STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LILLIAN McLEAN-LANE,

Defendant-Appellant.

UNPUBLISHED
November 15, 1996

No. 181857
LC No. 94-65874-FH

Before: O'Connell, P.J., and Smolenski and T.G. Power,* JJ.

PER CURIAM.

Defendant was convicted by jury of embezzlement, MCL 750.174; MSA 28.371, and was sentenced to six months in the county jail, with work release, and five years' probation. She was also ordered to pay restitution to Michigan State University (hereinafter MSU) in the amount of $24,388.30. She now appeals as of right, and we affirm her conviction. We remand, however, for reconsideration of the order of restitution.

Defendant had been employed by MSU in the College of Social Science's School of Labor and Industrial Relations (hereinafter LIR). Her duties included collecting payment for course packs sold to students. When payment was made by check, defendant instructed the students to make the checks payable to her. Then, instead of depositing the checks into a university account, defendant deposited them into her personal bank account. Defendant claimed that the funds were, nonetheless, used to pay university-related expenses.

Defendant first argues that the trial court abused its discretion in prohibiting defense counsel from eliciting testimony meant to demonstrate that at least some of the proceeds derived from the sale of course packs were not considered to be MSU funds. Defendant intended to suggest that if the funds that she was accused of converting were not MSU funds, she could not be convicted of embezzling funds from MSU. We review the court's decision to exclude this testimony for an abuse of discretion, which exists where the act of the court is "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 Coleman*, 210 Mich App 1,

* Circuit judge, sitting on the Court of Appeals by assignment.

4; 532 NW2d 885 (1995). We find none. The court excluded this testimony because defendant was accused of embezzling only checks, while the funds to which the excluded testimony pertained were strictly cash. Thus, the identity of the "owner" of the cash would not have been directly relevant to the crime of which defendant was accused. While we concede that the excluded testimony may have had relevance in that it offered some support for defendant's position that any funds she may have taken were not MSU funds, given the tenuous relationship of this evidence and the crime charged, we do not find the court's decision to exclude it to be suggestive of perversity of will, defiance of judgment, or bias. *Id*.

Defendant next challenges the court's denial of her motion for a directed verdict, contending that the prosecution failed to prove that she converted the money to her own use, which is one element of embezzlement. See *People v Wood*, 182 Mich App 50, 53; 451 NW2d 563 (1990). The "gist" of the element of conversion "is that defendant exercises dominion or control or uses the property against the interest of the actual owner." *People v Miciek*, 106 Mich App 659, 666; 308 NW2d 603 (1981). Here, evidence was introduced that defendant deposited the checks into her personal account, that defendant enjoyed an "upscaling" of her lifestyle during this period, and that her checking account would have been overdrawn but for the deposit of MSU funds. Viewing the evidence in the light most favorable to the non-moving party, *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979), a rational trier of fact could easily have concluded that these actions constituted the exercise of dominion over the MSU funds. Therefore, the court did not err in denying defendant's motion.

Finally, defendant asserts that the trial court erred in failing to resolve questions concerning the appropriate amount of restitution to be paid to MSU before setting that amount. We agree. Restitution was ordered in the amount of $24,388.30. That figure represents the total amount in checks traced to defendant's bank account. At sentencing, defense counsel requested that the amount be reduced, noting defendant's financial hardship and other evidence that the actual loss was $17,597.35. The prosecutor argued that the $24,388.30 figure was accurate. The trial court set restitution at $24,388.30 but invited the defense to move to lower the amount at a later date, stating that there was no need to hold an evidentiary hearing because the court had heard the evidence.

Resolution of this question turns on whether the trial court failed to follow the mandates of the restitution statute. As set forth in MCL 780.767(1); MSA 28.1287(767)(1),

> [t]he court, in determining whether to order restitution . . . the amount of that restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources and earning ability of the defendant, the financial needs of the defendant and the defendant's dependents, and such other factors as the court considers appropriate.

Issues of statutory construction are questions of law and are reviewed de novo. *Westchester Fire Ins Co v Safeco Ins Co*, 203 Mich App 663, 667; 513 NW2d 212 (1994). In *People v Grant*, 210 Mich App 467, 471, 473; 534 NW2d 149 (1995), this Court held that the statute mandates consideration of these factors and remanded for reconsideration where the trial court failed to consider them when setting restitution at a particular figure. While an evidentiary hearing on the issue may not be

necessary if all the pertinent considerations were addressed at trial, see *People v Walker*, 428 Mich 261, 268; 407 NW2d 367 (1987), a hearing should be held after which the court should articulate its conclusion in light of MCL 780.767(1); MSA 28.1287(767)(1). Accordingly, we remand for reconsideration of the order of restitution and direct the trial court to consider the statutory factors, including the amount of the loss and defendant's needs and abilities.

Defendant's conviction is affirmed. The case is remanded for reconsideration of the order of restitution. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Thomas G. Power