

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE ARTHUR TULGETSKE,

Defendant-Appellant.

UNPUBLISHED

August 17, 1999

No. 205326

Presque Isle Circuit Court

LC No. 97-091614 FH

Before: Griffin, P.J., and McDonald and White, JJ.

McDONALD, J. (*concurring in part and dissenting part*).

I concur in part and dissent only on the issue of whether the trial court reversibly erred when it refused to give defendant's requested misdemeanor instruction. I find the trial court properly denied defendant's request.

I agree with the majority that a court must instruct concerning a lesser included misdemeanor if (1) there is a proper request, (2) there is an "inherent relationship" between the greater and lesser offense, (3) the requested misdemeanor is supported by a "rational view" of the evidence, (4) the defendant has adequate notice, and (5) no undue confusion or other injustice would result. *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982); *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996). In this case, the trial court found the evidence did not support giving the embezzlement instruction and that the jury would be confused if it gave the embezzlement instruction.

The trial court concluded that the third part of the *Stephens* test is not satisfied. I agree. The prosecution's evidence showed defendant did not have authority to take parts out of the store and sell them to customers at "cost." Accordingly, under the prosecution's theory of the case, defendant could not have committed embezzlement because he did not obtain possession or control of the locking hubs rightfully. See *People v Bergman*, 246 Mich 68, 71; 224 NW 375 (1929). Under defendant's version of the events, he always intended to pay the \$70 he obtained from the sale to the store and only failed to do so because he had insufficient funds. This Court has explained that "the mere failure to pay over monies belonging to another, without fraudulent intent, is not embezzlement." *People v Artman*, 218 Mich App 236, 241; 553 NW2d 673 (1996). If the jury believed defendant's testimony, he would not have been guilty of embezzlement. Accordingly, a rational view of the evidence does not

support giving an instruction on the requested misdemeanor, and the trial court properly denied defendant's request.

In light of my conclusion on defendant's claim of instructional error, I am required to address defendant's claim that he is entitled to resentencing. Defendant argues he is entitled to resentencing because the trial court failed to articulate its reasons for the sentence and because his sentence is disproportionate. I disagree.

I do not believe we are required to remand this case to the trial court because of a lack of articulation under *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989). The trial court announced the sentence it was imposing on defendant immediately after hearing arguments from defense counsel and the prosecution. Defense counsel acknowledged defendant's extensive criminal record, but emphasized that defendant was not a violent offender. Counsel argued the trial court should sentence defendant to thirty-two to forty-eight months' imprisonment rather than the maximum sentence allowed under the habitual offender statute because defendant was not "the worst case offender" and had not committed "the worst case offense." The prosecutor argued that defendant had a twenty-five year history of committing felony offenses, that defendant had been imprisoned in Michigan, Oklahoma, Texas, California, and in the federal prison system, and that defendant had violated the terms of parole and probation every time he had been placed on parole or probation. The prosecutor argued that defendant's habitual offender status and his inability to conform his behavior to the rules of society subjected him to a penalty of up to fifteen years in jail. The trial court then sentenced defendant to five to fifteen years' imprisonment without explicitly stating the reasons for the sentence. This Court has held that "the *Triplett* rationale may be satisfied where the articulation is provided by the context of the preceding remarks." *People v Lawson*, 195 Mich App 76, 78; 489 NW2d 147 (1992). In *Lawson*, this Court found it was clear in the context of counsel's arguments that the sentencing guidelines would be the basis of the sentence. Here, I find it is clear in the context of counsel's arguments that the trial court was basing defendant's sentence on his extensive criminal record, his habitual offender status, and his inability to reform. Accordingly, I see no need to remand for articulation. *Id.* at 77-78.

Moreover, I find the trial court did not abuse its discretion in sentencing defendant as an habitual offender to five to fifteen years' imprisonment. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). The sentence imposed was within the statutory limit of fifteen years authorized by the Legislature, MCL 769.12(1)(b); MSA 28.1084(1)(b), and was proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), *Hansford, supra* at 326. The fact that I have found defendant's sentence proportionate is further reason to avoid remanding this case for articulation because it maximizes judicial resources. *Lawson, supra* at 78; *People v Beneson*, 192 Mich App 469, 471; 481 NW2d 799 (1992).

I would affirm defendant's conviction and sentence.

/s/ Gary R. McDonald