defendant to go to the back of the store where he could verify the check. Maki testified that as they were walking to the back of the store defendant either “turned to push through” or hit him. Thereafter, with assistance from other store employees, defendant was subdued and held until the police arrived.

Regarding DeBoer’s inquiry into the validity of the check, he testified that he called the store’s loss prevention director, Douglas Theule. Theule compared the check defendant had presented with a Sweet Express check that was already in the company’s computer system and found that the checks did not match. While checking the system, Thule also discovered that defendant cashed another Sweet Express check he believed to be counterfeit at a different store location the day before he attempted to cash the check at issue during trial. Thule contacted Sweet Express, and was informed that defendant had not worked there since 2009. Edwin Ramadani, an accounting manager employed by Sweet Express, testified that after looking in the company’s system, it did not appear that Sweet Express had issued defendant any checks since the time he was employed.

With respect to the absconding or forfeiting bond charge, Sheriff Joel Roon testified that defendant was facing identity theft charges and failed to appear at sentencing for that charge.

Defendant was ultimately found at a jail in California and was extradited to Michigan.

On appeal, we first address defendant's argument that there was insufficient evidence to support his convictions.

We review sufficiency of the evidence issues de novo, examining the evidence in a light most favorable to the prosecution, to determine whether a rational trier of fact could have found that every essential element was proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). We "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

With respect to his absconding or forfeiting bond conviction, defendant argues that his testimony was un rebutted, and accordingly, the trier of fact was obligated to acquit him of that charge. However, it is up to the finder of fact to make decisions about credibility of witnesses and the probative value of evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Accordingly, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to find defendant guilty beyond a reasonable doubt of absconding or forfeiting bond.

The elements of absconding or forfeiting bond, MCL 750.199a, are (1) that the defendant did abscond and (2) that he did so from a criminal proceeding wherein a felony was charged. *People v Litteral*, 75 Mich App 38, 41-42; 254 NW2d 643 (1977). Abscond is defined as "a design to withdraw clandestinely, to hide or conceal one's self, for the purpose of avoiding legal proceedings." *Id.* Here, the finder of fact could draw the reasonable inference that defendant was hiding or concealing himself from the court because he failed to appear for sentencing. Defendant was ultimately located in California and extradited back to Michigan. Further, identity theft is a felony under MCL 777.14h. This evidence, if believed, is sufficient to convict defendant of absconding or forfeiting bond.

With respect to his uttering and publishing conviction, defendant argues that the evidence was insufficient because the prosecution failed to prove that he knew the check was forged and because it relied on "pseudo expert testimony" to establish that the check was false.

The three elements of uttering and publishing, MCL 750.249, are "(1) knowledge on the part of the defendant that the instrument was false; (2) an intent to defraud; and (3) presentation of the forged instrument for payment." *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

First, we conclude that the prosecution presented sufficient evidence to prove that defendant knew the check was false beyond a reasonable doubt. It is not disputed that defendant presented the Sweet Express check at issue for payment, and testimony established that Duthler's Foods previously cashed checks from Sweet Express and the check that defendant presented did not match the appearance of other Sweet Express checks. Further, the testimony in this case demonstrated that defendant had not been employed by Sweet Express since 2009, and that Sweet Express had not issued defendant any checks since the time of his employment. The record also established that defendant successfully cashed another false check at a different

Duthler's Foods location the day before the underlying offense occurred. This evidence supports the inference that defendant had the intent to defraud. Finally, Maki testified that defendant started an altercation with him after he questioned the validity of the check, which could also support an inference that defendant knew the check was forged. Accordingly, if believed, this evidence was sufficient to establish uttering and publishing.

Defendant also argues that the prosecution relied on "pseudo expert testimony" to establish that the check was fraudulent. In particular, defendant maintains that the trial court improperly allowed testimony from DeBoer and Maki about why they thought the check was suspicious; thus, defendant maintains that his conviction cannot rest on this "improper" evidence.¹ Defendant characterizes this testimony as testimony from unqualified experts; however, on the basis of the record it is plain that the testimony was not offered or admitted as expert testimony.² Thus, MRE 701 controls whether the testimony was admissible. Under MRE 701, a lay witness may testify to opinions or inferences that are "rationally based on the perception of the witness" and are "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." See also *People v Dobek*, 274 Mich App 58, 77-78; 732 NW2d 546 (2007). Testimony is properly allowed when it consists of "reliable conclusions that could be made by people in general on the basis of the evidence . . . and [is] not overly dependent on scientific, technical, or specialized knowledge." *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 455-456; 540 NW2d 696 (1995). In this case, the challenged testimony was admissible because it was "rationally based on the witness[es]' perception of the incident" and because it explained why DeBoer and Maki chose to bring defendant to a back room. MRE 701. The testimony was of a "general nature," and was not "overly dependent on scientific, technical, or specialized knowledge." *Richardson*, 213 Mich App at 455-456. Accordingly, we conclude that the testimony was properly admitted; thus, defendant's claim that his conviction rested on improper evidence has no merit.³

¹ We note that no objection to the testimony of either DeBoer or Maki was raised during trial; thus, defendant's claim that this testimony was improperly admitted is reviewed only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

² The prosecution did not submit notice of any intent to offer expert testimony nor did it argue that either DeBoer or Maki was an expert regarding check fraud. Moreover, neither witness offered expert testimony on the subject. Rather, both witnesses merely explained the reason that the check was suspicious on the basis of their personal experience accepting and cashing checks.

³ Further, we reject defendant's argument that the testimony was also inadmissible under MRE 401, 402, and 403. Defendant does not raise this argument in his statement of the issue, accordingly, we need not address this issue. *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008); MRE 7.212(C). Nevertheless, we find that the evidence was properly admitted because it was relevant to explain the circumstances surrounding the commission of the crime and to explain why the validity of the check was questioned. Moreover, the evidence did not interject considerations extraneous to the merits of the lawsuit into the trial nor was it given

Next, defendant argues that the trial court improperly consolidated both charges into one trial. The record shows that defendant waived his right to a jury trial in both cases, and thereafter, a bench trial concerning both charges was conducted without any motion for consolidation or objection from either party. Thus, this argument is not properly preserved and arguably any claim of error on appeal was waived by the parties' implicit consent to the joint trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Nevertheless, we find that defendant has failed to demonstrate any error requiring reversal.

Unpreserved errors are reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. Under MCR 6.120, joinder is permitted "if offenses are 'related.'" *People v Williams*, 483 Mich 226, 233; 769 NW2d 605 (2009). "Offenses are 'related' if they comprise either 'the same conduct' or 'a series of connected acts or acts constituting part of a single scheme or plan.'" *Id.* Because one offense was based on the failure to appear and the other was based on the presentment of a false check, we conclude that these acts did not compromise the "same conduct," nor did they involve "a series of connected acts or acts constituting part of a single scheme or plan." *Id.* While improper joinder may be "harmless" when "evidence of each charged offense could have been introduced in the other trial under MRE 404(b)," *id.* at 243, this is not the case here. Thus, defendant's offenses were not related, and the trial court committed plain error. *Id.*

However, defendant has not shown that the plain error affected his substantial rights. *Carines*, 460 Mich at 763. Sufficient evidence existed to support each conviction. See *Hawkins*, 245 Mich App at 452; *People v Edwards*, 171 Mich App 613, 619; 431 NW2d 83 (1988). Further, we note that defendant waived his right to a jury trial, and a trial court is presumed to know and follow the law unless the contrary is clearly shown. *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999); *People v Farmer*, 30 Mich App 707, 711; 186 NW2d 779 (1971). Here, nothing in the record indicates that evidence of one crime was used to convict defendant of the other. Under these circumstances, defendant has failed to demonstrate any plain error affecting his substantial rights.

Defendant also argues that the trial court violated his due process rights by allowing the prosecutor to introduce unfairly prejudicial other acts evidence. Specifically, defendant objects to Thule's testimony regarding the fact that defendant cashed another Sweet Express check that was believed to be counterfeit at a different store location the day before he attempted to cash the check at issue in this case.⁴ However, we conclude defendant has abandoned his argument that the other acts evidence was improperly admitted because he makes no specific arguments regarding why the evidence introduced in this particular case was improperly introduced. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) (holding that an appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue).

undue or preemptive weight by the finder of fact. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998); *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995).

⁴ We note that the prosecution expressly characterized this evidence as other acts evidence under MRE 404(b) in its opening statement.

Rather, defendant only argues that his attorney was ineffective for failing to object to the other acts evidence.

In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

In this case, we conclude that the other acts evidence was properly admitted. This Court explained in *Hawkins*, 245 Mich App at 447-448, quoting *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), that other acts evidence is admissible if:

(1) a party offers it to prove "something other than a character to conduct theory" as prohibited by MRE 404(b); (2) the evidence fits the relevancy test articulated in MRE 402, as "enforced by MRE 104(b)"; and (3) the balancing test provided by MRE 403 demonstrates that the evidence is more probative of an issue at trial than substantially unfair to the party against whom it is offered, defendant in this case.

The evidence in this case was offered for a proper purpose under MRE 404(b), specifically to show that defendant had the intent to defraud. Second, the evidence was relevant to establishing intent. MRE 402. Third, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice because the evidence was probative of defendant's intent to defraud. MRE 403. Accordingly, defense counsel's failure to object to the admission of the evidence did not constitute ineffective assistance of counsel because counsel is not required to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Additionally, defendant argues that defense counsel was ineffective for failing to object to the consolidation of his charges and for failing to object to the testimony of DeBoer and Maki regarding why they were suspicious of the check defendant presented.

Regarding defendant's ineffective assistance of counsel claim premised on defense counsel's failure to object to consolidation of defendant's charges, we agree that because it was improper for the court to consolidate defendant's charges into one trial, as discussed *supra*, counsel was objectively unreasonable for failing to object. *Pickens*, 446 Mich at 338. However, defendant has not established the existence of a reasonable probability that "but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Sufficient evidence existed to convict defendant of both crimes, and nothing in the record indicates that the trial court at this bench trial improperly considered evidence from one charge to convict defendant of the other charge. Accordingly, defendant has failed to demonstrate any prejudice resulting from counsel's failure.

Regarding defendant's ineffective assistance of counsel claims premised on defense

counsel's failure to object to the testimony of DeBoer and Maki, we conclude that defendant has failed to demonstrate ineffective assistance of counsel because the testimony was properly admitted, as discussed *supra*. Defense counsel is not required to make futile objections. *Milstead*, 250 Mich App at 401.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Amy Ronayne Krause