STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 22, 2004
v	No. 247644 Clinton Circuit Court
DIANE IRENE PLINE, Defendant-Appellant.	LC No. 02-007269-FH

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from a jury-trial conviction of embezzlement by a person in a relationship of trust with a vulnerable adult, MCL 750.174a(4)(a). The trial court sentenced defendant to 180 days in jail and 36 months' probation. We affirm.

Defendant argues on appeal that defense counsel's failure to move to quash the bindover, inadequate time to prepare for trial, and failure to call a witness deprived defendant of her right to the effective assistance of counsel. We disagree.

To establish ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). With respect to prejudice, " a defendant must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different ….'" *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). Defendant bears the heavy burden of overcoming the presumption of effective assistance of counsel. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). And an attorney's decisions regarding strategic matters are given deference by this Court. *Id.* at 76-77. Our review in the present case is limited to mistakes apparent on the record because defendant failed to move for a new trial or a *Ginther*[1] hearing below. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Here, the preliminary examination testimony established probable cause that the felony of embezzlement occurred, and that defendant committed that felony; therefore, the district court properly bound her over for trial.[2] MCL 766.13; MCR 6.110(E); *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). A motion to quash would have been meritless and would not have altered the results. *Toma, supra* at 302-303. An attorney is not required to advocate a meritless position. *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant also fails to show how an adjournment would have yielded a different result. *Toma, supra* at 302-303. Defendant's second attorney argued during his motion to adjourn that he needed additional time to obtain certain items of evidence. He ultimately presented testimony that supported the points that he indicated he wished to make. Thus, the denial of an adjournment did not have any discernable effect on the outcome.[3]

Defendant argues that her attorney rendered ineffective assistance by failing to call a witness, who she alleged would have supported her assertion that the victim gave her the money as a gift. However, we defer to counsel's decision not to call this witness. *Rockey, supra*. This was likely sound trial strategy, given that defense counsel indicated that the witness could not recall when his conversation with the victim about giving defendant a gift took place.

Defendant next argues that the prosecution presented insufficient evidence that she committed embezzlement by a person in a relationship of trust with a vulnerable adult. We disagree.

"When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Additionally, all conflicts must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn

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[2] To the extent the manner in which defendant frames the issue suggests that the trial court abused its discretion in binding over defendant for trial, she is entitled to no relief. "If a defendant is fairly convicted at trial, no appeal lies regarding whether the evidence at the preliminary examination was sufficient to warrant a bindover." *People v Wilson*, 469 Mich 1011; 677 NW2d 29 (2004), citing *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990), and *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003).

[3] To the extent that defendant also argues that the trial court abused its discretion and clearly erred in refusing to adjourn the trial, we decline review because defendant does not support these assertions with citation to relevant law, nor pertinent analysis, and this issue is not included in defendant's statement of questions presented. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority."); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000) (argument not preserved for appeal if not raised in statement of the issues presented).

from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Intent may be inferred from all the facts and circumstances. *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). "Minimal circumstantial evidence is sufficient to prove an actor's state of mind." *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001).

The elements of the charged crime, embezzlement by a person in a relationship of trust with a vulnerable adult, include that (1) the defendant was in a relationship of trust with the victim; (2) the victim was a vulnerable adult; (3) the defendant obtained money from the vulnerable adult (4) through fraud, deceit, misrepresentation, or unjust enrichment; (5) the money belonged to the vulnerable adult; and (6) the amount of money at issue was more than $1,000 but less than $20,000. MCL 750.174a(1), (4)(a). However, before trial, defendant stipulated that the prosecutor would have to prove only two elements of the charged offense: "whether [the victim] was a vulnerable adult by definition on or about June 26th or June 27th of 2001; and whether the money received from [the victim] to [defendant] was by way of embezzlement as also defined in the same statute." Defendant argues that the prosecutor failed to prove these two elements. However, her argument regarding what she referred to below as the "embezzlement" element focuses primarily on her contention that the prosecutor failed to prove that she acted with the requisite intent.

The statute at issue here defines "vulnerable adult" as "an individual age 18 or over who, because of age, developmental disability, mental illness, or disability, whether or not determined by a court to be an incapacitated individual in need of protection, lacks the cognitive skills required to manage his or her property." MCL 750.174a(11)(d). Here, there was ample evidence that the victim was a vulnerable adult within the meaning of the statute. The victim was, at the time of the trial, a ninety-year-old Alzheimer's patient. The victim's physician testified that the victim had dementia at the time of the transaction at issue, and while he could make decisions regarding his property and finances, it was improbable that he could comprehend the consequences of those decisions. The victim told the bank manager that he was withdrawing his money to deposit it in a bank closer to his home. However, while at his hometown bank a short time later, the victim did not know where he was—the teller at the bank testified that the victim asked her where he was just before signing the nearly $20,000 check over to defendant. Further, defendant told the teller to put the victim's money in her name. While the evidence demonstrating defendant's intent is wholly circumstantial, we find it sufficient to support her conviction with respect to both of the disputed elements of the charged offense. *Ortiz, supra*.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra