STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 31, 1999
v	Nos. 206394; 206395; 206396 Kent Circuit Court
JAMES ALAN COLE, Defendant-Appellant.	LC Nos. 96-009264-FH 96-009265-FH 96-009267-FH

Before: Griffin, P.J., and Wilder and R.J. Danhof*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of embezzlement over $100 by an agent, MCL 750.174; MSA 28.371.[1] Defendant was sentenced to concurrent terms of three to ten years' imprisonment for each count and ordered to pay $40,000 in restitution to the victim, District 9 Little League ["District 9"]. Defendant appeals of right. We affirm.

Defendant first claims that there was insufficient evidence to convict him of embezzlement because the prosecution failed to establish a motive for the offense and failed to show that defendant personally benefited from the money. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, this Court will view the evidence in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995).

Under MCL 750.174; MSA 28.371, a person is guilty of embezzlement over $100 by an agent if he conceals with the intent to convert to his own use money or personal property without the consent of the owner. *People v Artman*, 218 Mich App 236, 241; 553 NW2d 673 (1996); *People v Wood*, 182 Mich App 50, 53; 451 NW2d 563 (1990). In this case, the prosecutor was required to establish

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

the following elements in order to prove that defendant was guilty of the offense of embezzlement over $100 by an agent beyond a reasonable doubt:

(1) the money belonged to District 9 Little League,

(2) defendant had a relationship of trust with District 9 Little League because he was an agent of District 9 Little League by virtue of his position as the district administrator,

(3) defendant obtained possession or control of the money because of this relationship,

(4) defendant

(a) dishonestly disposed of the money, or

(b) converted the money to his own use, or

(c) took or hid the money with the intent to convert it to his own use,

(5) defendant did this without District 9 Little League's consent,

(6) at the time defendant did this, he intended to defraud or cheat District 9 Little League of some property. [*Wood, supra* at 53.]

Here, it is undisputed that the money in question belonged to District 9, that defendant was in a relationship of trust with District 9 when he served as its administrator, and that defendant was in possession and control of the unaccounted for funds by virtue of his position as district administrator. However, defendant contends that the remaining elements have not been proven beyond a reasonable doubt.

The prosecution's theory of the case was that defendant concealed District 9 money with the intent to convert it to his own use. See *Wood, supra* at 53. At trial, the prosecution presented evidence that defendant maintained a separate bank account ["account number 6563"], in addition to the general fund account and bingo account, into which District 9 funds were deposited. Defendant admitted that no one else involved in the little league organization knew that account number 6563 existed.[2] There was evidence on the record that defendant routinely wrote checks to himself or to cash from account number 6563 for alleged District 9 expenses, and that many of the expenses allegedly justifying these disbursements had already been paid for with money from the general fund account. In addition, there was evidence that defendant withdrew twice as much money from account number 6563 than was needed to cover the legitimate District 9 expenses.

The record further discloses that defendant wrote checks to the bingo account from account number 6563 when the State Lottery required that only cash be deposited, that there was approximately $48,000 of bingo cash missing from the District 9 organization, and that when questioned about the funds missing from account number 6563, defendant admitted that funds well in excess of $100 were missing and that he could not account for the money. Further, the evidence showed that defendant's income was only $21,000 in 1992 and $23,000 in 1993, but that he always carried around

large sums of cash, often treated little league and bingo volunteers to food and drinks beyond the permissible amount, and that defendant was a heavy gambler. Contrary to defendant's argument, the prosecution was not required to establish a motive for defendant's conduct, or that he personally benefited from the funds embezzled in order to prove embezzlement. See MCL 750.174; MSA 28.371; *Wood, supra* at 53. Viewing the evidence in the light most favorable to the prosecution, we find that there was sufficient circumstantial evidence for a rational trier of fact to find that the essential elements of embezzlement were proven beyond a reasonable doubt. *Hoffman, supra* at 111.

Defendant next argues that the trial court erred by failing to sua sponte give the standard jury instruction on defendant's good character, and by impermissibly expanding the elements of embezzlement over $100 by an agent thereby allowing the jury to convict defendant on a theory that was not presented by the prosecution. We disagree. Defendant failed to request the standard jury instruction on good character at trial, and did not object to the embezzlement instruction given by the trial court. In the absence of a particular request for an instruction, or a timely objection on the record, appellate review of alleged instructional error is precluded unless failure to review the issue would result in manifest injustice. See MCL 768.29; MSA 28.1052; *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993). Manifest injustice occurs when an erroneous or omitted instruction pertains to a basic and controlling issue in the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

First, defendant contends that the evidence at trial supported an assertion of defendant's good character such that the trial court would have been obligated to read the first paragraph of CJI2d 5.8a[3] to the jury had defendant requested the instruction. Thus, because there was adequate evidence to support the instruction had it been requested, defendant claims that the trial court should have sua sponte provided the relevant instruction. Contrary to defendant's contention, "the failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29; MSA 28.1052. Here, several witnesses testified regarding defendant's loyalty and commitment to District 9 and the jury was free to assess the credibility of each witness and afford their testimony appropriate weight. The trial court was under no independent obligation to instruct the jury on defendant's good character absent a specific request for the instruction from defendant. *Van Dorsten, supra* at 545; *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). Under the facts of this case, we are not convinced that the trial court's failure to give an instruction on defendant's good character impeded the defense or denied defendant a fair trial. *Van Dorsten, supra* at 545. Accordingly, we find no manifest injustice.

Second, defendant contends that the trial court's instruction on the elements of embezzlement was improper because it "left open alternative theories for conviction not advocated by the prosecution" and allowed for a less than unanimous verdict. Jury instructions are read in their entirety to determine if error occurred requiring reversal. *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995). Even if the instructions are somewhat imperfect, there is no error if they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant. *People v Head*, 211 Mich App 205, 210-211; 535 NW2d 563 (1995).

The trial court instructed the jury on the elements of embezzlement over $100 as follows:

To establish this particular offense [embezzlement], the evidence presented at this trial and whatever inferences follow from that evidence must establish five things to your satisfaction beyond a reasonable doubt . . . .

First, it must be established that Mr. Cole had a relationship of trust with District 9 as an agent of District 9. Now, an agent is simply a person or entity who is authorized by another person or business entity to act on their behalf; for example, to conduct business on behalf of the other person or entity.

The second thing which the evidence must establish is that money belonging to District 9 came into Mr. Cole's possession or under his control as a result of his relationship of trust with the district. To have money in one's possession simply means to have it in hand. To have money under one's control means to have authority to direct its expenditure; for example, to be able to withdraw it from an account, to write checks on an account, to direct that that money be spent by somebody else, et cetera.

The third thing which the evidence must establish is that Mr. Cole used some of District 9's money, some of his District 9 money in his possession or under his control, against the interest of District 9. Now, that can be established by proving that he appropriated some of that money for his own use or that he appropriated it for somebody else's use, doing one or the other without District 9's permission, or that he misapplied some of that money for a purpose other than a purpose for which District 9 had entrusted the money to him.

Mr. Cole need not have derived any direct personal benefit or advantage from the misappropriation or misapplication. Obviously, if he did, if he did derive some direct personal benefit, then this particular element of the offense has been proven, but that does not have to be proven.

It is sufficient if the evidence establishes that Mr. Cole appropriated the money which he had in his possession which was District 9's money to someone else's use *or that he used it for a purpose not authorized by District 9, even if he used that money for District 9 related activities*.

But one of those things has to be proven, one of those three. That he used it for his own purposes. That he used it for somebody else's purposes, doing so without District 9's permission as to either of those matters. *Or that he used the money for a purpose not authorized by District 9, even if it was for a related activity, it if wasn't, however, authorized.*

The fourth thing which has to be proven is that the amount misappropriated or misapplied was more than a hundred dollars. Frankly, a precise amount need not be established so long as it's proven that the amount exceeded $100.

> And, finally, the fifth thing which must be established is that Mr. Cole intended to defraud District 9. Now, to prove that intent, the evidence has to establish that Mr. Cole actually meant to use some of District 9's money for his own purposes, to benefit somebody else, *or in some way not authorized by District 9.*
>
> To do something which accidentally or unexpectedly deprives the owner of money of its use doesn't constitute an embezzlement. Accidents and inadvertent activities are simply not crimes.
>
> Nor is it the crime of embezzlement to use somebody else's money if the individual who used the money, as alleged in this case, Mr. Cole, honestly believes that he was entitled to use that money in that way and that belief was reasonable under the circumstances.
>
> *Now, if an individual knew that he lacked authority to use the money as, in fact, he used it, or if it was unreasonable to believe that he had the authority to use the money as he used it, then the crime of embezzlement has been proven, even though that person thought that what he did was right. You have to think it was right in order for this exception to apply, but it also has to be reasonable to, in fact, conclude that you had authority.* [Emphasis added.]

Defendant contends that the italicized portions of the trial court's instruction improperly allowed the jury to convict defendant if they found that defendant used the money on unauthorized expenses related to District 9 when there was no evidence presented at trial to support this theory.

After a thorough review of the record, we conclude that the trial court's instruction to the jury on the elements of embezzlement was not improper and did not include any theory for conviction that was not advocated by the prosecution or supported by the evidence. As noted above, the prosecution's theory of the case was that defendant concealed District 9 money and converted it to his own use. To prove that defendant improperly converted District 9 funds for his own use, the prosecution introduced evidence that defendant used District 9 funds for unauthorized purposes, namely, to entertain little league volunteers during local tournaments, to entertain volunteers that assisted in running the bingo games, and to run television programs that did not benefit District 9 exclusively, when the record explicitly showed that District 9 only authorized defendant to use District 9 money on expenditures such as telephone bills, postage stamps, office supplies, operation of bingo games, sending teams to tournaments, and certain motel and meal expenses when adults accompanied teams to tournaments. On this record, we find that the trial court did not improperly expand the prosecutor's theory of the case; rather, the evidence supported the trial court's instruction to the jury that it could find defendant guilty of embezzlement if it found that defendant used District 9 money for purposes not authorized by District 9. The challenged instruction, when read in its entirety, accurately presented the issues to the jury and adequately protected defendant's rights. *Head, supra* at 210-211. Accordingly, we find no manifest injustice.

Finally, defendant argues that the trial court's order of restitution in the amount of $40,000 was excessive. Defendant does not allege that he is unable to pay the amount of restitution ordered; rather, he claims that the evidence does not show that District 9 suffered a loss in the amount of $40,000. We disagree.

A sentencing court is authorized to order a defendant convicted of a felony to make full or partial restitution to the victim of the defendant's conduct. *People v Griffis*, 218 Mich App 95, 103; 553 NW2d 642 (1996); MCL 769.1a(2); MSA 28.1073(2). The statutory inquiries for determining whether to order restitution and the appropriate amount of that restitution include the amount of the victim's loss, the financial resources and earning ability of the defendant, and the financial needs of the defendant. MCL 780.767; MSA 28.1287 (767); *People v Grant*, 455 Mich 221, 232; 565 NW2d 389 (1997).

Our review of the record discloses that there is ample evidence to show that $40,000 was a reasonable amount of restitution. First, we note that defendant admits in his brief on appeal that "[t]here was approximately $40,000 to $50,000 which Mr. Cole [defendant] had control over, which was put into cash, and Mr. Cole [defendant] could not fully explain what was done with the money." Moreover, the evidence presented at trial showed that there was at least $48,000 missing from District 9 for which defendant had no explanation and no receipts to verify how it was used. When disputing an amount of restitution, the defendant has the burden of presenting contrary evidence where the prosecutor has introduced evidence to establish the amount of restitution owed. *Grant, supra* at 234. Defendant has failed to produce such evidence, and the trial court did not abuse its discretion by ordering defendant to pay restitution in the amount of $40,000.

Affirmed.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Robert J. Danhof

[1] At the time of defendant's conviction, MCL 750.174; MSA 28.371, provided as follows:

> Any person who as the agent, servant or employee of another, or as the trustee, bailee or custodian of the property of another, or of any partnership, voluntary association, public or private corporation, or of this state, or of any county, city, village, township or school district within this state, 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 or other personal property of his principal which shall have come to his possession of 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 $100.00 or under, shall be guilty of a misdemeanor; if

> the money or personal property so embezzled be of the value of more than $100.00, such person shall be guilty of a felony, punishable by imprisonment in the state prison nor more than 10 years or by a fine not exceeding $5,000.00.

MCL 750.174; MSA 28.371 was subsequently amended by 1998 PA 312, effective January 1, 1999. The substantive language in the statute remained substantially the same, but the amendment reclassified the prohibited conduct as a misdemeanor or felony and imposed varying punishments based on the value of the money or property embezzled.

[2] When defendant became the little league administrator in 1971, District 9 had one bank account, account number 6563. In 1977, defendant opened a special bingo account and a general fund account which, together, were sufficient to run the organization. However, defendant did not close account number 6563, and defendant was the only person involved in the organization that knew account number 6563 remained open.

[3] The first paragraph of CJI2d 5.8a as proposed by defendant provides:

> (1) You have heard evidence about the defendant's character for honesty, and dedication to the Little League. You may consider this evidence, together with all the other evidence in the case, in deciding whether the defendant committed the crime with which he is charged. Evidence of good character alone may sometimes create a reasonable doubt in your minds and lead you to find the defendant not guilty.