

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY LEE BRANDT,

Defendant-Appellant.

UNPUBLISHED

January 28, 2010

No. 288466

Jackson Circuit Court

LC No. 08-004046-FH

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of embezzlement of over \$100,000, MCL 750.174(7), and embezzlement from a financial institution, MCL 750.180. We affirm defendant's convictions, vacate the sentence imposed on the conviction of embezzlement of over \$100,000, and remand for resentencing on that conviction. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions stem from his transfer of monies contained in the general account of Cascades Credit Union, where he served as the Chief Financial Officer, into personal accounts in 2007 and 2008. According to Thomas Dulzen, the credit union's Chief Executive Officer, in 2008 the management of Cascades Credit Union noticed problem withdrawals from the general account. After conducting preliminary investigations into the credit union's finances, and finding a number of transfers into defendant's personal accounts, Dulzen called the police and then called defendant to meet with him, with the police present. Defendant admitted to Dulzen that he had a long-time gambling problem related to betting on the stock market and that he had taken the money to allow him to continue to play the stock market after he had amassed \$60,000 in personal credit card debt. As a result, between October 2006 and January 2008, defendant transferred approximately \$340,000 from the general checking account of the Cascades Credit Union into personal accounts.¹ Defendant subsequently admitted to his wrongdoing and signed a written confession.

¹ At the time of sentencing, defendant still owed \$234,000 in restitution after some of the money was recovered from his accounts and pension.

During trial, defense counsel argued that while defendant could be properly convicted of embezzlement from a financial institution, he could not properly be convicted of embezzlement by an agent, because the credit union did not own the property held in the general account. He again raises this issue on appeal and maintains that the prosecution presented insufficient evidence to support this conviction.

We review a defendant's allegations regarding insufficiency of the evidence *de novo*. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* Satisfactory proof of the elements of the crime can be shown by circumstantial evidence, and the reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). "It is for the trier of fact, not the appellate court, to determine what inferences fairly can be drawn from the evidence and the weight to be accorded to those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

MCL 750.174 provides in pertinent part:

(1) A person who as the agent, servant, or employee of another person, governmental entity within this state, or other legal entity or who as the trustee, bailee, or custodian of the property of another person, governmental entity within this state, or other legal entity fraudulently disposes of or converts to his or her own use, or takes or secretes with the intent to convert to his or her own use without the consent of his or her principal, any money or other personal property of his or her principal that has come to that person's possession or that is under his or her charge or control by virtue of his or her being an agent, servant, employee, trustee, bailee, or custodian, is guilty of embezzlement.

* * *

(7) If the money or personal property embezzled has a value of \$100,000.00 or more, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$50,000.00 or 3 times the value of the money or property embezzled, whichever is greater, or both imprisonment and a fine.

In *People v Lueth*, 253 Mich App 670, 683; 660 NW2d 322 (2002), this Court articulated the following elements of embezzlement by agent pursuant to the statute:

(1) the money in question must belong to the principal, (2) the defendant must have a relationship of trust with the principal as an agent or employee, (3) the money must come into the defendant's possession because of the relationship of trust, (4) the defendant dishonestly disposed of or converted the money to his own use or secreted the money, (5) the act must be without the consent of the principal, and (6) at the time of conversion, the defendant intended to defraud or cheat the principal.

Defendant maintains that the members, not the credit union, owned the funds that he appropriated and that he could not be found guilty of violating MCL 750.174 because he did not take property belonging to his principal. Defendant is mistaken. Once deposited, the funds became the property of the credit union. “By a general deposit the money becomes the *absolute property* of the bank, received as a loan, for which the bank is indebted to the depositor for that amount.” *People v Crawford*, 218 Mich 125, 136; 187 NW 522 (1922) (emphasis added). See also *People v Wadsworth*, 63 Mich 500, 509; 30 NW 99 (1886) (“Deposited without [a special agreement to keep the deposit separate, the depositor] parts with his title, and loans his money to the bank. The bank, therefore, cannot embezzle his money, because he has none in its hands.”).² Like a bank, when a member puts money in the credit union, it is like a loan where the member has the right to be repaid. The property defendant embezzled, taken from the credit union’s general fund, belonged to the credit union. We find that the prosecution presented sufficient evidence to support defendant’s conviction for embezzlement by an agent.

Defendant next argues that the trial court misscored Offense Variable (OV) 10 (victim exploitation) at ten points and Prior Record Variable (PRV) 2 (prior low severity felony convictions) at five points.³ He maintains that OV 10 should be scored at zero points because the trial court abused its discretion in finding that defendant had abused an authority status to exploit the victim, i.e., the credit union in this case. Defendant asserts that PRV 2 should be scored at zero because the prosecution failed to meet its burden of proving that defendant’s previous conviction satisfied the ten-year gap requirement contained in MCL 777.50.

When scoring the guidelines, “[a] sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision “for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). We review scoring decisions to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The interpretation and application of the sentencing guidelines present questions of law subject to de novo review on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

We find that the trial court erred when it scored OV 10. MCL 777.40, which governs the scoring of OV 10, provides in pertinent part:

² The cases defendant cites for his argument that a person merely deposits money in a bank for safekeeping, *Wadsworth* and *People v Nielsen*, 130 Mich 670, 670-671; 90 NW 1132 (1902), do not support his contention that an employee cannot embezzle general deposit money from a bank. Rather, they stand for the proposition that a *bank* cannot embezzle money from its *depositors* because once the money is deposited it becomes the property of the bank.

³ Defendant also maintains that PRV 7 should be scored at zero points because his concurrent conviction for embezzlement by an agent should be vacated by this Court. As we have determined that the prosecution presented sufficient evidence to support this conviction, we need not decide defendant’s claim of error concerning the scoring of this variable.

(1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status..... 10 points

* * *

(3) As used in this section:

* * *

(b) "Exploit" means to manipulate a victim for selfish or unethical purposes.

(c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

(d) "Abuse of authority status" means a victim was exploited out of fear or deference to an authority figure, including, but not limited to, a parent, physician, or teacher.

The prosecution argued that defendant abused his authority status and that, therefore, ten points were appropriately scored. However, even to the extent that one could regard the credit union as a "vulnerable victim," defendant did not "abuse his authority status" as that term is defined in the statute. Defendant did use "fear or deference to an authority figure" to exploit the "victim" here. He simply was in a position to take the money and hide the transfers. With the correct scoring for OV 10, defendant's OV level changes from III to II, and the minimum sentencing range for this class B offense changes from 36 to 60 months to 30 to 50 months. MCL 777.63. Defendant's minimum sentence of five years falls above this guideline range. Therefore, we vacate the sentence imposed on defendant's conviction of embezzlement over \$100,000, and remand for resentencing on that conviction.

Defendant also argues that the trial court erred when it scored PRV 2 because the prosecution did not show that defendant's prior offense occurred within ten years of the instant offense. See MCL 777.50. Given our decision that resentencing is appropriate, we need not now resolve this issue. On resentencing, the trial court should review this issue as necessary.

Defendant's convictions are affirmed; the sentence imposed on defendant's conviction of embezzlement over \$100,000 is vacated; this case is remanded for resentencing on that conviction. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray