# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 29, 2004 |
| v | No. 244700<br>Ingham County Circuit Court |
| CHRISTINE ANN MULLEN,<br><br>Defendant-Appellant. | LC No. 01-077566-FH |

Before: Hoekstra, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Defendant, Christine Ann Mullen, appeals as of right her conviction by jury of felony embezzlement by agent or trustee, MCL 750.174. The trial court sentenced defendant to two years' probation, including thirty days in jail[1] and 300 hours of community service, and ordered her to pay restitution in the amount of $29,748. We affirm defendant's conviction, but vacate the order of restitution and remand for further proceedings.

In this case, the prosecution alleged that defendant, as a Family Independence Agency (FIA) employee, was entrusted with supervisory authority and control over the FIA's inventory of computer equipment. In that capacity, defendant allegedly caused two new computer servers to be delivered to her children's school system, the Olivet school district, without the knowledge or consent of the state. Further, the prosecution maintained that defendant concealed the transfer from the state by refusing to allow the school district to acknowledge the transfer of the computer servers, telling the school district that the computer servers were utilized as part of a pilot program that was nonexistent, and reporting on inventory records filed periodically with the state, as administratively required, that the computer servers were stored in a state controlled warehouse.

On appeal, defendant maintains that the trial court erred in denying her pretrial motion for dismissal and her motions for a directed verdict[2] because, at most, defendant made an

[1] The jail-time was suspended pending exhaustion of any appeals.

[2] Defendant moved for directed verdict at the close of the prosecution's proofs and renewed her motion at sentencing.

unauthorized loan of the computers to the Olivet school district, which is insufficient to establish the "fraudulently dispose of" element of embezzlement alleged by the prosecution. Defendant also challenges the sufficiency of the evidence presented at trial.

We review a motion to dismiss on legal grounds for error, but if the challenge is based on the factual sufficiency of the evidence, our review is for an abuse of discretion. *People v Davis*, 209 Mich App 580, 584; 531 NW2d 787 (1995). "In assessing a motion for a directed verdict of acquittal, a trial court must consider the evidence presented by the prosecution to the time the motion is made and in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003). Our review of the trial court's decision on a motion for directed verdict is de novo. *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002). Further, "[w]hen a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt." *Id.*

At the time of the alleged criminal act, MCL 750.174[3] provided in relevant part:

> Any person who as the … employee of another, or as the trustee, bailee or custodian of the property of another, … or of 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 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 … employee, … as aforesaid, shall be guilty of the crime of embezzlement ….

Here, the information alleged that defendant embezzled by fraudulently disposing of the state's computer servers, and consistent with CJI2d 27.1, the trial court instructed that this element of embezzlement is committed if "… the Defendant dishonestly disposed of the property." In her brief, defendant argues that embezzlement by fraudulently disposing of personal property is distinguishable from embezzlement by converting to one's own use. Defendant contends, in essence, that because the phrase "fraudulently dispose of" is not defined in the statute, the trial court should have engaged in statutory construction and ascertained the meaning of those words.

This Court has stated that Michigan's embezzlement statute recognizes two distinct forms of embezzlement. *People v Wood*, 182 Mich App 50, 53; 451 NW2d 563 (1990). The first of the two is at issue here and "occurs when an individual fraudulently disposes of or converts to his own use money or personal property of his principal." *People v Artman*, 218 Mich App 236, 241; 553 NW2d 673 (1996). The other occurs by concealing with intent to convert. *Id.* Consequently, the fraudulently dispose of or converts to his own use section of the statute does not denominate separate forms of embezzlement, but rather describes only one form of

[3] This statute was amended by 199 PA 312, effective January 1, 1999.

embezzlement that is potentially committed by either disposing of or converting to one's own use. In this context, the apparent distinction to be drawn is whether the property is transferred to the possession of another or is retained by the individual. In either case, however, the statute sanctions, like any embezzlement statute, the fraudulent dispossession of money or personal property from the one entitled to possession. In this case, defendant did not retain the property, but rather caused the transfer of the computer servers to the Olivet school district. Consequently, we conclude that the charges made against defendant conform to the statute and no further definition of the statute was required.

Next, defendant claims that the transfer was not fraudulent because the evidence only established that she made an unauthorized loan of the computer servers under circumstances where identical computer servers were still stored in the state's warehouse. Consequently, according to defendant, the state was not deprived of their use and, if necessary, they were available for return to the state from the school district. Under these circumstances, defendant maintains that the case should have been dismissed and that there was insufficient evidence to sustain her conviction.

However, defendant's interpretation of the evidence fails to acknowledge the prosecution's claim that defendant's transfer of the computers was dishonest and therefore fraudulent. The dishonesty of the transfer, according to the prosecution's theory, is shown by the precautions taken by defendant to conceal the true nature of the transfer by telling the school district that the computer servers were part of a pilot project when none existed and discouraging the school district from publicly acknowledging the receipt of the computers or sending an expression of appreciation to the state, and by continuing to certify that the computer servers were stored in a state warehouse. Also, the prosecution showed possible motives for the act being dishonest based on the benefit to her children's education and defendant's elevated status and influence in the school district. This evidence is contrary to defendant's contention that the transfer represented only an unauthorized loan and generates a fact question for the jury to resolve. Moreover, if believed, the evidence defeats defendant's alternative argument that the evidence was insufficient. From the evidence presented, a rational trier of fact could conclude that the prosecution proved beyond a reasonable doubt the challenged elements of fraudulent disposal and intent to defraud or cheat the state.

Next, defendant argues that the trial court erred in ordering restitution in the amount of $29,748. Specifically, defendant maintains that ordering her to pay the amount the servers depreciated in value was improper because the state did not show that the return of the servers was inadequate. We agree.

MCL 780.767(1) provides that "[i]n determining the amount of restitution to order under [MCL 780.766], the court shall consider the amount of the loss sustained by any victim as a result of the offense." MCL 780.767(4) indicates that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney." Thus, the finding of the restitution amount is a question of fact that this Court reviews for clear error. MCR 2.613(C).

MCL 780.766(3) provides:

> If a crime results in damage to or loss or destruction of property of a victim of the crime or results in the seizure or impoundment of property of a victim of the crime, the order of restitution may require that the defendant do 1 or more of the following, as applicable:
>
> (a) Return the property to the owner of the property or to a person designated by the owner.
>
> (b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (i) or (ii), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:
>
> (i) The value of the property on the date of the damage, loss, or destruction.
>
> (ii) The value of the property on the date of sentencing.
>
> (c) Pay the costs of the seizure or impoundment, or both.

In the present case, it is undisputed that the two computer servers were returned from the Olivet school district to the state. Consequently, entitlement to restitution hinges on the ability of the prosecution to show 1) that return itself was inadequate and 2) if inadequate, the difference between the value of the computer servers on the date of the damage, loss or destruction or the value of the computers on the date of sentencing, whichever is greater, less their value as of the date of return. MCL 780.766(3)(b).

At the restitution hearing, the prosecution established the purchase price of the two computer servers and their value at the time they were returned from the Olivet school district, and requested that the trial court award them the difference, which is essentially what the trial court ordered as the restitution. On this evidence, we find two flaws with the restitution order. First, the trial court failed to make any finding regarding whether the return of the computer servers was inadequate. The prosecution's expert witness assumed that the servers were functional for the purpose for which they were designed and that their value decreased primarily because of technological advances, not any reduction in their functional usefulness. On this limited record, we believe a question exists for the trial court to resolve regarding the adequacy of the return of the two servers. Further, the prosecution's proofs at the hearing assumed that the purchase price paid by the state represented the value of the computer servers at the time of their "damage, loss or destruction." However, just as the market value of the servers declined while being used by the school district, we have no doubt that their value also declined from the moment that they first came into the state's possession. Consequently, any order of restitution must be based on their value at the time they were removed from the state's possession, not simply their purchase price. Accordingly, we vacate the order of restitution entered in this case and remand for further proceeding consistent with this opinion.

Defendant's conviction is affirmed, but the order of restitution is vacated and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio