

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY GIBBONS,

Defendant-Appellant.

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UNPUBLISHED

April 23, 1999

Nos. 205089; 205090

Oakland Circuit Court

LC Nos. 95-141872 FH;

95-141874 FH

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of two counts of embezzlement, MCL 750.174; MSA 28.371,<sup>1</sup> and the court sentenced him to two years' probation for each conviction. Defendant appeals as of right. We affirm.

I

Defendant argues that the trial court should have granted his directed verdict motion because there was insufficient evidence from which the jury could find that he intended to defraud the Michigan Horse Council ("MHC"). In reviewing a trial court's decision regarding a motion for directed verdict, this Court considers the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Warren*, 228 Mich App 336, 345-346; 578 NW2d 692 (1998).

MCL 750.174; MSA 28.371 provides, in relevant part:

Any person who as the agent, servant or employee of another, or as the trustee, bailee or custodian of the property of another, . . . shall fraudulently dispose of or convert to his own use, or take or secrete with intent to convert to his own use without the consent of his principal, any money or other personal property of his principal which shall have come to his possession or shall be under his charge or control by virtue of his being such agent, servant, employee, trustee, bailee or custodian, as aforesaid, shall be guilty of the crime of embezzlement, and upon conviction thereof, . . . if the money or personal

property so embezzled shall be of the value of more than \$100.00, such person shall be guilty of a felony . . . .

An essential element of embezzlement under MCL 750.174; MSA 28.371 is the specific intent to defraud the victim. *People v Gadiant*, 185 Mich App 280, 286; 460 NW2d 896 (1990). Also, the intent to defraud must exist at the time of the conversion or appropriation of the property to the defendant's own use. *People v Artman*, 218 Mich App 236, 241; 553 NW2d 673 (1996). The question - did defendant intend to defraud the MHC -- is a question of fact for the jury to decide. See *People v Goecke*, 457 Mich 442, 450; 563 NW2d 31 (1998); *People v Bowers*, 136 Mich App 284, 298; 356 NW2d 618 (1984). An actor's intent may be inferred from all of the facts and circumstances. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Furthermore, because of the difficulty in proving a defendant's state of mind, minimal circumstantial evidence is sufficient. *Id.* at 518.

Here, the prosecutor presented sufficient evidence to allow the jury to conclude beyond a reasonable doubt that defendant intended to defraud the MHC. The prosecution presented evidence that defendant was promptly paid for all of his reimbursable expenses and that he was not owed any money by the MHC at the time of the alleged conversions. Defendant admitted that he deposited two checks totaling \$783.75, which were payable to the MHC for advertisements in its "Over the Fence" publication, into his personal checking account. Defendant further admitted that he did not have authority to endorse MHC checks or to deposit them into his personal bank account, and that he did not, prior to making these deposits, notify the MHC's board of directors that he was owed reimbursement for any expenses. Perhaps most relevant to the issue of intent is the fact that defendant did not notify anyone within the MHC, at any time, that he had deposited the checks into his account. The only reason that defendant's actions were ultimately discovered, some nine months later, was that the MHC's treasurer, James Warden, happened to notice that he had not received checks from two of the "Over the Fence" advertisers. From this evidence, a rational jury could have rejected defendant's "claim of right" defense and concluded that he intended to defraud the MHC.

## II

Defendant further contends that there was insufficient evidence to allow a rational jury to conclude that the MHC did not consent to his actions. This Court has noted that, under MCL 750.174; MSA 28.371, there are two forms of embezzlement, each requiring proof of different elements:

. . . [W]e conclude that there exist two distinct types of embezzlement. The first occurs when an individual fraudulently disposes of or converts to his own use money or personal property of his principal. The second occurs when an individual conceals with intent to convert to his own use money or personal property without the consent of his principal. We have discerned that lack of consent is an element only in this latter category and thus is not always required to sustain a charge of embezzlement. [*People v Wood*, 182 Mich App 50, 53-54; 451 NW2d 563 (1990).]

See also *Artman*, *supra* at 241 (“[t]here are two distinct forms of embezzlement recognized under MCL 750.174; MSA 28.371”). Here, the charge is based on the first type of embezzlement. Therefore, the prosecutor was not required to prove a lack of consent on the part of the MHC. *Wood*, *supra* at 53-54.

### III

Defendant also claims that the trial court abused its discretion in denying his motion for a new trial on the basis that the verdict was against the great weight of the evidence. In deciding motions for a new trial, the judge is not permitted to act as a “thirteenth juror”; rather, a trial court “may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.” *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). Defendant’s argument that the jury’s verdict was against the great weight of the evidence is based solely on his contention that he did not intend to cheat or defraud the MHC. However, whether defendant intended to defraud the MHC was a question of fact for the jury to decide. See *Goecke*, *supra* 457 Mich 450. While defendant’s contention that MHC owed him money was in conflict with Warden’s testimony, “[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *Lemmon*, *supra* at 647. Therefore,

[t]he question being one of credibility posed by diametrically opposed versions of the events in question, the trial court was obligated, ‘despite any misgivings or inclinations to disagree,’ to leave the test of credibility where statute, case law, common law, and the constitution repose it [sic] ‘in the trier of fact.’ [*Id.* at 646-647 (citation omitted).]

Defendant also argues that the court was required to grant his motion for a new trial because the verdict resulted in a miscarriage of justice. We disagree. The apparent political motivation for Warden’s actions in filing a complaint with the police department and in cooperating with the prosecuting attorney in this matter does not establish that the verdict resulted in a miscarriage of justice. While the evidence regarding Warden’s behavior may have been relevant to his credibility, the credibility of witnesses’ testimony is a matter for the trier of fact to ascertain, and will not be resolved anew on appeal. *Lemmon*, *supra* at 637; *People v Gadomski*, 232 Mich App 24, 28; \_\_\_ NW2d \_\_\_ (1998).

Affirmed.

/s/ Henry William Saad

/s/ William B. Murphy

/s/ Peter D. O’Connell

<sup>1</sup> The two counts of embezzlement were assigned separate lower court case numbers, but the cases were consolidated for trial and on appeal.