STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL PETERSEN,

Defendant-Appellant.

UNPUBLISHED
July 5, 1996

No. 180207
LC No. 93-0006431-FH

Before: Smolenski, P.J., and Holbrook, Jr., and F. D. Brouillette,* JJ.

PER CURIAM.

Defendant was charged with forgery, MCL 750.248; MSA 28.445, uttering and publishing, MCL 750.249; MSA 28.446, and larceny by conversion, MCL 750.362; MSA 28.594. A jury found defendant guilty as charged. The trial judge sentenced defendant to serve concurrent prison terms of three to fourteen years for the forgery conviction, three to fourteen years for the uttering and publishing conviction, and one to five years for the larceny by conversion conviction. Defendant appeals as of right from his convictions and sentences. We affirm.

Defendant, as director of a nonprofit corporation, managed a senior citizen complex in Traverse City. In April 1992, defendant's contract was terminated, and a new management company was installed. In August of that year, defendant used his employment position at a local brokerage firm to transfer a treasury note from the complex's reserve fund, required by its Farmers Home Administration (hereinafter "FmHA") loan, to an account maintained by one of defendant's other business entities. Subsequently, defendant used the proceeds from the sale of this note for personal expenses. At trial, defendant argued that the various contracts between the nonprofit corporation and the complex allowed him to make this transfer to extinguish an unsatisfied debt owed to him by the complex. The jury rejected this claim of right defense and found defendant guilty as charged.

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* Circuit judge, sitting on the Court of Appeals by assignment.

I

Defendant argues that his right to a fair trial was infringed by his trial attorney's ineffective assistance. We disagree. This Court reviews de novo the record below to determine whether the defendant was prejudiced by the alleged ineffective assistance of counsel so as to deprive the defendant of a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To establish a claim that the assistance of one's counsel was ineffective, the defendant must first show that counsel's assistance fell below the objective standard of reasonableness. *Id*. In other words, the defendant must overcome the presumption that his counsel's actions were the product of sound trial strategy. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Second, the defendant must establish that his counsel's representation prejudiced him so as to have deprived him of a fair trial. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995). If this element cannot be established, the defendant's claim must fail. *People v Pickens*, 446 Mich 298, 333; 521 NW2d 797 (1994).

Defendant asserts that his trial counsel's failure to introduce the various contracts between the nonprofit corporation and failure to hire an accountant to act as an expert witness vitiated his claim of right defense. We disagree. For the most part, the introduction of evidence and the decision to call witnesses are part of counsel's trial strategy. *People v Lavearn*, 201 Mich App 679, 684; 506 NW2d 909 (1993), rev'd on other grounds 448 Mich 207; 528 NW2d 721 (1995). In order to overcome the presumption that failure to introduce evidence or call a witness was sound trial strategy, the defendant must show that the failure deprived him of a substantial defense that would have affected the outcome of the proceedings. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant asserts that the actions of his trial attorney deprived him of the use of the claim of right defense. A claim of right defense is defined as:

> "Where one, in good faith, takes the property of another and converts it to his own use, believing it to be legally his own, or that he has a legal right to its possession, he is not guilty of larceny … It is necessary, however, in all cases that the claim of right be a bona fide one and not a mere cover for a felonious taking. The taker's claim of right must be something more than a vague impression, it must amount to an honest conviction." [*People v Karasek*, 63 Mich App 706, 713; 234 NW2d 761 (1975), quoting 52A CJS, Larceny, § 26, pp 449-450. Emphasis omitted.]

We find that defendant could not claim this defense because he clearly lacked the express authority to make the withdrawals in August 1992 given that his contracts with the complex terminated in April 1992. 2A CJS, Agency, § 110, p 726. Consequently, no claim of ineffective assistance of counsel can be sustained. *Daniel*, *supra* at 58.

II

Defendant argues next that the prosecutor's remarks concerning the only management agreement in evidence constituted prosecutorial misconduct. We disagree. Because defendant failed to object below to the prosecutor's remarks, we will review the issue to see whether a miscarriage of justice occurred. *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995). We find that no miscarriage of justice occurred because the remarks in question addressed issues raised by defendant's own counsel. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

III

Defendant next argues that only a federal prosecution was proper under the circumstances of his case because he either enjoyed immunity as a quasi-federal official with the FmHA, the state action was preempted by federal law, or the state prosecution was prohibited by the Supremacy Clause of the United States Constitution, US Const, Art VI. This issue is being raised for the first time on appeal. We may still review such an issue if failure to consider it would result in manifest injustice, such as when a criminal defendant claims that he was deprived of a fundamental constitutional right at trial that was decisive to the outcome of the case. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Nevertheless, we disagree.

Our review of the record shows that defendant could not be considered any type of federal official at the time he committed the crimes in question, so he enjoyed no immunity. Federal laws or regulations pertaining to a given area of law can preempt state law governing the same field when preemption can be found via express preemption, implied preemption, or as a result of a conflict between the laws of the two jurisdictions. *Hillsborough Co v Automated Labs, Inc*, 471 US 707, 713; 105 S Ct 2371; 85 L Ed 2d 714 (1985). Defendant's proffered federal law, 42 USC 1485, does none of these, so no preemption can be found. Last, the state prosecution had no effect on the management of the complex, so the supremacy argument has no application in the case at hand. *People v Seder*, 139 Mich App 380, 384; 362 NW2d 289 (1984).

IV

Defendant also argues that his convictions for both forgery and uttering and publishing violate the prohibition against double jeopardy because he is being punished twice for the same offense. We disagree. Although defendant did not raise the double jeopardy issue below, we will still review the issue because it involves a significant constitutional question. *People v Lugo*, 214 Mich App 699, 705; ___ NW2d ___ (1995).

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. We note that defendant's argument is based upon the multiple punishment for the same offense branch of this right. The purpose of this branch is to protect the defendant's interest in not enduring more punishment than was intended

by the Legislature. *Lugo*, *supra* at 705-706. In a situation where the defendant was convicted of both forgery and uttering and publishing, this Court has stated:

> Review of chapter XL of the Penal Code reveals a series of offenses prohibiting different phases of conduct involved in forgery and counterfeiting, with a separate penalty for each. The two statutes at issue in the present case proscribe separate and distinct acts which may or may not occur together in the same criminal transaction. The fact that both statutes provide a maximum penalty of fourteen years in prison shows that the seriousness of each offense is equally weighted and, we believe, evidences a legislative intent to separately punish violations of each statute. To suggest that the Legislature intended uttering and publishing to subsume the coequal felony of forgery merely because the defendant is the creator of the forged instrument he presents for payment is to attribute a total lack of purpose to the Legislature's decision to create separate offenses for each act. [*People v Kaczorowski*, 190 Mich App 165, 170; 475 NW2d 861 (1991). Citation omitted.]

Consequently, we likewise find that no double jeopardy violation can be found in the present case.

V

Defendant argues last that his minimum three year sentence for his uttering and publishing conviction is disproportionate. We disagree. In Michigan, a defendant's sentence must be proportionate to the seriousness of the crime and the defendant's prior criminal history. *People v Milbourn*, 435 Mich 630, 645-636, 654; 461 NW2d 1 (1990). To ensure proportionality, our Supreme Court promulgated sentencing guidelines and made their use mandatory. *People v Brown*, 171 Mich App 401, 403; 429 NW2d 667 (1988).

In the present case, the guidelines recommend a minimum sentence in the range of zero to twelve months. Nevertheless, the trial court deviated from the recommended range by two years. Therefore, this deviation is suspect. *Milbourn*, *supra* at 656-657. Consequently, the record must be examined to determine whether the trial court adequately explained the rationale for its departure. *People v Fleming*, 428 Mich 408, 426; 410 NW2d 266 (1987). Our review of the sentencing opinion and sentencing information report shows that the trial court adequately explained the reasons for its departure from the guidelines' recommended sentence and that those reasons justify a departure. Consequently, defendant's three-year minimum sentence is proportionate.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Francis D. Brouillette