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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2026 10:35 AM
v	No. 375887 Wayne Circuit Court
EDDIE LATRICE DAVIS, Defendant-Appellant.	LC No. 22-006801-01-FH

Before: MALDONADO, P.J., and RIORDAN and YOUNG, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted[1] his jury-trial conviction of gambling-activities violation, MCL 432.218(2), for which he was sentenced to three years' probation. For the reasons set forth, we reverse his conviction and remand to the trial court for a new trial.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of defendant's arrest after he presented a counterfeit bill to an MGM Grand Casino blackjack dealer. MGM uses surveillance cameras to watch the floor, and video of the incident in question was reviewed at trial. Defendant approached a blackjack table and presented the dealer with money. The dealer then counted out the bills and swiped them with a counterfeit pen. If the pen mark changes from light brown to dark black, the bill is counterfeit. One of the $100 bills presented by defendant had a dark mark. The dealer set the marked bill aside under a "dropper" and did not provide defendant gambling chips for the value of the counterfeit bill. Instead, the dealer provided defendant chips for his valid currency. The tables manager was notified, who also checked the bill before alerting security that there was a counterfeit bill on the table.

Sergeant Timothy Holme was called to the scene. Defendant claimed to be shocked when the police arrived because he did not know that he had provided a counterfeit bill and had no intent to defraud

[1] *People v Davis*, unpublished order of the Court of Appeals, entered October 6, 2025 (Docket No. 375887).

or cheat the casino. Defendant only became aware that there was a problem when he was approached by Sergeant Holme asking to speak with him and pointing to the bill on the dropper. Defendant testified: "I immediately said, if it's counterfeit it came from here cause I grabbed money from the last time that I won before I left home, from winnings from my previous visits."

According to defendant, all of his winnings from gambling go into his safe. Defendant testified that the counterfeit bill must have been given to him by MGM from a previous visit, as the bill originated from those winnings in his safe. While defendant lacks training to identify counterfeit bills, he knows that using counterfeit money is illegal. Defendant agreed that $100 is a large sum of money, and he stated that he would pay attention to the denomination when sorting money but would not examine every bill. He handed the money to the dealer as a stack of hundreds and denied knowing that a counterfeit bill was in the stack.

Count I, as originally charged, alleged that defendant committed a gambling-activities violation by either cheating at a gambling game, see MCL 432.218(2)(f), or by claiming, collecting, or taking anything of value from a gambling game, see MCL 432.218(2)(j). Count II alleged that defendant committed uttering and publishing, see MCL 750.253. After the close of proofs, the prosecutor moved to amend the information to add the lesser-included offense of attempt to Count I. The prosecutor reasoned that "there's clearly an attempt of this," even if defendant "did not receive the actual value back" from presenting the counterfeit bill to the dealer. The trial court granted the prosecutor's request for an amendment, and the case proceeded to deliberations with charges of a gambling-activities violation and the lesser-included attempted gambling-activities violation, both under Count I, and the charge of uttering and publishing under Count II.[2]

During its deliberations, the jury asked the following question: "Is intent considered in Count I? The lesser offense utilized the words intended and Count I did not. Is it presumed that cheat has intent associated?" Following discussion with counsel, the trial court instructed the jury that "Count I is a general intent crime. In criminal law the intent to do that which the law prohibits. It is not necessary for the prosecution to prove that the defendant intended the precise harm or the precise result which eventuated."

The jury found defendant guilty of the gambling-activities violation and not guilty of uttering and publishing. Moreover, by finding him guilty of the gambling-activities violation, the jury did not find him guilty of the lesser attempt charge. Defendant was sentenced to three years' probation. This appeal followed.

II. STANDARD OF REVIEW

"A claim that the evidence was insufficient to convict a defendant invokes that defendant's constitutional right to due process of law." *People v Lane*, 308 Mich App 38, 57; 862 NW2d 446 (2014). "This Court reviews de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction." *Id*. "We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution had proved the crime's elements beyond a reasonable doubt." *Id*. Minimal circumstantial evidence and reasonable inferences therefrom may

[2] In particular, Count I provided the jury with three options—not guilty, guilty, and guilty of the lesser-included attempt violation. Count II simply provided the jury with two options—not guilty and guilty.

sufficiently prove the defendant's state of mind, knowledge, or intent. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

III. DISCUSSION

On appeal, defendant argues there was insufficient evidence to sustain his conviction of gambling-activities violation, MCL 432.218(2), because the counterfeit bill was set aside and he did not receive anything of value from the casino as a result of presenting it. We conclude that the evidence was sufficient to sustain his conviction under one theory but not another theory of the gambling-activities violation argued to the jury, so the proper remedy is a new trial.

MCL 432.218(2) sets forth several alternative means for committing a gambling-activities violation. The jury here was instructed on MCL 432.218(2)(f), which prohibits cheating at a gambling game; and MCL 432.218(2)(j), which prohibits claiming, collecting, taking, or attempting to claim, collect, or take, anything of value from a gambling game.

MCL 432.218(2)(f) states:

> A person commits a felony punishable by imprisonment for not more than 10 years or a fine of not more than $100,000.00 or both, and in addition, is barred for life from a gambling operation under the jurisdiction of the board if the person does any of the following:
>
> * * *
>
> (f) cheats at a gambling game.

The word "cheat" is defined by MCL 432.202(k), which provides that " 'cheat' means to alter the selection of criteria that determine the result of a gambling game or the amount or frequency of payment in a gambling game, in violation of this act or rules promulgated under this act." Consequently, for a gambling-activities conviction under MCL 432.218(2)(f), the relevant statutes essentially require proof of (1) altering the selection criteria, (2) of a gambling game.

Alternatively, MCL 432.218(2)(j) prohibits the following:

> (j) claims, collects, takes, or attempts to claim, collect, or take money or anything of value in or from a gambling game, with intent to defraud, without having made a wager contingent on winning the gambling game, or claims, collects, or takes an amount of money or thing of value greater value than the amount won.

Thus, to convict under MCL 432.218(2)(j), the statute essentially requires proof of (1) claiming, collecting, or taking anything of value from a gambling game, or attempting to do so; (2) with an intent to defraud. Establishing an intent to defraud requires the prosecution to show that the defendant acted with an intent to cheat or deceive. *People v Brown*, 239 Mich App 735, 747; 610 NW2d 234 (2000).

In this case, the trial court instructed the jury as follows:

In order to convict the Defendant the prosecutor must prove beyond a reasonable doubt that the Defendant cheated at a gambling game or the Defendant claimed, collected or took money or something of value from the gambling game and that money or something of value was more than the defendant won.

* * *

. . . Cheat means to alter the selection of criteria that determined the result of a gambling game or the amount or frequency of payment in a gambling game in violation of this act or rules promulgated under this act.

The Defendant is also charged with the lesser serious crime of – the less serious crime of attempted gambling activities violation. To prove that the Defendant attempted – or I should say you may also consider this lesser offense.

To prove that the Defendant attempted to commit this crime the prosecutor must prove the following elements beyond a reasonable doubt. First, that the Defendant intended to commit gambling activities violation which is defined as the Defendant cheated at a gambling game or the Defendant claimed, collected or took money or something of value from the gambling game and that the money or something of value was more than the defendant won.

The violation occurred on or about August 17, 2021 in the County of Wayne and, second, that the Defendant took some action towards committing the alleged crime, but failed to complete the crime.

* * *

In order to qualify as an attempt the action must go beyond mere preparation to the point where the crime would have been completed if it had not been interrupted by outside circumstances.

Defendant argues that there was insufficient evidence to support the verdict for Count I because he did not receive gambling chips for the counterfeit bill. Thus, defendant contends, there is no factual support in the record for him having taken something of value to which he was not entitled, see MCL 432.218(2)(j), and because the counterfeit bill was set aside, the selection criteria for the gambling game remained unaltered, so he did not cheat, see MCL 432.218(2)(f).

Regarding MCL 432.218(2)(j), the prosecutor provided evidence that defendant gave the dealer a counterfeit bill blended with valid United States currency, and the dealer set the note aside and gave defendant his chips, less the amount of the counterfeit bill. Consequently, defendant did not receive anything of value in exchange for his counterfeit bill. On appeal, the prosecutor agrees that defendant "could not and did not claim, collect, or take anything of value from the gambling table . . . ." As such, there was insufficient evidence to convict defendant under MCL 432.218(j) for directly claiming, collecting, or taking anything of value from the gambling game.

Alternatively, however, the prosecutor contends that the conviction should be sustained under the "attempt" language of MCL 432.218(2)(j).[3] We agree with the prosecution that the evidence was sufficient to sustain a conviction under this theory.[4] Intent may be proven by circumstantial evidence. *Kanaan*, 278 Mich App at 622. Here, the prosecutor introduced evidence that defendant had engaged in long-time casino gambling. Thus, defendant would have been familiar with the dealer's general practice of spreading out of the bills before counting, so he presumably was aware that he should check the bills for possible counterfeit nature before presenting them to the dealer. His testimony that he did not check the bills beforehand is, therefore, doubtful. In addition, the counterfeit nature of the bill at issue was apparent upon casual inspection, particularly the reference to "UNITED STATES PLAY MONEY" at the top of the bill. Further, given that defendant was an experienced gambler, it seems doubtful as well that he would not have noticed that he was shortchanged by $100 when receiving his gambling chips from the dealer. Given these facts, the jury had sufficient evidence to find beyond a reasonable doubt that defendant attempted to claim, collect, or take something of value from the gambling game with intent to defraud. See MCL 432.218(2)(j).

Nonetheless, our conclusion that the evidence was sufficient to support a conviction under the "attempt" language of MCL 432.218(2)(j) does not, by itself, compel an outright affirmance or otherwise resolve this appeal. "Where one of two alternative theories of guilt is legally insufficient to support a conviction, and where it is impossible to tell upon which theory the jury relied, the defendant is entitled to a reversal of his conviction and a new trial." *People v Grainger*, 117 Mich App 740, 755; 324 NW2d 762 (1982). Here, the trial court instructed the jury on the gambling-activities violation by combining the elements of MCL 432.218(2)(f) and (j), and the verdict form does not indicate upon which subsection the jury relied. Thus, we only may affirm the gambling-activities conviction if the evidence was sufficient to support a conviction under MCL 432.218(2)(f) as well.

With regard to MCL 432.218(2)(f), defendant contends that the counterfeit bill being set aside prevented the criteria for payment from changing and, as a result, the facts do not support a conviction under that statute. We agree. Once again, MCL 432.218(2)(f) simply prohibits "cheat[ing] at a gambling game," and MCL 432.202(k) defines "cheat" as "alter[ing] the selection of criteria that determine the result of a gambling game or the amount or frequency of payment in a gambling game . . . ." Here, because the dealer rejected the counterfeit bill and did not give defendant one or more gambling chips for that bill, defendant did not alter the criteria that determines the amount or frequency of payment in blackjack.[5]

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[3] We emphasize that MCL 432.218(2)(j) uses the "attempt" language to describe the completed offense itself. In other words, the attempt is an alternate means to completing the offense set forth in MCL 432.218(2)(j). This is unlike most "attempt" offenses in criminal law, in which the attempt is a separate and lesser crime from the completed offense. See MCL 750.92.

[4] We acknowledge that the jury was not clearly presented with this theory in the jury instructions, as those instructions instead implied, erroneously, that an attempt to claim, collect, or take anything of value was a separate and lesser crime. See footnote 3, *supra*. However, any such instructional error in this regard would, at most, entitle defendant to a new trial, see *People v Duncan*, 462 Mich 47, 57; 610 NW2d 551 (2000), which we are granting him in any event.

[5] On appeal, the prosecutor urges us to follow the reasoning of *People v Countryman*, unpublished per curiam opinion of the Court of Appeals, issued July 16, 2015 (Docket Nos. 316913 and 316919), and

Thus, the evidence was insufficient to show that defendant cheated at a gambling game in violation of MCL 432.218(2)(f).

Finally, the prosecutor argues that even if the evidence was insufficient to show cheating under MCL 432.218(2)(f), the evidence was sufficient to show that defendant was guilty of attempted cheating, contrary to MCL 432.218(2)(f) and MCL 750.92.[6] Thus, the prosecutor argues, this Court should remand to the trial court for a judgment of conviction on the lesser attempt offense.

For the reasons explained above concerning the "attempt" theory of MCL 432.218(2)(j), we agree with the prosecutor that the evidence was sufficient to show attempted cheating as well, contrary to MCL 432.218(2)(f) and MCL 750.92. Simply put, the evidence theoretically was sufficient for the jury to find behind a reasonable doubt that defendant attempted to alter the amount of payment in a gambling game. See MCL 432.218(2)(f) and MCL 432.202(k). However, "attempt" is not a necessarily-included lesser offense, but rather is a cognate lesser offense. *People v Adams*, 416 Mich 53, 56-57; 330 NW2d 634 (1982).[7] In other words, "[n]either an attempt to commit an offense nor all the elements of an attempt to commit an offense are elements of the completed offense." *Id*. at 57. As applied here, attempted cheating, MCL 432.218(2)(f) and MCL 750.92, requires specific intent because it is an "attempt" offense. See *People v Thousand*, 465 Mich 149, 164 n 15; 631 NW2d 694 (2001). However, as the trial court instructed the jury, cheating presumptively is a general-intent crime. See *People v Zitka*, 335 Mich App 324, 340; 966 NW2d 786 (2020) (explaining that another subsection of MCL 432.218 sets forth a general-intent offense). Therefore, attempted cheating has an element that cheating itself does not, rendering attempted cheating a cognate lesser offense.

In *People v Bearss*, 463 Mich 623, 632-633; 625 NW2d 10 (2001), our Supreme Court explained as follows:

> We hold that, if an appellate court determines that insufficient evidence was presented to support a conviction, it may not direct a conviction on a cognate offense on remand unless

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People v Faithful, unpublished per curiam opinion of the Court of Appeals, issued April 10, 2025 (Docket No. 369190), and hold that defendant here violated MCL 432.218(2)(f). "Although MCR 7.215(C)(1) provides that unpublished opinions are not binding under the rule of stare decisis, a court may nonetheless consider such opinions for their instructive or persuasive value." *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017). However, we have reviewed these cases and find them factually distinguishable from the matter before us. For this reason, we decline to follow them.

[6] MCL 750.92 provides, in relevant part, that it is a crime for "[a]ny person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same . . . ."

[7] A necessarily-included lesser offense is one in which "the charged greater offense requires the jury to find a disputed factual element which is not required for a conviction of the lesser-included offense." *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002) (quotation marks and citation omitted). In contrast, a cognate lesser offense is one that shares some elements with the greater offense and is "of the same class or category, but may contain some elements not found in the [greater] offense." *Id*. at 345 (quotation marks and citation omitted).

(1) there was sufficient evidence to support a conviction of the lesser offense and (2) the appellate court can unequivocally state that the jury's verdict must have included a specific finding of every element necessary to support a conviction of the cognate offense.

In this case, while the first *Bearss* requirement is satisfied, the second requirement is not. The trial court, in response to the jury's question during deliberations about whether and to what extent "intent" is an element of Count I, instructed the jury that "Count I is a general intent crime." As a result, we are unable to "unequivocally state" that the jury's gambling-activities conviction included a "specific finding" of specific intent. See *id*. Consequently, we cannot remand to the trial court for a judgment of conviction of attempted cheating, MCL 432.218(2)(f) and MCL 750.92.[8]

IV. CONCLUSION

We conclude that the evidence was sufficient to support a conviction under the "attempt" language of MCL 432.218(2)(j) but that the evidence was insufficient to show that defendant otherwise violated subsection (2)(j). Further, we conclude that the evidence was sufficient to show that defendant was guilty of attempted cheating, contrary to MCL 432.218(2)(f) and MCL 750.92, but that the evidence was insufficient to show the cheating violation itself under subsection (2)(f). Therefore, under the circumstances of this case, in which the evidence was sufficient to show guilt under at least one theory but not the other theories, the proper remedy is to reverse defendant's gambling-activities conviction and remand to the trial court for a new trial. See *Grainger*, 117 Mich App at 755.

Reversed and remanded. We do not retain jurisdiction.

/s/ Allie Greenleaf Maldonado
/s/ Michael J. Riordan
/s/ Adrienne N. Young

[8] Ordinarily, "[i]t is proper to remand for entry of a judgment of conviction of the lesser included offense where the jury has returned a verdict of guilty of the higher charged offense upon evidence sufficient only to prove the lesser offense." *People v Hoffmeister*, 394 Mich 155, 162; 229 NW2d 305 (1975). However, that rule appears to apply to necessarily-included lesser offenses, such as second-degree murder compared with first-degree murder, as in *Hoffmeister*. See *id*. at 157. In our view, *Bearss* is controlling here.