**STATE OF MICHIGAN**

**IN THE DISTRICT COURT FOR THE COUNTY OF IOSCO**

PEOPLE OF THE STATE OF MICHIGAN,

vs. FILE NO. 16-707-FY

CATHERINE ANNE ANDERSON,

Defendant. /

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## BRIEF OF LAW

In this matter the Defendant is charged with the very specific charge of Embezzlement by a Public Officer, contrary to MCL. 750.175. Said statute states in its entirety:

> **750.175. Embezzlement by public officer, agent or servant**
> Sec. 175. Embezzlement by public officer, his agent, etc.
> 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.

MCL 750.175

The Michigan standard jury instructions for this charge detail the required elements:

**M Crim JI 27.3 Embezzlement by a Public Official**

(1) The defendant is charged with the crime of embezzlement by a public official. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant either held public office or was the agent or servant of a public official.

(3) Second, that the defendant received [money / property] in [his / her] official position.

(4) Third, that the defendant knew that the [money / property] was public property.

(5) Fourth, that the defendant used the [money / property] for an unauthorized purpose. It is charged in this case that the defendant used the [money / property] for [*state purpose*]. Such use of public [money / property] is unauthorized.

(6) Fifth, that [the property was worth $50 or more / more than $50 was involved].

The Court has acknowledged as it relates to the proofs at preliminary examination that it is satisfied as to all of the elements except as it relates to element four and the question of intent. The question as posed by the Court was whether using money for an unauthorized purpose creates "a strict liability" or whether there is a requirement to show "criminal intent," specifically referencing its belief of the lack of intent to defraud or intent to permanently deprive. The simple answer is that for this charge there is no requirement to show an intent to defraud or to permanently deprive. The Court creates a false choice between a strict liability offense and proof of "criminal intent" or the element of an intent to defraud or intent to permanently deprive. It is not an "either/or" situation. There is no specific "criminal intent" that must be proven; all that is required is each of the elements of the charge. Intent to defraud or intent to permanently deprive

is not an element of the charge of embezzlement by a public office, as opposed to a larceny[1] charge or even a standard embezzlement charge[2]. The fourth element in this charge does however relate to intent in this matter; which is that the Defendant "knowingly" used the money for an unauthorized purpose. People v. Fick 2008 WL 2746003. This is the requirement that the action to use the money be done knowingly, as opposed to accidentally. Id.

In 1936 the Michigan Supreme Court recognized this very issue of the fact that MCL 750.175 does not require a fraudulent intent"

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[1] M **Crim JI 23.1 Larceny**

(1) The defendant is charged with the crime of larceny. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
(2) First, that the defendant took someone else's property.
(3) Second, that the property was taken without consent.
(4) Third, that there was some movement of the property. [It does not matter whether the defendant actually kept the property or whether the property was taken off the premises].[FN 1]
(5) Fourth, that at the time the property was taken, the defendant intended to permanently deprive the owner of the property.[FN 2]
(6) Fifth, that the property had a fair market value at the time it was taken of:[FN 3]
[*Choose only one of the following unless instructing on lesser offenses*:]
(a) $20,000 or more.
(b) $1,000 or more, but less than $20,000.
(c) $200 or more, but less than $1,000.
(d) some amount less than $200.
[*Use the following paragraph only if applicable*.]
(7) [You may add together the values of property stolen in separate incidents if part of a scheme or course of conduct within a 12-month period when deciding whether the prosecutor has proved the amount required beyond a reasonable doubt.]

[2] **M Crim JI 27.1 Embezzlement by Agent or Servant**

(1) The defendant is charged with the crime of embezzlement. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
(2) First, that the [money / property] belongs to [*name principal*].[FN 1]
(3) Second, that the defendant had a relationship of trust with [*name principal*] because the defendant was [*define relationship*].[FN 2]
(4) Third, that the defendant obtained possession or control of the [money / property] because of this relationship.
(5) Fourth, that the defendant
[*Choose (a), (b), or (c)*:]
(a) dishonestly disposed of the [money / property].
(b) converted the [money / property] to [his / her] own use.
(c) took or hid the [money / property] with the intent to convert it to [his / her] own use without the consent of [*name principal*].
(6) Fifth, that at the time the defendant did this, [he / she] intended to defraud or cheat [*name principal*] of some property.[FN 3]
(7) Sixth, that the fair market value of the property or amount of money embezzled was:[FN 4]
[*Choose only one of the following unless instructing on lesser offenses.*]
(a) $20,000 or more.
(b) $1,000 or more, but less than $20,000.
(c) $200 or more, but less than $1,000.
(d) some amount less than $200.
[*Use the following paragraph only if applicable*:]
(8) [You may add together the value of property or money embezzled in separate incidents if part of a scheme or course of conduct (within a 12-month period)[FN 5] when deciding whether the prosecutor has proved the amount required beyond a reasonable doubt.]
*Use Note*
1. The principal must be someone other than the defendant.
2. The statute lists agent, servant, employee, trustee, bailee, or custodian. See the table of contents to chapter 22 on page 22-1 for a list of definitions that may be used.
3. This is a specific intent crime. The defendant's intent to return or replace the money at a later time does not provide a defense. *People v Butts*, 128 Mich 208, 87 NW 224 (1901).
4. The Fair Market Value Test, CJI 22.1, should be given when applicable.
5. The 12-month time limit does not apply if the embezzlement scheme or course of conduct was directed against only one legal entity. In those cases, with one victim, do not include the parenthetical phrase referring to the 12-month period.

> The people state in their brief that the prosecution was under the general section, 174, and appellant says the prosecution, if any, should have been under the public officer section, 175, Michigan Penal Code. Under the latter section, proof is required that the accused knowingly and unlawfully appropriated to his own use, etc., while under the former it is necessary to show fraudulent intent.

People v Hopper, 274 Mich. 418, 423 (1936).

The Michigan Supreme Court also early on rejected the argument that the predecessor statute required an element to permanently deprive:

> The statute under which this information is filed reads as follows: 'The people of the state of Michigan enact: That if any person holding any public office in this state, or if the agent or servant of such person, knowingly or 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 fifty dollars or upwards, the person so offending shall be deemed guilty of a felony, and shall, upon conviction, be punished by an imprisonment in the state prison at hard labor, not to exceed ten years, or by fine not exceeding five thousand dollars, or both said fine and imprisonment.' 3 How. Ann. St. § 9263a. It is the claim of the attorney of respondent in relation to this statute that before one can come within its provisions, so as to make himself a felon, he must knowingly and unlawfully appropriate the money to his own use, or to the use of some other person, with an intent to so appropriate it as to forever exclude the rightful owner from its use and possession. We do not think the statute is susceptible of such construction.

People v Warren, 122 Mich. 504, 520–21 (1899).

The Michigan Supreme Court made clear that this statute applies just as in this case, when the money is used for any other purpose that the public purpose:

> It cannot be said of most men that when they use public funds they mean to permanently retain them. Experience shows that frequently they are lost because used for speculative purposes; the user expecting to return them, but failing to do so because his speculation did not turn out as he expected. The intention of the statute was to prevent any public official from using money or property coming to him in his official capacity for any other purpose than the purpose for which it came to him. If he does knowingly use it, or permit others to do so, for other purposes than the one for which it was intrusted to him, then he comes within the provisions of the statute.

People v Warren, 122 Mich. 504, 521–22 (1899).

Further there is no defense of the return of the money or belief that there was permission, further noting that there was no evidence presented in this matter of permission by the public to use public money for private purposes.

> In *People v. Glazier,* 159 Mich. 528, 546; 124 NW 582 (1910), our Supreme Court interpreted 1897 CL 11612 and held that "the adverb 'knowingly' used in the statute was intended to exclude from the definition of the offense mistakes of fact, accidents, such as the loss of the money by fire or other casualty, or inadvertent appropriations," and that the provisions of the law "plainly imply that a felonious intent is not an element of the crime." The *Glazier* Court went on further to state:
> In our opinion it was the intention of the legislature to provide that any public officer, who devoted the public funds in his custody and control to any other purpose than those to which the law authorized their appropriation, must account for them to his successor, or be guilty of a felony, *no matter how good his intentions may have been. [Id.* (emphasis added).]
> This position was then reaffirmed in *People v. Hopper,* 274 Mich. 418, 423; 264 NW 849 (1936) ("Under the latter section [MCL 750.175], proof is required that the accused knowingly and unlawfully appropriated to his own use, etc., while under the former [MCL 750.174] it is necessary to show fraudulent intent"). The Supreme Court has not altered its interpretation of the word "knowingly" as the word is used in MCL 750.175. The trial court properly relied on these cases when it denied defendant's request for an intent instruction. Defendant quotes CJI 27:2:01, the predecessor of CJI2d 27.3, for jury instructions on "unlawfully" and "knowingly." Specifically, the instructions include the following definitions: "Knowingly means that the defendant knew the property [money] was public property. Unlawfully means that the defendant used the property [money] for an unauthorized purpose." CJI 27:2:01(6). This language supports the conclusion that the jury instructions given by the trial court were proper. Although the trial court did not include the specific language "that defendant did so knowingly and unlawfully" in its instructions, the third and fourth elements of the offense as set forth by the trial court in the instructions given at trial are almost exact replications of the above definitions. Thus, it does not appear that, if there was any error, the error requires reversal. "[T]he charge as a whole covers the substance of the omitted instruction." *Canales, supra .*
> Furthermore, the lack of a fraudulent intent does not transform the offense into a strict liability crime. "For a strict-liability crime, the people need only prove that the act was performed regardless of what the actor knew or did not know." *People v. Lardie,* 452 Mich. 231, 240–241; 551 NW2d 656 (1996), overruled on other grounds *People v. Schaefer,* 473 Mich. 418 (2005). Here, defendant could not be convicted without regard to his knowledge. The prosecution, as evidenced

> by the trial court's jury instructions, was required to prove that defendant knew the gasoline was public property. See CJI 27.3(4).

People v Fick, No. 276770, 2008 WL 2746003, at *3–4 (Mich Ct App July 15, 2008)

Returning the funds does not negate the crime, nor does another's knowledge that funds were used and returned.

> This testimony discloses, as plainly as words can express, that while respondent was secretary of the company funds belonging to the company came into his possession, which he appropriated to his own use; not inadvertently, and unintentionally, but designedly and intentionally, knowing the funds belonged to the company, and not to himself. Taking his own version of the transaction, there is not a single element of the offense described by the statute lacking. Act No. 114, Pub. Acts 1897; People v. Warren, 122 Mich. 504, 81 N. W. 360. It is true, the respondent says he intended to return the money, but that does not do away with the offense. It is doubtless true that nearly every employé who misappropriates funds intends to return them to his employer, and to do this before the misappropriation is discovered. But this intention does not prevent the act from becoming a crime. The crime consists in the intentional appropriation of the money by the employé of the employer. It is true, too, that respondent claims that one or more of the directors of the company knew what he was doing, and did not object to it. This is denied by the other officers of the company, but, whether true or false, it does not excuse the defendant.

People v Butts, 128 Mich. 208, 214 (1901).

This statute's purpose is to protect public money from this very type of misuse as occurred in this matter and presented to the Court at preliminary examination.

> "The intention of the statute was to prevent any public official from using money or property coming to him in his official capacity for any other purpose than the purpose for which it came to him. If he does knowingly use it, or permit others to do so, for other purposes than the one for which it was intrusted to him, then he comes within the provisions of the statute." *People v. Warren,* 122 Mich. 504, 521-522, 81 N.W. 360 (1899).
> Moreover, in analyzing a provision in the statute governing embezzlement by an agent or servant, M.C.L. § 750.174; M.S.A. § 28.371, which is similar to the second paragraph in § 175, for an equal protection violation the panel in *Rafalko* stated:
> While such an argument is truly novel, a careful consideration of the presumption itself has been ignored. Underlying the entire thesis is the supposition that an alleged embezzler capable of returning the money may escape legal consequences

> for his crime. We do not so read the statute. *The first section of the statute is complete in itself.* The requirement of intent is provable in the same manner as any statute requiring intent. The facts of the case at hand reveal that no advantage is given the purported embezzler who is able to return the monies taken upon demand. *The fact that these monies are returned does not allow an individual to escape prosecution and conviction, for he can be prosecuted under the first paragraph of the statute without the aid of the presumption.* The second paragraph is not an exculpatory clause allowing escape from prosecution if restitution is made.

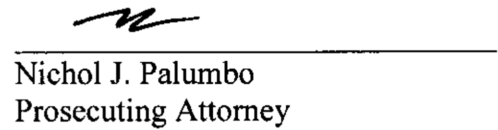
People v Jones, 182 Mich. App 668, 670–71 (1990).

There is no contradiction that in 2011/2012 the Defendant on multiple occasions used public money for her own personal use, including for her doctor's appointment, by both her own statements and those of the witness the amount was over $50.00. It is those intentional acts that satisfy the fourth element. At preliminary examination all that is necessary for bind over is that sufficient evidence be presented as it relates to each element of the crime charged, and not any other elements of uncharged crimes. "It is clear from these decisions, especially *Asta* and *Doss,* that the magistrate is *not* required to find that the evidence at the time of the preliminary examination proves the defendant's guilt beyond a reasonable doubt in order to bind the defendant over for trial on the charge.

Despite this rather low level of proof, the magistrate must always find that there is "evidence regarding each element of the crime charged or evidence from which the elements may be inferred" in order to bind over a defendant. *People v. Selwa,* 214 Mich. App. 451, 457, 543 N.W.2d 321 (1995). If the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt, the magistrate must let the factfinder at trial resolve those questions of fact. This requires binding the defendant over for trial." People v Hudson, 241 Mich. App. 268, 278 (2000).

Therefore, while there is an element involving intent; it is simply to knowingly use the money for a purpose other than a "public use" as opposed to accidentally using it. This does not mean that it is a strict liability statute, nor does it create a requirement to show an intent to defraud or an intent to permanently deprive. In this matter the requisite burden of proof has been met as to each element, and the Court is obligated to bind the matter over to Circuit Court.

Dated: 9/13/16



Nichol J. Palumbo
Prosecuting Attorney

2008 WL 2746003
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff–Appellee,
v.
Joseph C. FICK, Defendant–Appellant.

Docket No. 276770.
|
July 15, 2008.

Ogemaw Circuit Court; LC No. 06–002658–FH.

Before: SAWYER, P.J., and JANSEN and HOEKSTRA, JJ.

**Opinion**

PER CURIAM.

***1** Following a jury trial, defendant was convicted of embezzlement by a public officer, MCL 750.175. Defendant appeals as of right. Because defendant's conviction is supported by sufficient evidence, there was no discovery violation, and because an intent to defraud is not an element of the offense, nor is the offense a strict liability offense, we affirm.

Defendant first claims that there is insufficient evidence to sustain his conviction. A challenge to the sufficiency of the evidence is reviewed de novo. *People v. Cline*, 276 Mich.App 634, 642; 741 NW2d 563 (2007). We view the evidence in a light most favorable to the prosecution to determine if a reasonable jury could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* Circumstantial evidence and reasonable inferences drawn therefrom can constitute satisfactory proof of the elements of a crime. *People v. Lee*, 243 Mich.App 163, 167–168; 622 NW2d 71 (2000).

The elements of embezzlement by a public officer are: (1) that the defendant held public office or was the agent or servant of a public officer; (2) that he received money or property in his official capacity; (3) that he appropriated the money or property for his own use or that of some other person; (4) that he did so knowingly and unlawfully; and (5) that the value was $50 or more. MCL 750.175; see also CJI2d 27.3. Defendant only argues there was insufficient evidence for the jury to find beyond a reasonable that he unlawfully appropriated county property for his own use.

Evidence was presented that defendant was issued personal gas card number 2755153 and vehicle gas card number 22. The vehicle gas card was issued for defendant's personal vehicle. The gas cards were to be used only for official county business and not volunteer activities. After June 2005, defendant was no longer authorized to use his personal vehicle for county business. [1] Timesheets filled out by defendant evidenced the days that he reported he had worked in October, November, and December 2005. Itemized gas records from Pacific Pride showed when defendant's gas cards were used to purchase gasoline. The records indicated that, during October through December 2005, defendant used his vehicle gas card on nine days that he did not work. [2] Six of the purchases were for 19.6 gallons of gasoline. However, no county fleet vehicle, other than the jail van and the animal control truck, could hold 19.6 gallons of gasoline. Defendant was not assigned to either the corrections or animal control departments during October, November, or December 2005. Further, Larry DeAugustine testified that, on November 3, 2005, defendant, at a Pacific Pride gas station, put gasoline in his personal vehicle and then used the vehicle for personal errands rather than county business. Viewing this evidence in a light most favorable to the prosecution, a reasonable jury could have found that defendant unlawfully appropriated county property to his own use beyond a reasonable doubt. *Cline, supra.* Defendant's conviction is supported by sufficient evidence.

***2** Defendant next claims that the trial court abused its discretion in denying his request to admit into evidence the September 2005 billing statement of gas purchases. Defendant further contends the trial court's refusal to admit the billing statement into evidence deprived him of his right to present a defense. However, because defendant withdrew the exhibit prior to the trial court's ruling, the issue is waived, see *People v. Goddard*, 135 Mich.App 128, 138; 352 NW2d 367 (1984), rev'd on other grounds 429 Mich. 505 (1988), and we decline to review it. [3]

Defendant also claims that he was denied his right to a fair trial by the surprise testimony of an undisclosed statement and by defense counsel's failure to request a mistrial or continuance in light of the statement. We disagree. We review the admission or exclusion of evidence by the trial court for an abuse of discretion. *People v. Bauder,* 269 Mich.App 174, 179; 712 NW2d 506 (2005). A trial court abuses its discretion when its action falls outside the principled range of outcomes. *People v. Carnicom,* 272 Mich.App 614, 616–617; 727 NW2d 399 (2006).

Defendant argues that the prosecution violated MCR 6.201(B) when it failed to provide him with his statement to Sheriff Howie Hanft that, upon submitting a letter of resignation, he offered to pay for the gasoline.[4] MCR 6.201(B) provides in relevant part:

> Upon request, the prosecuting attorney must provide each defendant:
>
> * * *
>
> (3) any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial[.]

The term "statement" is not defined in MCR 6.201. *People v. Holtzman,* 234 Mich.App 166, 176; 593 NW2d 617 (1999). However, the definition of "statement" contained in MCR 2.302 is incorporated by reference into the rules of criminal procedure. *Id.* at 176–177. Pursuant to MCR 2.302(B)(3)(c), a "statement" is either of the following:

> (i) A written statement signed or otherwise adopted or approved by the person making it; or
>
> (ii) a stenographic, mechanical, electrical, or other recording, or a transcription of it, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Here, because defendant's offer was not evidenced in any writing signed, adopted or approved by defendant, nor was defendant's offer contemporaneously recorded, it was not a "statement" as defined by the court rules. Consequently, defendant's argument that he was denied a fair trial by the prosecution's failure to comply with MCR 6.201(B) is without merit.

Even if a discovery violation had occurred, we would not find that the trial court erred in refusing to prohibit Hanft from testifying about defendant's offer to pay for the gasoline. When deciding the appropriate remedy for a discovery violation, a trial court must balance the interests of the public, the court, and the parties in light of all relevant circumstances. *People v. Greenfield (On Reconsideration),* 271 Mich.App 442, 454 n 10; 722 NW2d 254 (2006). In addition, the complaining party must show that the violation caused him actual prejudice. *Id.* Although defendant claims that, by the prosecution's failure to disclose his offer, defense counsel had an inadequate opportunity to prepare, he did not indicate what, if anything, would have been done differently had defendant's offer been disclosed. Accordingly, defendant failed to meet his burden of showing actual prejudice.

***3** Defendant has only given cursory treatment to his claim of ineffective assistance of counsel.[5] Accordingly, defendant has abandoned the issue. See *People v. Matuszak,* 263 Mich.App 42, 59; 687 NW2d 342 (2004). In any event, based on the record,[6] the claim lacks merit. Because there was no discovery violation, a motion for a mistrial would have been meritless. Counsel is not required to advocate a meritless position. *People v. Snider,* 239 Mich.App 393, 425; 608 NW2d 502 (2000). Moreover, counsel's own statements to the trial court indicate that his choice not to request a mistrial was a matter of trial strategy. We will not second-guess counsel on matters of trial strategy, nor we will assess counsel's competence with the benefit of hindsight. *People v. Rice (On Remand),* 235 Mich.App 429, 444–445; 597 NW2d 843 (1999). Defendant was not denied the effective assistance of counsel.

Defendant's final two claims relate to the intent element of the charged offense. Defendant argues that the trial court erred by denying his request for a jury instruction on intent because intent to defraud is an essential element of the charged offense. Defendant concludes that if MCL 750.175 is not interpreted to require an intent to defraud, embezzlement by a public officer becomes an unconstitutional strict liability offense. We review de novo claims of instructional error. *People v. Hubbard (After Remand),* 217 Mich.App 459, 487; 552 NW2d 493 (1996). Whether a statute imposes strict liability or requires proof of *mens rea* requires a review of the statute to determine the Legislature's intent. *People v. Quinn,* 440 Mich. 178, 185; 487 NW2d 194 (1992). Statutory interpretation is a

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question of law that is also reviewed de novo. *People v. Derror,* 475 Mich. 316, 324; 715 NW2d 822 (2006). A jury must be instructed on all the elements of the charged offense. *People v. Canales,* 243 Mich.App 571, 574; 624 NW2d 439 (2000). However, "[e]rror does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction." *Id.*

We conclude that the trial court's jury instructions were proper and that such instructions did not render MCL 750.175 a strict liability crime. In *People v. Glazier,* 159 Mich. 528, 546; 124 NW 582 (1910), our Supreme Court interpreted 1897 CL 11612[7] and held that "the adverb 'knowingly' used in the statute was intended to exclude from the definition of the offense mistakes of fact, accidents, such as the loss of the money by fire or other casualty, or inadvertent appropriations," and that the provisions of the law "plainly imply that a felonious intent is not an element of the crime." The *Glazier* Court went on further to state:

> In our opinion it was the intention of the legislature to provide that any public officer, who devoted the public funds in his custody and control to any other purpose than those to which the law authorized their appropriation, must account for them to his successor, or be guilty of a felony, *no matter how good his intentions may have been. [Id.* (emphasis added).]

> *4 This position was then reaffirmed in *People v. Hopper,* 274 Mich. 418, 423; 264 NW 849 (1936) ("Under the latter section [MCL 750.175], proof is required that the accused knowingly and unlawfully appropriated to his own use, etc., while under the former [MCL 750.174] it is necessary to show fraudulent intent"). The Supreme Court has not altered its interpretation of the word "knowingly" as the word is used in MCL 750.175. The trial court properly relied on these cases when it denied defendant's request for an intent instruction.

Defendant quotes CJI 27:2:01, the predecessor of CJI2d 27.3, for jury instructions on "unlawfully" and "knowingly." Specifically, the instructions include the following definitions: "Knowingly means that the defendant knew the property [money] was public property. Unlawfully means that the defendant used the property [money] for an unauthorized purpose." CJI 27:2:01(6). This language supports the conclusion that the jury instructions given by the trial court were proper. Although the trial court did not include the specific language "that defendant did so knowingly and unlawfully" in its instructions, the third and fourth elements of the offense as set forth by the trial court in the instructions given at trial are almost exact replications of the above definitions.[8] Thus, it does not appear that, if there was any error, the error requires reversal. "[T]he charge as a whole covers the substance of the omitted instruction." *Canales, supra* .

Furthermore, the lack of a fraudulent intent does not transform the offense into a strict liability crime. "For a strict-liability crime, the people need only prove that the act was performed regardless of what the actor knew or did not know." *People v. Lardie,* 452 Mich. 231, 240–241; 551 NW2d 656 (1996), overruled on other grounds *People v. Schaefer,* 473 Mich. 418 (2005). Here, defendant could not be convicted without regard to his knowledge. The prosecution, as evidenced by the trial court's jury instructions, was required to prove that defendant knew the gasoline was public property. See CJI 27.3(4).

Affirmed.

**All Citations**

Not Reported in N.W.2d, 2008 WL 2746003

Footnotes

1 Defendant, however, retained possession of his personal gas vehicle card.

2 The county paid the bills that included defendant's gas usage.

3 In any event, the trial court properly found that the September 2005 billing statement was irrelevant. The existence of evidence showing days that defendant was scheduled to work when he pumped gasoline using vehicle card 22 did not make any fact of consequence more or less probable. MRE 401.

4 The prosecutor told the trial court that Hanft's trial testimony was "pretty much" the first time she had heard that defendant had offered to pay for the gasoline.

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5 Defendant's argument consists of one sentence and one citation. Defendant does not even identify which portion of the identified case supports his claim.

6 Because defendant did not request a *Ginther* hearing, *People v. Ginther,* 390 Mich. 436; 212 NW2d 922 (1973), our review of defendant's claim "is limited to mistakes that are apparent on the record." *People v. Mack,* 265 Mich.App 122, 125; 695 NW2d 342 (2005).

7 This statute, the predecessor of MCL 750.175, is essentially worded the same as MCL 750.175.

8 The trial court instructed the jury:

> Third, that the defendant knew the gasoline was public property;
>
> Fourth, the defendant used the gasoline for an unauthorized use. The charge in this case is the defendant used the gas for personal use, such use of public gasoline is unauthorized.

**End of Document**

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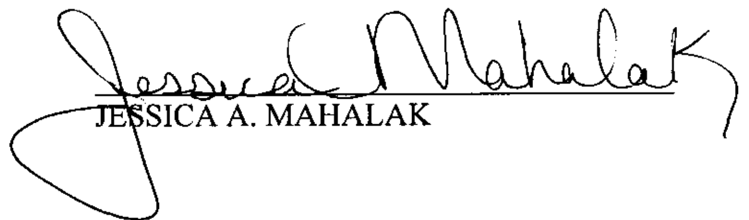
**PROOF OF SERVICE**

JESSICA A. MAHALAK hereby verifies that on the 13th day of September, 2016, she served a copy of the BRIEF OF LAW, upon Michael J. Nichols, Attorney for Defendant, by placing it in the United States mail, postage prepaid, properly addressed to: Michael J. Nichols, Nichols Law Firm, PLLC, 3452 East Lake Lansing Rd., East Lansing, MI 48823.

DATED: 09-13-2016



JESSICA A. MAHALAK