

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NASIR-UDDINMAHMUD QURESHI,

Defendant-Appellant.

UNPUBLISHED

April 27, 2006

No. 258472

Oakland Circuit Court

LC No. 2002-186756-FH

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Defendant Nasir-Uddinmahmud Qureshi appeals as of right from his bench trial conviction for embezzlement of more than \$1,000 but less than \$20,000.¹ The trial court ordered Qureshi to pay restitution and sentenced him to 18 months' probation. We affirm.

I. Basic Facts And Procedural History

Qureshi helped out at Alaa Sabrah's store, Wixom Smokers, during August and September of 2001. Qureshi had been Sabrah's customer for a few months and eventually they became friends. According to Sabrah, Qureshi knew that he was dealing with some personal issues and that he needed some help running the store. Qureshi repeatedly offered Sabrah his assistance and, at some point, Sabrah took Qureshi up on his offer to help. Sabrah began training Qureshi to run the store. In time, Sabrah let Qureshi work at the store unsupervised.

On Labor Day weekend of 2001, Sabrah went camping out of town, so Qureshi was responsible for opening and closing the store for the entire weekend. Sabrah instructed Qureshi to place the earnings and receipts from each workday into a bag. Sabrah gave Qureshi the choice of either bringing each day's bag to Sabrah's house and leaving it with Sabrah's wife, or leaving the bags at the store in an office drawer for Sabrah to pick up when he returned from his trip. When Sabrah returned home from his trip, his wife told him that Qureshi did not bring the bags to the house. The next day, Sabrah went to the store to catch up on paperwork and to get the bags from the designated drawer. But, according to Sabrah, when he checked the drawer, the bags were not there. Sabrah then began to open the store and noticed that the register only

¹ MCL 750.174(4)(a).

contained approximately \$20 to \$30, instead of the normal \$150. Sabrah then noticed that the change bag kept underneath the register, which usually had \$100 to \$150 inside, also only contained approximately \$20 to \$30.

Qureshi arrived at the store at approximately 9:15 a.m. that morning. Sabrah asked Qureshi about the money in the register and the change bag, and Qureshi replied, "I took them so I can go make change so I can work today." Because Qureshi came into the store empty-handed, Sabrah asked him where the change was so he could open the store. Qureshi had no response. Sabrah then asked Qureshi about the bags with the money and receipts from Labor Day weekend. Qureshi told Sabrah that he had taken the bags home, so Sabrah instructed Qureshi to go home to get the bags so he could deposit the money. Qureshi then left the store as if he were going home to get the bags. Qureshi did not return until 2 p.m. even though he lived only two miles away from the store.

When Qureshi returned to the store, he produced three bags, one for each day he worked over the weekend. But the bags only contained receipts and were missing the cash. Qureshi first told Sabrah that he had lost the cash but then told Sabrah that the cash had been stolen from him. Qureshi tried to further explain but Sabrah told him to just explain it to the police.

Aside from Sabrah, Qureshi was the only person with a key to the store during the time in question. According to the register receipts, the store made cash profits of \$1,747.20 on August 31, 2001; \$1,844.98 on September 1, 2001; and \$846.33 on September 2, 2001.

Sabrah started to call the police, and Qureshi told him not to. Qureshi left the store, but then he came back, and he told Sabrah, "You know I'm going to pay you the money, just don't call the police." Sabrah told Qureshi that he had already called the police. Qureshi then gave Sabrah a credit card and told him to charge \$2,000 on the card. He said that he would give Sabrah another \$1,500 in a few days. Sabrah noticed that the name on the credit card was not Qureshi's, so Sabrah refused to swipe the card. Qureshi then went around the counter, swiped the card, and charged \$2,000 to the credit card.

When Wixom Police Officer Shannon Luther arrived at the store, Sabrah told her that he was missing \$4,000. Sabrah also told the officer about the credit card transaction. Qureshi told Officer Luther that the credit card belonged to his girlfriend and that he had permission to use the card. Officer Luther informed Qureshi that he could not use the credit card because the card was not issued in his name. She instructed Sabrah to reverse the charge. When Officer Luther told Qureshi that she was going to contact the girlfriend to see if he had permission to use the credit card, Qureshi insisted that Officer Luther not contact the girlfriend because she was ill. Officer Luther tried to contact Qureshi's girlfriend anyway, but she was unsuccessful. Officer Luther stated that Qureshi told her that the money had been stolen from underneath the front seat of his car. Qureshi told Sabrah and Officer Luther that he wanted to pay the money back. Sabrah and Qureshi then agreed to an arrangement for repayment in lieu of criminal charges. According to Officer Luther, Qureshi never asserted that he had a claim of right to the money; he only maintained that the money had been stolen.

At some point, Qureshi left the store. Later that day, Sabrah conducted an inventory of all the cigarettes in the store. Sabrah did a manual count of the cigarettes and an inventory check based on the register receipts. Sabrah maintained that 203 packs of premium cigarettes and

1,227 packs of generic cigarettes were missing from the store, totaling approximately \$4,350.90. At trial, the parties stipulated that Qureshi told Wixom Police Officer Val Klock that, at most, he took two cartons of cigarettes from the store.

Sabrah explained that he did not know Qureshi's social security number and that he did not issue Qureshi a formal paycheck. Instead, Sabrah allowed Qureshi to keep a running tab with the store. Whenever Qureshi needed cash or cigarettes Sabrah would add the money or cigarettes to Qureshi's tab and then later deduct the money owed from Qureshi's pay. In a separate proceeding, Qureshi filed suit against Sabrah and obtained a judgment, which ordered Sabrah to pay "all applicable withholding taxes to the Internal Revenue Service, the Social Security Administration, or the State of Michigan for the \$1,072 in wages he earned during the period in question."²

Qureshi testified that he began helping Sabrah at the Smoke Shop in June 2001. While he confirmed that he had a running tab with the store, he maintained that he did not take the missing cigarettes from the store. Qureshi also maintained that whenever he managed the store unsupervised he always took the money bag and receipts home with him because Sabrah told him not to leave the money in the office. According to Qureshi, he had the money in his car and somehow lost it along the way. Qureshi maintained that he offered to pay the money back and, with permission from his girlfriend, he was going to use her credit card to repay \$2,000 of the money lost that day. Qureshi never reported the alleged theft to the police. And Qureshi never repaid any of the money back to Sabrah.

Ruling from the bench, the trial court concluded that a relationship of trust existed between the store and Qureshi, noting that Qureshi was employed "to take charge of that particular operation for the Labor Day weekend" As a result of that trust, the trial court explained, Qureshi came into possession of money and property belonging to the store that was in excess of \$1,000. Regarding what happened to the money, the trial court found significant that Qureshi did not file a police report of the alleged theft from his car, making it "difficult for the Court to believe that the money had been stolen." The trial court then concluded that "the circumstances and testimony of this case demonstrate beyond a reasonable doubt that the Defendant, Mr. Qureshi, did take that money, did take it personally, with the intent to convert the money to his own use." The trial court convicted Qureshi as charged.

II. Sufficiency Of The Evidence

A. Standard Of Review

Qureshi argues that the prosecutor engaged in misconduct because he failed to prove the necessary elements for his embezzlement conviction. However, we deem Qureshi's argument more aptly framed as a challenge to the sufficiency of the evidence.

² Sabrah stated that "later on" he deducted the appropriate withholdings from Qureshi's wages.

A claim of insufficiency of the evidence invokes a defendant's constitutional right to due process of law,³ which we review de novo on appeal.⁴ "[T]his Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt."⁵

B. Embezzlement

Generally, to prove embezzlement the prosecution must show that:

(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.⁶

Additionally, to prove embezzlement under MCL 750.174(4)(a), the prosecution must show that the defendant embezzled money or personal property of more than \$1,000 but less than \$20,000.

We reject Qureshi's apparent argument that the prosecution failed to present sufficient evidence because it failed to establish that there was an employer/employee relationship. What is required is that it be shown that the defendant is in a relationship of trust with the principal, as an agent or employee. Clearly, there was ample evidence that Qureshi was Sabrah's agent in running the store in his absence, if not his employee. The prosecution presented sufficient evidence regarding each element. On Labor Day weekend in 2001, Qureshi managed the store unsupervised and was responsible for opening and closing the store, which included assuming responsibility for each day's earnings. Sabrah produced receipts from the weekend sales showing the amount of cash that he was supposed to receive from Qureshi when he returned to the store. However, Qureshi never turned over the cash for the Labor Day weekend sales. Qureshi maintained that he lost the money or it was stolen, yet Qureshi was able to produce the receipts from that weekend notwithstanding the fact that the receipts and cash were kept in the same bag. Further, Qureshi admitted that he never reported the alleged theft to the police. Sabrah also produced evidence that several boxes of cigarettes were missing from the store. Qureshi was the only person, aside from Sabrah, to have a key to the store, and Qureshi admitted that he took the money home with him. Qureshi also offered to pay the money back to Sabrah.

³ US Const, Am, XIV; Const 1963, art I, § 17; *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

⁴ *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

⁵ *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004); see also *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979).

⁶ MCL 750.174; *People v Lueth*, 253 Mich App 670, 683; 660 NW2d 322 (2002).

Based on “the circumstances and testimony” the trial court concluded “beyond a reasonable doubt” that Qureshi took the money with the intent to convert it to his own use.

“It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.”⁷ Thus, “a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.”⁸ Questions of credibility are within the province of the trier of fact, which has a superior ability and is best equipped to resolve such questions on the basis of its firsthand observations.⁹ Thus, we conclude that the trial court properly concluded that the prosecutor presented sufficient evidence to establish the necessary elements in support of Qureshi’s conviction.

III. Prosecutorial Misconduct

Qureshi argues that the prosecutor engaged in misconduct by concealing a potential witness from the trial court. Because Qureshi failed to preserve this claim of prosecutorial misconduct, our review is limited to plain error affecting Qureshi’s substantial rights.¹⁰ But Qureshi has not demonstrated that the prosecution withheld witness information from the trial court or the defense. Thus, Qureshi has failed to prove prosecutorial misconduct.

IV. Effective Assistance Of Counsel

Qureshi argues that he was denied the effective assistance of counsel. An evidentiary hearing or a motion for new trial must precede a claim of ineffective assistance of counsel.¹¹ Here, neither request was made. Therefore, this issue is unpreserved, and we consider Qureshi’s claim only to the extent that his defense counsel’s claimed mistakes are apparent on the record.¹²

To establish a claim of ineffective assistance of counsel, a defendant must show “(1) that his trial counsel’s performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.”¹³ “Effective assistance of counsel is presumed, and the defendant bears a heavy

⁷ *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

⁸ *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

⁹ *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004); *Hawkins*, *supra* at 459.

¹⁰ *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

¹¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973); *People v Johnson*, 144 Mich App 125, 129; 373 NW2d 263 (1985).

¹² *Johnson*, *supra* at 129-130.

¹³ *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005).

burden to prove otherwise.”¹⁴ A defendant must overcome a strong presumption that defense counsel’s action constituted sound trial strategy.¹⁵

Qureshi argues that he was denied the effective assistance of counsel because counsel failed to present certain witnesses. “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.”¹⁶ Qureshi has not provided any reason for this Court to conclude that counsel’s failure to call the witnesses was anything but trial strategy.

Qureshi also argues that his trial counsel was ineffective for failing to impeach Sabrah and for filing a pre-trial motion and then not conducting a hearing on that motion. However, Qureshi merely announces these claimed errors without any argument or citation to authority.¹⁷ Therefore, we decline to address these claims.

V. Other Issues

Qureshi argues that Sabrah violated 26 USC 7202 by filing a false tax return in 2001. Even if this allegation were true, we fail to see any relevance to Qureshi’s criminal conviction. Therefore, Qureshi has not provided a basis for this Court to address this issue.

Qureshi also argues that Detective Osborne filed a false police report. But he has not offered any evidence or argument to support a finding that Detective Osborne filed such a report. We, therefore, decline to address this issue.¹⁸

We affirm.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Alton T. Davis

¹⁴ *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

¹⁵ *Walker*, *supra* at 545.

¹⁶ *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

¹⁷ *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

¹⁸ *Id.*