

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DIEDRE B. JOHNSON,

Defendant-Appellee.

UNPUBLISHED

June 21, 2002

No. 235594

Wayne Circuit Court

LC No. 01-003579

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant was charged with three counts of uttering and publishing, MCL 750.249, and one count of embezzlement by an agent or trustee, MCL 750.174(4)(a). After the district court bound her over for trial, defendant brought a motion to quash the information. The circuit court granted defendant's motion, which resulted in the dismissal of all charges brought against defendant. The prosecution now appeals as of right. We affirm.

In *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000), this Court explained the standard of review regarding motions to quash an information:

We review for an abuse of discretion a district court's decision to bind over a defendant. *People v Hamblin*, 224 Mich App 87, 91; 568 NW2d 339 (1997). "The standard for reviewing a decision for an abuse of discretion is narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997). A circuit court's decision with respect to a motion to quash a bindover order is not entitled to deference because this Court applies the same standard of review to this issue as the circuit court. This Court therefore essentially sits in the same position as the circuit court when determining whether the district court abused its discretion. See, generally, *People v Reigle*, 223 Mich App 34, 36; 566 NW2d 21 (1997); *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). In other words, this Court reviews the circuit court's decision regarding the motion to quash a bindover only to the extent that it is consistent with the district court's exercise of discretion. The circuit court may only affirm a proper exercise of

discretion and reverse an abuse of discretion. Thus, in simple terms, we review the district court's original exercise of discretion.

“An abuse of discretion is found only where an unprejudiced person, considering the facts upon which the court acted, would say there was no justification or excuse for the ruling.” *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999), quoting *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

“A defendant must be bound over for trial if evidence is presented at the preliminary examination that a felony has been committed and there is probable cause to believe that the defendant was the perpetrator.” *People v Woods*, 200 Mich App 283, 287; 504 NW2d 24 (1993). To bind a defendant over, the magistrate must find evidence concerning each element of the charged crime or evidence from which the elements can be inferred. *People v Kim*, 245 Mich App 609, 613 n 3; 630 NW2d 627 (2001). Moreover,

[t]o bind a defendant over for trial, the magistrate must be satisfied that there is sufficient evidence that an offense has been committed and that there is probable cause to believe that the defendant committed it. The magistrate has the duty to pass judgment on the credibility of witnesses as well as the weight and competency of the evidence, but the magistrate should not engage in fact finding or discharge a defendant when the evidence raises a reasonable doubt regarding defendant's guilt. The district court's inquiry is not limited to whether the prosecution has presented sufficient evidence on each element of the offense, but extends to whether probable cause exists after an examination of the entire matter based on legally admissible evidence. [*People v Crippen*, 242 Mich App 278, 282; 617 NW2d 760 (2000); citations omitted.]

In the instant case, defendant was charged with three counts of uttering and publishing, MCL 750.249, and one count of embezzlement by an agent, MCL 750.174(4)(a). “The elements of uttering and publishing require that the defendant knew the instrument was false, that [s]he had an intent to defraud, and that [s]he presented the forged instrument for payment.” *People v Dukes*, 189 Mich App 262, 265; 471 NW2d 651 (1991).

We conclude that the testimony at the preliminary examination was insufficient to support a finding of probable cause against defendant with respect to uttering and publishing. The testimony established that defendant was a teller for a check cashing company, U.S. Check Cashing, and that her duties included cashing checks for the company's customers. Although defendant cashed nineteen counterfeit checks within a five-day time period, this was insufficient to demonstrate probable cause, given that defendant was employed as a teller. There was no evidence that defendant herself presented the counterfeit instruments for payment or that she had an intent to defraud. The fact that defendant failed to follow the company's procedures with regard to cashing the counterfeit checks adds little in the probable cause determination, especially given the testimony that defendant had a prior history of failing to follow the company's procedures. The prosecution suggests that there was evidence of an intent to defraud because preliminary examination evidence indicated that a coworker's initials appeared on one of the counterfeit checks, yet the coworker denied cashing the check. We conclude, however, that evidence of a check containing a coworker's initials was insufficient to establish probable

cause with regard to uttering and publishing. The district court abused its discretion in binding defendant over for trial.

Defendant was also charged with embezzlement under MCL 750.174(4)(a). The information charged that defendant “did, being an agent, servant, or employee of U. S. Check Cashing, convert to [her] own use, without the consent of [her] principal \$16,174.62, money, or personal property of [her] principal, having a value of \$1,000.00 or more but less than \$20,000.00, that came into the defendant’s possession or under the defendant’s charge or control by virtue of [her] relationship with the principal”

The elements of embezzlement by an agent include the following: (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 either dishonestly disposed of or converted the money to her 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 must have intended to defraud or cheat the principal. *People v Collins*, 239 Mich App 125, 130-131; 607 NW2d 760 (1999). In the instant case, defendant’s employer testified at the preliminary examination that the \$16,000 paid out in fraudulent checks belonged to U. S. Check Cashing, that defendant was an employee of U. S. Check Cashing as a teller whose duties included cashing checks, and that defendant had no permission to take the \$16,000. This testimony could at least satisfy the first, second, third, and fifth elements of embezzlement.

However, we find that there was insufficient evidence to establish probable cause regarding the fourth and sixth elements of embezzlement. Indeed, there was no evidence from which it could *reasonably* be inferred that defendant converted the money to her own personal use or that she intended to defraud. Accordingly, the district court abused its discretion in binding defendant over for trial, and the circuit court properly quashed the information on the charge of embezzlement.

We also reject the prosecution’s contention that there was probable cause to establish that defendant committed the offenses based on an aiding and abetting theory. We reiterate that the prosecution produced insufficient evidence regarding defendant’s intent; thus, an aiding and abetting theory is of no help to the prosecution. See *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001) (the necessary intent for conviction as an aider and abettor is that necessary to be convicted as a principal). Moreover, the prosecution concedes that there was no evidence that defendant had any accomplices, and there was no testimony demonstrating that defendant performed acts or gave encouragement that assisted the commission of the offenses.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage
/s/ Patrick M. Meter