

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN ARTHUR CURRIER,

Defendant-Appellant.

UNPUBLISHED

September 13, 2007

No. 269564

Oakland Circuit Court

LC No. 2004-198527-FH

Before: O’Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant of fraudulent retention or use of building contract funds, MCL 570.152, and the trial court sentenced him to six months in jail and 18 months’ probation. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion by admitting evidence of his previous conviction for larceny by conversion. We disagree.

MRE 404(b) governs the admission of prior bad acts, crimes, or wrongs. To be admissible under MRE 404(b), other crimes evidence generally must conform to three requirements: (1) the evidence must be offered for a proper purpose, (2) the evidence must be relevant, and (3) the probative value of the evidence must not be substantially out weighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). In addition, the trial court, if requested by the defendant, may provide a limiting instruction to the jury, consistent with MRE 105. *Id.* In general, MRE 404(b) is treated as a rule of inclusion, and a defendant’s prior bad acts are only excluded from evidence if admitted for the improper purpose of proving a defendant’s bad character, and propensity to act in conformity with therewith. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993).

The trial court determined that defendant’s prior conviction was relevant, and more than marginally probative, for the purpose of establishing defendant’s fraudulent intent because the prior conviction made it more likely that defendant intended to misapply funds from the victim’s construction account and that the misuse was not a mistake. We review a trial court’s decision to admit evidence of a defendant’s prior bad acts for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). 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). A trial court’s decision on a close evidentiary question ordinarily

will not be considered an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

MCL 570.152 penalizes (1) a contractor, (2) who, with the intent to defraud, (3) retains or uses the proceeds of a building contract fund for his own purposes, (4) before paying subcontractors for materials or labor. *People v Brown*, 239 Mich App 735, 739; 610 NW2d 234 (2000). Defendant's trial strategy focused on the lack of intent to defraud. Under MRE 404(b)(1), a defendant's prior crimes may be admissible to establish the defendant's intent. Thus, a proper purpose for the admission of the evidence existed. The next inquiry is whether the evidence was relevant.

Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized. [*Crawford, supra* at 387 (citation omitted).]

The evidence must be truly probative of something other than the defendant's propensity to commit the crime. *Id.* at 390. The trial court determined that "the fact patterns that have been shown here or have been offered by the [prosecutor] show that there is significant probative value to the evidence," because of the similarity between the crimes. Both crimes involved the improper transfer of construction loan money by defendant and the improper use of the money. Both crimes also involved the use of fraudulently altered documents to conceal what was occurring. Defendant's prior conviction of larceny by conversion made it more probable that defendant acted with fraudulent intent, as opposed to accidentally misapplying or retaining the money. The past crime made defendant aware that it was a crime to misappropriate construction loan money and use false waivers. The challenged evidence was therefore relevant, and it established a proper intermediate inference, other than the impermissible propensity inference. *People v Martzke (On Remand)*, 251 Mich App 282, 294-295; 651 NW2d 490 (2002).

Defendant also argues that the prior conviction was dissimilar to the instant offense and, therefore, the danger of unfair prejudice caused by the admission of his prior conviction substantially outweighed its probative value. To show that the danger of unfair prejudice substantially outweighed the probative value of the prior crime, defendant was required to show that "the evidence will be given undue or preemptive weight by the jury," or that "it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). Prejudice alone is not enough to exclude evidence, because all relevant evidence presented by an opponent is necessarily prejudicial to a defendant. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Unfair prejudice refers to the possibility that a jury decides a case by placing undue weight on the marginally probative evidence. *Id.*

A review of the record reveals that the challenged evidence was more than marginally probative and that any unfair prejudice did not substantially outweigh the probative value of the evidence. Thus, the trial court did not abuse its discretion in admitting the evidence. Further, the trial court issued a limiting instruction regarding the evidence of defendant's previous conviction. A trial court's limiting instruction to the jury concerning the proper use of the

evidence alleviates the potential for unfair prejudice, because juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant additionally argues on appeal that, even if the facts underlying his previous conviction were relevant, the conviction itself should not have been admitted. However, our Supreme Court has previously acknowledged that the admission of a former conviction may be proper where there is a noncharacter purpose for the evidence, and it otherwise meets the required standard for admissibility. *Crawford, supra* at 382 n 3.

Defendant next argues that he was denied a fair trial by the prosecutor's comments during closing argument and that defense counsel was ineffective for failing to object to the allegedly improper comments. Defendant failed to preserve this claim of prosecutorial misconduct for appellate review. Accordingly, we review defendant's challenges to the prosecutor's actions for plain error affecting defendant's substantial rights. *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 caused the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 774. This Court will not find error requiring reversal where a curative instruction could have prevented any prejudicial effect. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003); *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Defendant objects to the following prosecutorial comments:

Whose name is on that contract? Who submitted the sworn statements? Who is reassuring [the Mios] that the work is really being done and the check is in the mail? Is it anyone else? That the defendant doesn't know what's going on in a contract that he signed, that he doesn't know the day-to-day operations? He's the President. And now to shift it off on his secretary or someone that's doing fazes or someone that's on the worksite, it's their fault?

He contends that the prosecutor's comments instructed the jury that defendant could be convicted for another person's criminal acts. A prosecutor's comments must be examined in context, and their propriety depends on the particular facts of the case. *Callon, supra* at 330. Prosecutors are generally afforded great latitude in their closing arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor's clear misstatement of the law, which remains uncorrected, may deprive a defendant of a fair trial. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). If the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can be cured. *Id.* at 357.

When the prosecutor's comments are viewed in their proper context, it is clear that the prosecutor did not assert that defendant could be convicted merely because he was president of his company, but instead asserted that the evidence showed that defendant participated in criminal actions. In making his argument, the prosecutor merely rebutted defendant's argument that defendant was not culpable because other people in his company were responsible for the misapplication of funds. The challenged comments did not improperly state the law or inform the jury that defendant could be convicted simply because he was the president of his company. The prosecutor's challenged argument connected defendant personally to the crimes. "A

corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation." *Brown, supra* at 742. The prosecutor's comments did not constitute a clear misstatement of law. Furthermore, the trial court correctly instructed the jury that the "lawyers' statements and arguments [were] not evidence." As mentioned above, jurors are presumed to follow their instructions. *People v Matuszak*, 263 Mich App 42, 55; 687 NW2d 342 (2004).

Finally, we reject defendant's argument that counsel was ineffective for failing to object to the challenged comments by the prosecutor. Because the prosecutor's comments were not improper, defendant's trial counsel was not ineffective for failing to challenge them. Defendant's trial counsel will not be deemed ineffective for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald