# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>July 22, 2010 |
| v | No. 291854<br>Wayne Circuit Court |
| TENELL KEITH-JAMES SMITH,<br><br>Defendant-Appellant. | LC No. 08-009838-FH |

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant Tenell Smith of embezzlement of $1,000 or more but less than $20,000,[1] and sentenced him to two years' probation. He appeals as of right. We affirm. We decide this appeal without oral argument.[2]

## I. BASIC FACTS

Smith worked as a cashier at an Ikea store. His register was wired into its own computer/card reader device, referred to as a "hypercon," which was used to process credit card transactions. Smith processed a transaction on his own credit card. The register/hypercon recorded it as a refund of $2,005.56, and a credit in that amount appeared on Smith's next credit card statement. Smith claimed that he rang up a purchase of $2.56 and that the hypercon malfunctioned.

## II. SUFFICIENCY OF THE EVIDENCE

### A. STANDARD OF REVIEW

Smith argues that the evidence was insufficient to prove that he acted with fraudulent intent and that the trial court erred in concluding otherwise because it misconstrued MCL 750.174(10). When presented with a challenge to the sufficiency of the evidence in a bench trial,

[1] MCL 750.174(4)(a).

[2] MCR 7.214(E).

this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt.[3] "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime."[4] "All conflicts with regard to the evidence must be resolved in favor of the prosecution."[5] This Court reviews the trial court's factual findings for clear error and its conclusions of law de novo.[6]

## B. THE STATUTORY SCHEME

In Michigan, the statutes set out two distinct forms 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 the principal."[7] Smith was charged with both types, but the trial court assumed that he was charged with the first type by converting Ikea's money to his own use. The elements of the crime are: (1) the property at issue belongs to the principal; (2) the defendant has a relationship of trust with the principal because he was an employee; (3) the property came into the defendant's possession or control because of that trust relationship; (4) the defendant converted the property to his own use; (5) at the time the defendant did this, he intended to defraud or cheat the principal of the property; and (6) the property had a fair market value of $1,000 or more but less than $20,000.[8]

As part of its ruling, the trial court stated, "[W]here property has been entrusted to an agent and isn't returned, the Court can—under the statute, infer intent." The trial court apparently was referring to MCL 750.174(10), which provides:

> In a prosecution under this section, the failure, neglect, or refusal of the agent, servant, employee, trustee, bailee, or custodian to pay, deliver, or refund to his or her principal the money or property entrusted to his or her care upon demand is prima facie proof of intent to embezzle.

In fact, the statute does not permit an inference of intent from the mere fact that money or property is not returned. Rather, it eases the prosecution's burden of proving the defendant's intent by allowing the factfinder to infer that the defendant had the requisite intent from the fact that he failed to return the property upon demand.[9] In this case, there was no evidence of a

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[3] *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001).

[4] *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

[5] *Id.*

[6] *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

[7] *People v Artman*, 218 Mich App 236, 241; 553 NW2d 673 (1996).

[8] MCL 750.174(1) and (4)(a); CJI2d 27.1; *People v Wood*, 182 Mich App 50, 53-54; 451 NW2d 563 (1990).

[9] *People v Rafalko*, 26 Mich App 565, 568-569; 182 NW2d 732 (1970).

demand for return of the credited funds, so Smith's failure to return the funds did not establish prima facie proof of his fraudulent intent. Thus, the trial court erred to the extent that it relied on the statute as permitting an inference of intent in this case.

## C. HARMLESS ERROR

Nonetheless, the error was harmless. In a criminal case, an error is harmless "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative."[10] A defendant's intent may be inferred from his conduct and statements as well as from the facts and circumstances of the case.[11] "[B]ecause of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient."[12]

Here, the trial court found that other circumstances, independent of MCL 750.174(10), supported an inference of Smith's fraudulent intent. The trial court found that Smith did not follow "the normal process for a refund," which was supported by evidence that Smith did not enter his ID number for the transaction and did not call for a manager to perform or oversee the transaction. The trial court also found that the credit to Smith's account was not a computer mistake, which was supported by the absence of any evidence to show that the hypercon was malfunctioning such that it could have mistakenly recorded a debit in one amount as a credit in another amount.

Further, the evidence showed that there were a special series of steps used to process a credit card refund and, because Smith was credited with a refund when he ran his card through the hypercon, it can be inferred that he followed those particular steps and did not ring up a purchase as he claimed. The trial court also found that Smith did not attempt to refund the money after the alleged mistake was discovered. Even without a demand, where a defendant claims that a principal's property came into his possession by mistake, yet makes no effort to return the property despite knowing that he does not have a right to retain it, it is reasonable to infer that there was no mistake and that the defendant acted with fraudulent intent. Accordingly, there was sufficient evidence to prove beyond a reasonable doubt that Smith acted with fraudulent intent. Further, because the trial court found other circumstantial evidence of fraudulent intent apart from the mere fact that Smith failed to return the funds, it is more probable than not that the trial court's misapprehension of MCL 750.174(10) was not outcome determinative.

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[10] *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999), quoting MCL 769.26.

[11] *People v Strong*, 143 Mich App 442, 452; 372 NW2d 335 (1985).

[12] *People v Fetterley*, 229 Mich App 511, 518; 583 NW2d 199 (1998).

## III. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. STANDARD OF REVIEW

Smith argues that he is entitled to a new trial due to ineffective assistance of counsel. Specifically, he contends that his defense counsel was ineffective for failing to investigate Ikea's problems with the hypercon system and for failing to obtain documents showing that the credit to his account could have been caused by "a faulty machine or computer system." He also contends that his counsel should have requested an adjournment to allow a prosecution witness to obtain records necessary to answer certain questions. Smith did not raise this issue in a motion for a new trial or request for an evidentiary hearing below, and this Court denied his motion to remand; therefore, our review is limited to errors apparent from the record.[13]

### B. LEGAL STANDARDS

The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise.[14] To establish that a defendant's right to the effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial.[15] To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different.[16] The defendant must also overcome a strong presumption that counsel's assistance constituted sound trial strategy.[17] However, counsel will still be found ineffective despite a strategic decision if the strategy employed was not sound or reasonable.[18]

It is counsel's duty to make an independent examination of the facts, laws, pleadings, and circumstances involved in the matter, and to pursue all leads relevant to the issues.[19] Counsel may be ineffective for failing to make a reasonable investigation of the case.[20] "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present,

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[13] *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

[14] *People v Eloby* (*After Remand*), 215 Mich App 472, 476; 547 NW2d 48 (1996).

[15] *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

[16] *Id*.

[17] *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008).

[18] *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988).

[19] *People v Grant*, 470 Mich 477, 486-487; 684 NW2d 686 (2004).

[20] *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

valuable evidence that would have substantially benefited the defendant."[21] The defendant has the burden of establishing the factual predicate of his claim of ineffective assistance of counsel.[22]

C. APPLYING THE STANDARDS

Here, the only evidence of hypercon malfunctions was one employee's testimony that the system "needed a little bit of tweaking" when it was first implemented, but that was because "[t]here were parts of the system that we didn't understand because we didn't get the instructions[.]" Whatever the problems were, they were resolved after two days, or by May 17, 2008. James Steig, the security manager, testified that he had never come across another situation in which a hypercon improperly credited or debited a credit card except where someone's credit card had been "used illegally" or where another employee had improperly accessed the system to place undeserved credit on his or her own credit card. In questioning Steig about the latter scenario, Smith's defense counsel asked how many times it had occurred and whether in each instance Steig "found evidence that it was a crime." Steig could not answer either question because he did not have his records available.

Steig's testimony did not suggest that he was aware of other problems with the hypercon system, but rather that there were other improper uses of the system. Whether other employees had engaged in the same misconduct as Smith and whether they had been criminally prosecuted did not tend to show that the hypercon had malfunctioned in the manner Smith claims. Because there is nothing in the record to show that the hypercon had ever malfunctioned in this manner before, Smith has failed to establish the factual predicate for his claim—that is, that there were records of similar malfunctions that counsel could have discovered and presented at trial. Therefore, Smith's ineffective assistance of counsel claim is without merit.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

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[21] *People v Bass* (*On Rehearing*), 223 Mich App 241, 253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998).

[22] *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).