STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 23, 2014
v	No. 316951 Wayne Circuit Court
LYNNE MARIE HANDZLIK, Defendant-Appellee.	LC No. 11-009699-FH

Before: FITZGERALD, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

The prosecution appeals as of right the circuit court's order granting defendant's motion to quash the information and dismissing two counts of embezzlement by a public officer of over $50, MCL 750.175.[1] We affirm.

Defendant was the bond clerk for the 18th District Court. Her job duties included receiving the bonds from the local police department and processing those bonds through the court's administrative system. An investigation revealed three discrepancies allegedly connected to defendant. First, a $1,000 cash bond was delivered to the district court on October 19, 2010 but was not received and entered until November 4, 2010. Second, an envelope containing a $1,000 cash bond that was delivered to the district court on November 4, 2010 was found empty. Third, a different envelope containing another $1,000 cash bond that was delivered to the district court on November 5, 2010 was also found empty. As a result of the investigation, the prosecution filed a felony complaint against defendant in May 2011 charging defendant with three counts of embezzlement by a public officer. Following a preliminary examination, the 19th District Court dismissed the count relating to the delayed cash bond but bound defendant over on the remaining two counts. The prosecution filed an amended felony information reflecting two

[1] While the record before us interchangeably uses the terms "public official" and "public officer," we will consistently use the latter.

counts of embezzlement by a public official over $50.[2] Each count read as follows, with only the date of the incident differing in each count:

> On or about November 4, 2010 [the other information read November 5, 2010] defendant did, being a person holding public office in this state, knowingly and unlawfully appropriate to his/her own use, or to the use of any other person, money or property received by him/her in his/her official capacity or employment, to wit: bond receipts, of the value of $50 or more; contrary to MCL 750.175.

Defendant then brought a motion to quash the information and argued that she was not a public officer within the scope of MCL 750.175. She noted that the prosecution never suggested that she was an agent or servant of a public officer, and that the prosecution did not present any evidence at the preliminary examination to show that she was an agent or servant of a public officer.[3] The prosecution conceded that defendant was not a public officer, but argued for the first time that the chief judge of the 18th District Court was a public officer and defendant was an agent or servant of the chief judge. After a hearing on the motion, the circuit court held that the prosecution did not meet its burden "in establishing that the defendant is either a public [officer], which is how the information reads, or that she is an agent or a public servant of a public [officer] as contemplated under MCL 750.175. Thus, the court circuit held that the district court abused its discretion when it bound defendant over on the charges. The prosecution now appeals.

"A district court's ruling that alleged conduct falls within the scope of a criminal law is a question of law that is reviewed de novo for error, but a decision to bind over a defendant based on the factual sufficiency of the evidence is reviewed for an abuse of discretion." *People v Henderson*, 282 Mich App 307, 312; 765 NW2d 619 (2009). However, this Court reviews de novo any questions of law involved in the decision. *People v Hotrum*, 244 Mich App 189, 191; 624 NW2d 469 (2000). This Court does not give the circuit court's decision any deference. *Henderson*, 282 Mich App at 313. A decision that falls outside the range of principled outcomes constitutes an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008).

"The purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime was committed and whether there is probable cause to believe that the defendant committed it." *People v Cohen*, 294 Mich App 70, 74; 816 NW2d 474 (2011) (citations and internal quotation marks omitted). The prosecution must set forth some evidence on each element of the crime. *People v Henderson*, 282 Mich App at 312. "Even if the evidence conflicts or reasonable doubt exists concerning the defendant's guilt, if the prosecutor shows probable cause that the defendant committed a felony, the district court is required to bind over

---

[2] The language of Counts I and II in the amended felony information was identical to the language of Counts II and III, respectively, in the felony complaint.

[3] Defense counsel suggested, without conceding guilt, that a better charging statute would have been MCL 750.174, which proscribes embezzlement by employees.

the defendant and leave those issues for the trier of fact." *People v Baugh*, 243 Mich App 1, 5; 620 NW2d 653 (2000), rem on other grounds 465 Mich 863 (2001).

The statute penalizing embezzlement by a public officer or his or her servant or agent, MCL 750.175, reads as follows:

> Any person holding any public office in this state, or the agent or servant of any such person, who knowingly and unlawfully appropriates to his own use, or to the use of any other person, the money or property received by him in his official capacity or employment, of the value of 50 dollars or upwards, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years or by fine of not more than 5,000 dollars.
>
> In any prosecution under this section the failure, neglect or refusal of any public officer to pay over and deliver to his successor all moneys and property which should be in his hands as such officer, shall be prima facie evidence of an offense against the provisions of this section.

The elements of embezzlement by a public officer or his or her agent are: (1) the defendant either held public office or was the agent or servant of such officer, (2) the defendant received money or property in his official capacity or employment, (3) the defendant appropriated this money or property to his or her own use or to the use of another person, (4) the defendant did so knowingly and unlawfully, and (5) the money or property was valued at 50 dollars or greater. *People v Jones*, 182 Mich App 668, 672 n 1; 453 NW2d 293 (1990); see also CJI2d 27.3.

At issue in this case is the first element of the offense. No evidence was presented at the preliminary examination to show that defendant was the agent or servant of a public officer. The prosecution did not even suggest that defendant was an agent or servant of a public officer until defendant moved to quash the information. Thus, the district court abused its discretion by binding defendant over for trial because the prosecution failed to support the first element of the crime at the preliminary examination.[4]

The prosecution also argues that the trial court erred in quashing the information under MCR 6.112(G)(2), which reads in relevant part as follows:

> Absent a timely objection and *a showing of prejudice*, a court may not dismiss an information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense. [Emphasis added.]

[4] The arguments presented by the prosecution with regard to whether a bond clerk is an agent or servant of the district court or the chief judge of the district court were not presented at the time of the preliminary examination; rather, they were raised either in response to defendant's motion to quash the information or for the first time on appeal.

The prosecution concedes that the information erroneously suggested that defendant was a public officer, not a servant or agent, but argues that defendant failed to show that she was prejudiced by this error in the information. The prosecution's argument is misplaced, however, because MCR 6.112(G)(2) governs dismissal of an information for "a variance between the information and proof . . . ." In the present case, there was not a variance in proof between the information and the proofs; rather, there was an absence of proof.[5]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Donald S. Owens

[5] We also note that the prosecution never requested to amend the information to allege a different statutory violation (i.e., MCL 750.174). MCL 767.76 and MCR 6.112(H) provide for the amendment of the information to allow the prosecution to correct variances between the information and the proofs. See *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008).