

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ARTHUR B. BLACKWELL, II,

Defendant-Appellee.

UNPUBLISHED

July 3, 2012

No. 302473

Wayne Circuit Court

LC No. 09-031344-FH

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

The prosecution appeals as of right the circuit court's order granting defendant's motion to quash the information and dismissing charges of: embezzlement,¹ embezzlement by a public officer,² misconduct in office,³ refusal to deliver money to successor in office,⁴ and failure to safe keep public monies.⁵ We reverse and remand for reinstatement of the charges against defendant.

Defendant was the Emergency Financial Manager for the city of Highland Park and received compensation for his services as set forth in a contract, and its addenda, he negotiated with the Local Emergency Financial Assistance Loan Board (Loan Board). At some times during his several-year tenure, defendant's compensation was paid by Highland Park and at other times it was paid by the state. These criminal charges arose after it was determined that defendant allegedly caused the city of Highland Park to pay him \$264,000, which was unauthorized by the Loan Board or state officials and was contrary to the terms of his contract. Following a preliminary examination, defendant was bound over on the charges. He then brought a motion to quash the information and argued that the evidence did not establish

¹ MCL 750.174(7) (Count I).

² MCL 750.175 (Count II).

³ MCL 750.505 (Count III).

⁴ MCL 750.480 (Count IV).

⁵ MCL 750.490 (Count V).

probable cause to believe that he committed the charged crimes. The circuit court agreed, holding that if the state had deposited the funds into Highland Park's account instead of paying defendant directly for his services, defendant "would have been signing those checks anyway" as the emergency financial manager. In other words, there was insufficient evidence to show that defendant "did not have authority to sign the checks that he did and receive the monies that he did." Thus, the circuit court held, the district court abused its discretion when it bound defendant over on the charges. This appeal followed.

The prosecution argues that the evidence presented at the preliminary examination was sufficient to establish probable cause to believe that defendant committed the charged crimes; thus, the district court did not abuse its discretion when it bound defendant over on the charges. We agree.

"A district court's ruling that alleged conduct falls within the scope of a criminal law is a question of law that is reviewed de novo for error, but a decision to bind over a defendant based on the factual sufficiency of the evidence is reviewed for an abuse of discretion." *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). This Court does not give the circuit court's decision any deference. *Id.* at 313. A decision that falls outside the range of principled outcomes constitutes an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

The law regarding preliminary examinations is well-settled.

The primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it. Probable cause that the defendant has committed a crime is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but must present some evidence of each element. Circumstantial evidence and reasonable inferences from the evidence can be sufficient. If the evidence conflicts or raises a reasonable doubt, the defendant should be bound over for trial where the questions can be resolved by the trier of fact. [*Henderson*, 282 Mich App at 312 (citations omitted).]

Pursuant to MCL 750.174, the elements of embezzlement are:

(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 the conversion, the defendant intended to defraud or cheat the principal. [*People v Lueth*, 253 Mich App 670, 683; 660 NW2d 322 (2002).]

Additionally, the prosecution must show that a defendant embezzled \$100,000 or more. MCL 750.174(7).

In his motion to quash the information, defendant primarily argued that the prosecution failed to establish that he intended to defraud the city of Highland Park when he caused it to issue checks to him totaling \$264,000, which represented retroactive payments of his salary of \$11,000 a month for two years for which he had not been paid.⁶ Defendant raises this same argument on appeal. However, the evidence presented at the preliminary examination included that: (1) defendant's contract did not authorize the payment of this purported "retroactive salary" payable by Highland Park, (2) defendant was not permitted to use Highland Park funds, including for this alleged payment of compensation, without authorization from the Loan Board or state officials, which he did not obtain, and (3) defendant refused to refund the money upon demand which is "prima facie proof of intent to embezzle." MCL 750.174(10). Further, contrary to his claim, defendant failed to disclose the payments he made to himself from Highland Park funds in his two quarterly reports. In fact, the cash flow summary labeled as "Attachment A" and provided with his 2009 quarterly report did not list defendant as the recipient of any such funds.⁷

In light of this evidence, the circuit court's conclusion that there was insufficient evidence to show that defendant "did not have authority to sign the checks that he did and receive the monies that he did" must be reversed. The evidence was "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt." See *Henderson*, 282 Mich App at 312. Consequently, the decision to bind over defendant on the embezzlement and embezzlement-related charges did not constitute an abuse of discretion and the circuit court's holding to the contrary is reversed.

Defendant argues on appeal, as he did in the circuit court, that he was not a "public officer" and, thus, Counts III, IV, and V were properly dismissed. This argument is without merit. Although the circuit court did not address this issue that was raised by defendant, we will because the issue is likely to be raised in future proceedings. See *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Defendant claimed that his position as emergency financial manager lacked the requirements of "some permanency and continuity." See *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999), quoting *People v Freedland*, 308 Mich 449, 457-458; 14 NW2d 62 (1944). However, defendant was the emergency financial manager for several years; thus, the requirements of "some permanency and continuity" existed.

⁶ With regard to Count I, defendant argued that the evidence was insufficient to establish his intent to defraud. With regard to Count II, defendant argued that the evidence was insufficient to establish that he used the money for an unlawful purpose. With regard to Count III, defendant argued that the evidence was insufficient to establish that he had an improper or corrupt motive. With regard to Counts III, IV, and V, defendant argued that he was not a "public officer."

⁷ Defendant claimed that the line item figure for expenditures to "contractors" included those payments he made to himself but that is debatable and presents a question of fact.

Reversed and remanded for reinstatement of the charges against defendant. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra