Approved, Michigan Court of Appeals

LOWER COURT Ingham County Circuit Court	Electronically Filed BRIEF COVER PAGE	CASE NO. Lower Court 10-000146FH Court of Appeals 301823

(Short title of case)
Case Name: **People v. Joseph John Carr**

1. Brief Type (select one):
☐ APPELLANT(S) ☐ APPELLEE(S) ☒ REPLY
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☐ OTHER [identify]:

2. This brief is filed by or on behalf of [insert party name(s)]: **Joseph John Carr**

3. ☒ This brief is in response to a brief filed on November 1, 2011 by Plaintiff-Appellee.

4. ORAL ARGUMENT: ☒ REQUESTED ☐ NOT REQUESTED

5. ☐ THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID.
[See MCR 7.212(C)(12) to determine if this applies.]

6. As required by MCR 7.212(C), this brief contains, in the following order: [check applicable boxes to verify]
   - ☒ Table of Contents [MCR 7.212(C)(2)]
   - ☒ Index of Authorities [MCR 7.212(C)(3)]
   - ☒ Jurisdictional Statement [MCR 7.212(C)(4)]
   - ☒ Statement of Questions [MCR 7.212(C)(5)]
   - ☒ Statement of Facts (with citation to the record) [MCR 7.212(C)(6)]
   - ☒ Arguments (with applicable standard of review) [MCR 7.212(C)(7)]
   - ☒ Relief Requested [MCR 7.212(C)(9)]
   - ☒ Signature [MCR 7.212(C)(9)]

7. This brief is signed by [type name]: **Christopher M. Smith**
Signing Attorney's Bar No. [if any]: **(P70189)**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, COURT RULES

I. THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT JOSEPH CARR KNOWINGLY USED A FALSE PRETENSE WITH INTENT TO DEFRAUD, OR THAT THOSE WHO DETRIMENTALLY RELIED ON THE PRETENSE—IF ANY—LOST MORE THAN $1,000 IN TOTAL.

This reply brief is filed in response to the brief filed by the Plaintiff-Appellee on November 1, 2011. MCR 7.212(G). While Defendant-Appellant's original brief challenged the sufficiency of the evidence of several elements of false pretenses, this reply focuses solely on one element—detrimental reliance. Defendant-Appellant stands on his original brief with respect to the remaining elements.

A. False pretenses requires proof of actual reliance by the victims.

The crime of false pretenses is relatively unique insofar as it requires proof of not just the defendant's *mens rea*, but also the victim's state of mind. MCL 750.218. As the Plaintiff-Appellee notes, the offense requires proof that "another person relied on the defendant's pretense" and that the same person "suffered the loss of money by relying on the defendant's pretense." (Pros. Br. 16). Evidence of actual reliance—as opposed to the mere possibility of reliance—is required.

The difference between actual reliance and potential reliance is illustrated by this Court's opinion in *People v Chappelle*, 114 Mich App 364; 319 NW2d 584 (1982), *overruled on other grounds by People v Bearss*, 463 Mich 623; 625 NW2d 10 (2001). In that case, the defendant was convicted of false pretenses for passing a series of bad checks using "[a] false address, a false driver's license, and the existence of a bogus company, with identification in the form of business cards." *Id.* at 366, 368. Those misrepresentations would have "justified defendant's conviction under the false pretenses statute" but for one fact: there was no actual reliance on those representations by the victim. *Id.* at 368, 370. This Court reasoned that "the evidence

presented at trial is absolutely clear that the store clerk who took the defendant's check did not rely on anything that the defendant said or did in the accomplishment of the defendant's fraud. Rather, the clerk accepted the defendant's check because the store's owner had approved it." *Id.* at 370. Accordingly, this Court reversed the conviction for false pretenses. *Id.*

B. Here, proof of actual reliance could only come from the victims themselves. The failure to produce these witnesses is fatal to the prosecution's case.

Plaintiff-Appellee argues that "the prosecutor was not required to call 4,000 to 48,000 victims for each to testify about losing a quarter to Carr." (Pros. Br. 20). Rather, Plaintiff-Appellee contends that "[a]n inference of the victim's reliance can also be derived from the evidence." (Pros. Br. 17) (citing *People v Reigle*, 223 Mich App 34, 38; 566 NW2d 21 (1991)). These assertions are both factually and legally unsupported.

First, there is no hardship exception to the requirement of proof beyond a reasonable doubt. US Const Ams V, XIV; Const 1963, art 1, §17; *In re Winship*, 397 US 358, 361-62; 90 S Ct 1068; 25 L Ed 2d 368 (1970). If the prosecution is unable to produce enough evidence to prove each element of the offense beyond a reasonable doubt, the conviction must be reversed. *Id.*; *Jackson v Virginia*, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979). This rule applies even if the prosecution experiences difficulty in producing its witnesses.

Plaintiff-Appellee's position—that proof of potential reliance is an acceptable substitute for proof of actual reliance—does violence to the right of confrontation. US Const Ams VI, XIV; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177 (2004). The only way to determine whether a victim actually relied upon a misrepresentation is to ask them. If actual reliance could be inferred whenever there is the potential for reliance, then prosecutors would have little incentive to call victims to the witness stand. After all, to use the

example of *Chappelle*, *supra*, calling victims only creates the risk of eliciting testimony that they "did not rely on anything that the defendant said or did[.]" *Chappelle*, 114 Mich App at 370.

Further, Plaintiff-Appellee's position is not supported by the *Reigle* case cited in its brief. (Pros. Br. 17). Because *Reigle* was an appeal from an order quashing the information and dismissing the charges, it is inapposite here. *Reigle*, 223 Mich App at 35. The evidence in that case was analyzed under the probable cause standard; as the *Reigle* Court noted, "the prosecution [was] not required to prove each element of the crime beyond a reasonable doubt." *Id.* at 37. Yet even under this lesser burden of proof, the *Reigle* prosecutors elicited evidence of the victims' state of mind via statements they had offered and documents they had signed. *Id.* This is far more proof than what the instant prosecutor offered below.

Another problem with Plaintiff-Appellee's position is that it collapses multiple elements into one. Plaintiff-Appellee's brief cites the "prominent missing children stickers" as evidence that the victims must have actually relied upon those images before tendering 25 cents. (Pros. Br. 18). The brief also points to the defendant's personal belief that he would not be able to place the collection boxes without those images.[1] (Pros. Br. 19). But contrary to what Plaintiff-Appellee argues, actual reliance cannot be inferred by proof of a misrepresentation. Nor can the victim's state of mind be inferred from evidence of a defendant's state of mind. Otherwise, there would be no need to categorize detrimental reliance as a stand-alone element. This Court must avoid a construction that would render any part of a statute surplusage or nugatory. *Zwiers v Growney*, 286 Mich App 38, 44; 778 NW2d 81 (2009).

[1] Plaintiff-Appellee's assertion that Mr. Carr "admitted that he did not put out boxes with candy but without the missing children's pictures because he would get no money" is misleading. (Pros. Br. 19) (citing JT-II 210-211). As the transcript confirms, Mr. Carr actually testified that ***placement*** of the boxes would suffer without the imagery, not collections/sales. This distinction is important for the reasons discussed in Argument I, Subsection C of Defendant-Appellant's original brief on appeal.

Lastly, Plaintiff-Appellee ignores critical testimony offered by its own witness. As Special Agent Martin May acknowledged, there are three possible inferences to be drawn from the presence of coins in the collection boxes: (1) every victim gave money in reliance on the boxes' missing children imagery; (2) every victim paid what the box suggested as a fair price for the candy, regardless of the imagery; or (3) some combination of #1 or #2. (JT-II 114-115). Without testimony from those who deposited the money, there simply is nothing to establish beyond a reasonable doubt which inference is the most correct. Because the proofs—even when taken most favorably to the prosecutor—present no more than a choice between competing probabilities, a judgment of acquittal must enter. *United States v Saunders,* 325 F 2d 840 (CA 6, 1964); *United States v Leon,* 534 F 2d 660 (CA 6, 1975).

In sum, it is not enough to establish the possibility that a victim detrimentally relied upon a false assertion. Rather, the prosecution must also prove that the victims ***actually*** did so. *Chappelle, supra*. Here, the record does not disclose why anyone (save for Hunter Seyfarth) deposited coins in Mr. Carr's collection boxes. And since Mr. Seyfarth did not deposit more than a few dollars, the most the evidence establishes is a misdemeanor violation of MCL 750.218(2). Thus, for the reasons discussed above and in Defendant-Appellant's original brief, reversal is warranted.

II. THE PROSECUTION DEPRIVED JOSEPH CARR OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY DENIGRATING THE DEFENSE FOR FAILING TO CALL WITNESSES WHO LIKELY WOULD HAVE EXERCISED THEIR RIGHT AGAINST SELF-INCRIMINATION.

Plaintiff-Appellee emphasizes what Defendant-Appellant has already conceded: that when a defendant takes the witness stand and puts on a defense, the prosecutor is usually free to comment on the defendant's failure to present corroborating evidence. *People v Fields,* 450 Mich 94, 105-106; 538 NW2d 356 (1995). (Deft. Br. 25); (Pros. Br. 23-24). This case, however, involves an exception to that rule. When a witness cannot properly be called because of the likelihood that he or she will exercise the right against self-incrimination, the prosecutor may not point to the defendant's failure to call that witness as reason to disbelieve the defense. *People v Swindlehurst*, 120 Mich App 606, 612; 328 NW2d 92 (1982).

Plaintiff-Appellee's chief contention is that the record does not show whether Jeffrey Locke would have invoked his Fifth Amendment right. (Pros. Br. 26). In so arguing, Plaintiff-Appellee ignores a critical fact: Mr. Locke had already invoked his right to remain silent when questioned by law enforcement:

[Defense Counsel]:	Could you have [spoken to Mr. Locke]?
[Agent May]:	I attempted to interview him and ***he declined to speak with me***.
[Defense Counsel]:	Mr. Locke was in the same office at the same time on the same day on June 23rd with you and Mr. Carr, true or false?
[Agent May]:	You don't want to go there, Mr. Freeman. ***I could not speak with him.*** [(JT-II 105-106) (emphasis added].

Further, the people who served as references for the North Carolina entities were exposed to the same criminal liability as Mr. Locke and likely would have done the same had Michigan authorities bothered to question them. *See* (Deft. Br. 27-28).

As an alternative argument, Plaintiff-Appellee argues that the prosecutor's error was harmless. This contention is unpersuasive. Again, this was a credibility contest involving the *mens rea* element of false pretenses. The verdict pivoted on whether the jury believed Mr. Carr's testimony that he himself had been duped by the North Carolina entities into thinking he was engaged in legitimate philanthropy. In such a credibility contest "the wrongful admission of corroborating testimony 'on either side could tip the scales' and result in harmful error." *People v Anderson*, 446 Mich 392, 407; 521 NW2d 538 (1994) (quoting *People v Gee*, 406 Mich 279, 283; 278 NW2d 304 (1979)). Improper arguments that undercut one side's credibility in a credibility contest are just as harmful, and warrant retrial as well. Thus, for these reasons and those advanced in Defendant-Appellant's original brief on appeal, this Court should reverse Mr. Carr's convictions and remand for a new trial.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant the relief requested.

Respectfully submitted,

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