

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
July 21, 2015

v

MARK ALLEN SCHOENBORN,  
  
Defendant-Appellant.

No. 321845  
Kent Circuit Court  
LC No. 13-008678-FH

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Before: SERVITTO, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

Following a jury trial, defendant, Mark Allen Schoenborn, was convicted of uttering and publishing, MCL 750.249. The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to 2 to 25 years' imprisonment for his conviction. Defendant appeals as of right, and we affirm.

**I. PERTINENT FACTS AND PROCEDURAL HISTORY**

This case arises out of a forged check that the victim, Mark Tanis, received from defendant as payment for Tanis's Chevy pickup truck.

The prosecution presented evidence at trial to establish that defendant and Tanis had a business relationship in which they bought, repaired, and resold cars together. Defendant expressed a desire to purchase Tanis's truck, and Tanis allowed defendant to borrow the truck with the understanding that defendant would pay for the truck when he had the money. Defendant and Tanis ultimately agreed on a price of \$2,500 for the truck, but a deadline for payment was never set. Tanis retained title of the vehicle, pending full payment.

Tanis testified that in June of 2013, defendant informed him, "I have a check from my lawyer" that would cover the cost of the truck, and that it was at his sister's house. Tanis drove to defendant's sister's house to obtain the check, but neither she nor defendant was home at the time. As a result, defendant's girlfriend, Ana Flores, gave Tanis the check. Flores testified that she caught a glimpse of the check but did not know how much it was for or who sent it. According to Flores, defendant told her that he had received the check from selling a bed on Craigslist. Flores was unaware that defendant owned a bed to sell.

The check at issue identified Valley National Bank, located in New York, New York, as the bank from which the funds were to be drawn, with “Gottlieb, Rackman & Reisman, PC, Attorneys at Law” as the drawer from a “Professional Business Account.” The check was dated “6-25-2013,” and identified defendant “Mark schoenborn” as the payee in the amount of \$2,500. The law firm’s address, as identified on the check, was “270 Madison Avenue, Madison Avenue, NY, NY 10016.” Below the payment amount on the check, the name “Mark schoenborn” was again printed out, with a Grand Rapids, Michigan address listed below it. In the memo line of the check were printed the words “FUND AVAILABLE.”

Heather Fife, the comptroller for Gottlieb, Rackman & Reisman, a law firm located in New York City, testified by video that her firm specializes in intellectual property. Fife confirmed that her firm does its banking with Valley National Bank, and that they had been experiencing problems with the issuance of several fraudulent checks, one of them being the one at issue in this case. The checking account number “is actually two numbers shy of what [the firm’s] actual account number is.” Fife noted that defendant’s name appears twice on the check, and that his last name is spelled with a lower case “s.” Fife testified that people who had received a fraudulent check similar to the one in question were calling her firm to verify its legitimacy and were told that their check was, in fact, fraudulent. Fife confirmed that defendant, to her knowledge, has never been a client of the law firm. Geraldine Tortosa, another employee of the law firm, testified by video that defendant’s name “sounds very familiar” as someone who may have called her firm, although she did not recall the content of their conversation.<sup>1</sup>

After Tanis picked up the check, he met defendant at the Secretary of State’s Office. Defendant signed the check over to Tanis, and Tanis signed the title of the truck over to defendant. Tanis and defendant listed the sale price of the truck as \$300, even though they had agreed on an actual sale price of \$2,500. Tanis also wrote a check to defendant for \$155<sup>2</sup>; Tanis explained that he wrote the check to pay for the license, insurance, and transfer of the title because defendant did not have the money to do so himself.

Tanis deposited the \$2,500 check into his bank account, but after a few days he received notice from the bank “saying the check isn’t good.” A bank employee told Tanis that the check was altered or fictitious. Tanis filled out an affidavit of forgery, but did not contact defendant about the forged check. Rather, Tanis contacted the Grand Rapids Police Department and made a police report. Defendant did not return the truck to Tanis, despite Tanis’s efforts to get it back, nor did he give Tanis any money or other compensation for the truck, according to Tanis.

At the close of the prosecution’s case-in-chief, defendant moved for a directed verdict. Defendant argued that the elements of uttering and publishing, specifically that defendant knew the check was forged and had intent to defraud Tanis, were not met. Defendant argued that he

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<sup>1</sup> Tortosa was actually a defense witness called during the prosecution’s case in chief.

<sup>2</sup> Tanis testified that when he went to his bank to deposit defendant’s \$2,500 check, defendant contacted him regarding his inability to deposit the \$155 check, so Tanis had defendant meet him at the bank and he pulled \$160 from the ATM and gave it to defendant in place of the check.

did not know the check was bad and he did not intend to defraud Tanis. Defendant also argued that Flores gave Tanis the check, and that there was no evidence that defendant gave the check to Tanis or that he had knowledge the check was a forgery.

The prosecution argued that defendant did have knowledge that the check was forged. Based on the fact that defendant did not have any sort of relationship with the law firm, reasonable jurors could find that defendant had knowledge that the check was bad. Additionally, Flores' testimony gave no indication that she knew anything meaningful about the check at issue. Further, the element of intent was established because while defendant received the truck and \$160 to get the truck registered, licensed, and insured, Tanis did not receive compensation for the truck.

The court denied defendant's motion for a directed verdict.

Defendant testified that he received the check in question in the course of selling Tanis's truck to "a man" on Craigslist (prior to actually owning the truck). Defendant testified that the man who was buying the truck from him—whose name defendant never identified—was "in communication or in with Gottlieb, Lachman – Rackman & Reisman, the company on the check," and that when defendant looked into the firm, it all "panned out." Defendant testified that he initially thought the check "was kind of funny" and "didn't seem like something that I should be involved in." Nevertheless, defendant testified that he undertook to "find out that this was real," so he contacted the Valley National Bank and an employee confirmed that Gottlieb, Rackman & Reisman had an account with them. Defendant also indicated that he contacted the law firm itself, and that based on these communications, he believed the check was good. Defendant testified that he had already paid Tanis some money for the truck, and that he was supposed to receive any surplus over the agreed upon price after the \$2,500 check cleared. Defendant claimed that the \$155 check from Tanis, later replaced with \$160 in cash, was to cover the cost of a license plate and insurance for a different vehicle that they were in the process of repairing. Tanis informed defendant that the \$2,500 check did not clear, but defendant retained title to and possession of the Chevy truck. The prosecution elicited impeachment evidence from defendant that he has a prior conviction for forgery arising out of a 2007 or 2008 incident in which he forged the name on the signature line of his friend's check when his friend was purportedly buying a vehicle from defendant.

In sum, three versions of the origin of the check came out at trial. Tanis testified that defendant told him the check was from defendant's law firm. Flores testified that defendant told her the check came from his sale of a bed online. Defendant testified that he received the check from a man who was buying the truck from him online.

The jury convicted defendant as noted above.

## II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to support his conviction. We review the sufficiency of the evidence de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). Our review concerns "whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt." *Id.* at 175.

In making this determination, we view “the evidence in the light most favorable to the prosecution.” *Id.* Circumstantial evidence and reasonable inferences may be used to prove the elements of a crime. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

“The elements of uttering and publishing are: (1) defendant’s knowledge that the instrument was false, (2) an intent to defraud, and (3) presenting the forged instrument for payment.” *People v Knowles*, 256 Mich App 53, 58; 662 NW2d 824 (2003), overruled on other grounds by *People v Melton*, 271 Mich App 590; 722 NW2d 698 (2006). A defendant’s intent to defraud may be proven by circumstantial evidence. *Id.*

Defendant contends that the knowledge and intent elements of uttering and publishing were not proven beyond a reasonable doubt. Knowledge that an instrument is false may be imputed to a defendant when he is suspicious of the check or from events occurring after receipt of the check. *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). Here, defendant testified that he thought the check was “funny” and not something with which he should be involved. Defendant did not have a business relationship with the New York law firm from which the check was allegedly received, he did not identify who allegedly sent him the check, and he purportedly contacted the law firm and the bank to inquire into the authenticity of the check. In addition, defendant gave conflicting stories to Tanis and Flores about why he received the check and he told a third version to the jury. A reasonable juror was warranted in inferring that defendant knew the check was fraudulent, especially in light of his own testimony regarding his suspicions. Accordingly, there was sufficient evidence that established the knowledge element of uttering and publishing.

Similarly, there was also sufficient evidence to establish the intent element of uttering and publishing. A defendant’s intent to defraud may be proven by circumstantial evidence. *Knowles*, 256 Mich App at 58. In spite of the suspicious origins of the check, defendant gave the check to Tanis as payment for the truck. Defendant admitted that even after learning that the check did not clear, he did not attempt to return the truck or sign the title back over to Tanis. As the trial court put it, Tanis thus received a worthless piece of paper (the forged check), and defendant received a \$2,500 truck and \$160 in cash. Moreover, viewing the evidence in the light most favorable to the prosecution, defendant lied to Tanis by claiming that he received the check from “his attorney” and gave conflicting stories about the check’s origin. A reasonable juror was warranted in finding that defendant intended to defraud Tanis when he presented a false check for payment on the truck. Therefore, there was sufficient evidence to convict defendant of uttering and publishing.

### III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that his trial counsel was ineffective for failing to renew his motion for a directed verdict at the close of defendant’s case-in-chief. Where, as here, a *Ginther*<sup>3</sup>

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<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

hearing has not been held, our review is limited to errors apparent on the record.<sup>4</sup> *People v Jordan*, 275 Mich App 659; 739 NW2d 706 (2007). Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *Id.* at 579. To establish his claim of ineffective assistance of counsel, defendant must show that “(1) counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different.” *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

“A directed verdict of acquittal is appropriate only if, considering all the evidence in the light most favorable to the prosecution, no rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt.” *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). The trial court is not allowed to “determine the credibility of witnesses in deciding a motion for a directed verdict of acquittal, no matter how inconsistent or vague that testimony might be.” *Id.* At the close of the prosecution’s case-in-chief, defense counsel moved the trial court for a directed verdict, which the trial court denied. In denying the motion, the court referenced evidence that defendant signed a “\$2,500 bogus check” over to Tanis that defendant falsely represented was from his lawyer, despite having no relationship with the patent law firm from New York, and that Tanis received a “worthless piece of paper” while defendant received a truck and \$160 in cash, which defendant never attempted to rectify over the course of a year after it became clear that the check was fraudulent.

If defense counsel had renewed his motion for a directed verdict at the close of defendant’s case-in-chief, the trial court, in accordance with its earlier denial, would have been required to deny that motion. The trial court was compelled to view the evidence in the light most favorable to the prosecution. *Id.* Defendant’s version of the events did not change the fact that the prosecution had offered sufficient evidence from which a rational trier of fact could conclude that the elements of uttering and publishing were proven beyond a reasonable doubt. *Id.* Trial counsel is not ineffective for failing to raise a motion that would be futile. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011). Accordingly, defendant’s ineffective assistance counsel claim lacks merit.

Affirmed.

/s/ Deborah A. Servitto  
/s/ Jane M. Beckering  
/s/ Mark T. Boonstra

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<sup>4</sup> Defendant filed a motion with this Court to remand the case for a *Ginther* hearing on this very issue. Finding that defendant failed to demonstrate that further factual development of the record or an initial ruling by the trial court was necessary to address the issue, this Court denied the motion. *People v Mark Allen Schoenborn*, unpublished order of the Court of Appeals, entered November 26, 2014.