

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEBRY ANN DAVIS,

Defendant-Appellant.

UNPUBLISHED
February 14, 2012

No. 302225
Saginaw Circuit Court
LC No. 09-032432-FH

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

PER CURIAM.

Debry Ann Davis appeals as of right her jury trial conviction of embezzlement of money or personal property totaling \$1,000 but less than \$20,000.¹ Davis was sentenced to serve six months to five years in prison. We affirm.

Davis was employed by a dentist for approximately 18 years as an office manager. The dentist became aware of patients making cash payments that were not credited to their accounts. Because he suspected that Davis was stealing money from his practice, the dentist contacted police. During the investigation, Davis was asked not to return to the office. Additional information was discovered, and Davis was arrested and charged.

On appeal, Davis argues that the prosecution failed to present sufficient evidence to prove that she converted money for her own use or had an intent to defraud. We disagree. We review challenges to the sufficiency of the evidence *de novo*, examining “the evidence in a light most favorable to the prosecution . . . and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.”²

The elements of embezzlement, under the statutory provision used to charge Davis, include:

¹ MCL 750.174(4)(a).

² *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010).

(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.³

“[C]ircumstantial evidence and reasonable inferences arising from th[e] evidence can constitute satisfactory proof of the elements of a crime.”⁴ “[W]hat inferences may be fairly drawn from the evidence” and the weight to be given to those inferences is a question left to the jury.⁵

The evidence demonstrated that various patients made cash payments to Davis' employer. Computer transactions were identified in which cash payments were added to patient accounts and then removed by someone using the “Debry Davis” username. Only the dentist and Davis were authorized to remove or change computer entries. There was no evidence that the cash payments were reinstated, or otherwise credited to the patient accounts, or that the money was deposited into the bank. Additionally, there were administrative adjustments made to patient accounts that were not authorized by the dentist during the time in question. Davis asserts that there was evidence that other individuals in the office knew her password and that some of the computer entries using Davis' username were made while she was on sick leave. Because the jury is responsible for determining the “credibility of witnesses and the weight accorded to evidence,” reversal by this Court is not warranted.⁶

Davis also asserts that the trial court erred in sentencing her to serve a prison term, as it did not provide substantial and compelling reasons for its departure from the sentencing guidelines on the record. We disagree. A trial court's determination that substantial and compelling reasons exist to depart from the sentencing guidelines is reviewed for an abuse of discretion.⁷ An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable outcomes.⁸ The factors stated by the trial court for departing from the guidelines are reviewed for clear error.⁹ Whether factors are objective and verifiable is reviewed de novo.¹⁰

³ *People v Lueth*, 253 Mich App 670, 683-684; 660 NW2d 322 (2002).

⁴ *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010) (citation omitted).

⁵ *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

⁶ *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

⁷ *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

⁸ *Id.*

⁹ *People v Horn*, 279 Mich App 31, 43; 755 NW2d 212 (2008).

¹⁰ *Id.*

If the upper limit of the recommended minimum sentence range is 18 months or less, as it was in this case, the court shall impose an intermediate sanction,¹¹ which includes probation or any sanction other than imprisonment.¹² The trial court may sentence a defendant to serve a term of incarceration in prison, if such departure from the guidelines is supported by substantial and compelling reasons stated on the record.¹³ Substantial and compelling reasons are objective and verifiable reasons that “‘keenly’ or ‘irresistibly’ grab our attention, and we should recognize them as being ‘of considerable worth’ in deciding the length of a sentence.”¹⁴ Factors are objective and verifiable if they are “based on actions or occurrences external to the minds of those involved in the decision, and must be capable of being confirmed.”¹⁵

Accordingly, the Court of Appeals must determine, upon a review of the record, whether the trial court had a substantial and compelling reason to depart from the guidelines, recognizing that the trial court was in the better position to make such a determination and giving this determination appropriate deference. The deference that is due is an acknowledgment of the trial court’s extensive knowledge of the facts and that court’s direct familiarity with the circumstances of the offender.¹⁶

The trial court compared the sentencing guidelines for embezzlement to the guidelines for other theft crimes. These comments by the trial court comprise its subjective opinion and are not substantial and compelling reasons for its departure from the guidelines. That notwithstanding, the trial court’s departure from the sentencing guidelines was supported by substantial and compelling reasons which were stated on the record.¹⁷ The trial court found that Davis had a long-standing professional relationship with her employer and held a position of trust as the office manager. While in that position, she embezzled money on numerous occasions over an extended period of time, while attempting to conceal her behavior. Her improper behavior was both voluntary and repetitive and not only victimized her employer, but also the patients who sought treatment. There was also extensive evidence that Davis was guilty of the crime charged and she sought to implicate others in the crime. Davis asserts that the trial court improperly considered that she failed to show remorse when deciding to depart from the sentencing guidelines, however, “[t]he sentencing court may consider evidence of a lack of remorse in determining an individual’s potential for rehabilitation.”¹⁸ As such, the trial court did not abuse

¹¹ MCL 769.34(4)(a).

¹² MCL 769.31(b).

¹³ *People v Muttscheler*, 481 Mich 372, 374-375; 750 NW2d 159 (2008), citing MCL 769.34(4)(a).

¹⁴ *Babcock*, 469 Mich at 257, quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995).

¹⁵ *Horn*, 279 Mich App at 43 n 6.

¹⁶ *Babcock*, 469 Mich at 270.

¹⁷ *Muttscheler*, 481 Mich at 374-375.

¹⁸ *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003).

its discretion when it departed from the sentencing guidelines and sentenced Davis to serve her sentence in prison.¹⁹

Affirmed.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Kirsten Frank Kelly

¹⁹ *Babcock*, 469 Mich at 269.