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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1401**

State of Minnesota,
Appellant,

vs.

Jeffrey Peter Pohl,
Respondent.

**Filed January 2, 2018
Affirmed
Bjorkman, Judge**

Kandiyohi County District Court
File No. 34-CR-17-149

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Shane D. Baker, Kandiyohi County Attorney, Aaron P. Welch, Assistant County Attorney, Willmar, Minnesota (for appellant)

Mark D. Nyvold, Fridley, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

In this pretrial prosecution appeal, the state argues that the district court erred by dismissing the theft-by-swindle and theft-by-false-representation charges against

respondent for lack of probable cause. Respondent contends that this court lacks jurisdiction because the challenged order is based solely on a factual determination. We affirm.

FACTS

In June 2015, P.L. contacted Heritage Exteriors and Restoration Centers to obtain an estimate for cabin repairs. Heritage sent employee-respondent Jeffrey Pohl to assess the project and estimate the cost of repairs. Pohl told P.L. that Heritage was too busy and short-handed to do the work but that he could do it after hours. P.L. asked if the work would still be done by Heritage and whether it would be warranted by Heritage. Pohl replied that the work would be warranted, but he did not specify the person or entity who would provide the warranty. Pohl completed the repairs in four days. At Pohl's request, P.L.'s wife paid for the work with a \$4,500 check made out to "Cash." Pohl provided a generic receipt with "Heritage" written on the top.

A few months later, another Heritage employee discovered an invoice from a material supplier that identified "Jeff-Heritage" under the job name and listed P.L.'s cabin as the shipping address.¹ When Heritage confronted Pohl about the invoice, he lied and said that he obtained the materials for a friend.

In August 2016, P.L. contacted Heritage because the roof of his cabin was leaking and he wanted Heritage to honor the warranty. After reviewing its records, Heritage discovered that it had not performed work for P.L. Although Heritage learned that Pohl

¹ Pohl ordered the materials for P.L.'s project through Heritage, but paid for them with his own money.

had done the work on the side and pocketed the money, it agreed to honor the warranty and sent out an employee to make the necessary repairs.²

Appellant State of Minnesota charged Pohl with (1) theft by swindle and (2) theft by false misrepresentation. The complaint asserts Heritage was the victim of both offenses. Pohl challenged probable cause as to both charges. After a hearing, the district court dismissed both charges for lack of probable cause. The state appeals.

D E C I S I O N

In a pretrial appeal, we will only reverse if the state clearly shows that the district court erred in its judgment, and that, unless reversed, the error will have a critical impact on the outcome of the trial. *State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001). Dismissal of a criminal complaint satisfies the critical-impact requirement. *State v. Dendy*, 598 N.W.2d 4, 6 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999).

I. The dismissal order is appealable.

The state's ability to appeal a criminal case is limited. *State v. Rourke*, 773 N.W.2d 913, 923 (Minn. 2009). Under Minn. R. Crim. P. 28.04, subd. 1(1), the prosecution "may appeal a dismissal for lack of probable cause only if the dismissal is based on questions of law." *State v. Barker*, 888 N.W.2d 348, 352-53 (Minn. App. 2016) (quotation omitted). This rule is grounded in the notion that the state may reinstate charges dismissed based on factual insufficiency by other means, such as obtaining "other evidence that establishes

² Heritage estimates its lost profit to be \$2,395.94 (\$4,500 payment reduced by \$2,304.06 in material and labor costs) and claims its out-of-pocket loss is \$315 (labor and costs to repair the roof).

sufficient probable cause to prosecute” and then reissuing the complaint. *State v. Duffy*, 559 N.W.2d 109, 110 (Minn. App. 1997). But when a probable-cause dismissal is based on a district court’s assessment of the elements of the offense, statutory construction, or another legal issue, a question of law is presented and this court has jurisdiction. *State v. Tice*, 686 N.W.2d 351, 353 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

Pohl argues that this probable-cause dismissal is not appealable because it is based solely on a factual determination. He cites *Duffy* and *State v. Estrella*, 700 N.W.2d 496 (Minn. App. 2005), for the proposition that a district court’s application of a criminal statute to the facts of a case is a fact-based decision that is not subject to appellate review. We are not persuaded. In both *Estrella* and *Duffy*, the district court dismissed the charges because the state had not marshalled the evidence to support the charges. *Estrella*, 700 N.W.2d at 499 (dismissing charge because state did not allege the requisite evidence to support a racketeering charge); *Duffy*, 559 N.W.2d at 111 (dismissing charge because the complaint lacked evidence of an overt act in furtherance of a conspiracy to commit controlled-substance offense).

In contrast, the district court here concluded that the undisputed facts do not fit the elements of the charged offenses. In other words, the district court applied the law to the undisputed facts. *State v. Moe*, 498 N.W.2d 755, 758 (Minn. App. 1993). Unlike *Estrella* and *Duffy*, there is no more evidence for the state to provide; thus, the probable-cause dismissal is appealable. *See State v. Gerring*, 418 N.W.2d 517, 519-20 (Minn. App. 1988) (concluding that the probable-cause dismissal bars prosecution because the state “has no

additional evidence with which to re-charge” the defendant, and thus it is an appealable order).

II. The charged offenses are not supported by probable cause.

Dismissal of criminal charges for lack of probable cause is warranted where the facts in the record, if proven, would require the district court to grant a motion for a judgment of acquittal. *See State v. Gerard*, 832 N.W.2d 314, 317 (Minn. App. 2013), *review denied* (Minn. Sept. 17, 2013) (stating when dismissal is not warranted). But a district court is not allowed to invade the province of the jury when determining whether probable cause exists. *See State v. Hegstrom*, 543 N.W.2d 698, 703 (Minn. App. 1996) (holding district court erred by assessing the relative credibility and weight of conflicting evidence), *review denied* (Minn. Apr. 16, 1996). We review a district court’s decision to dismiss charges based on a lack of probable cause *de novo*. *Gerard*, 832 N.W.2d at 317.

The state argues that the district court did not consider all of the evidence in dismissing Pohl’s charges for lack of probable cause. Specifically, the state argues that the district court failed to consider that (1) Pohl represented himself to P.L. as an employee of Heritage, (2) P.L. asked if it would be a “Heritage job” and Pohl responded in the affirmative, (3) the warehouse order for job materials listed “Jeff-Heritage” as the job name and P.L.’s shipping address, (4) the handwritten receipt Pohl gave to P.L. after completing the job had the word “Heritage” on the top, and (5) Pohl lied to Heritage about the warehouse order with his name that listed P.L.’s address. We see no support in the record for the state’s contention that the district court did not consider this evidence. And because Pohl does not challenge the state’s version of the relevant facts and our standard of review

is de novo, any purported deficiency in the district court's express findings is irrelevant. Accordingly, we turn to whether probable cause supports the two charged offenses.

Theft by Swindle

A person commits theft by swindle when he, “by swindling, whether by artifice, trick, device, or any other means, obtains property or services from another person.” Minn. Stat. § 609.52, subd. 2(a)(4) (2014). To establish this offense, the state must prove the defendant had an affirmative intent to defraud. *State v. Flicek*, 657 N.W.2d 592, 598 (Minn. App. 2003).

The state first argues that this case is similar to *State v. Saybolt*, in which this court affirmed an employee's conviction for theft by swindle. 461 N.W.2d 729, 734-35 (Minn. App. 1990), *review denied* (Minn. Dec. 17, 1990). Cargill Metals instructed employee Saybolt to sell off the company's stock of zinc concentrate. *Id.* at 731. Saybolt decided to set up a shell corporation, conceal himself as the principal, sell the zinc concentrate to his shell corporation at a discounted rate, and then resell the zinc concentrate for a higher price. *Id.* Saybolt's scheme was discovered before he was able to carry it out. On appeal, Saybolt challenged whether the “value” of his swindle exceeded the \$35,000 statutory threshold. *Id.* at 733-34. This court concluded that ample evidence in the form of expert testimony supported the jury's verdict. *Id.* at 734-35.

We are not persuaded that *Saybolt* has any application here. Saybolt's scheme was designed to deprive his employer of its property—namely, the full value of its zinc concentrate supply. In contrast, Pohl did not deprive the alleged victim of the swindle,

Heritage, of its property. Heritage did not own the potential job that P.L. initially called Heritage about or any potential profits from that job.

The state next asserts that the evidence the district court allegedly failed to consider establishes the elements of theft by swindle. We disagree. None of the evidence the district court ostensibly “missed” is legally relevant. Most of the evidence solely relates to Pohl’s conduct vis-à-vis P.L., who is not the purported swindle victim. And Pohl’s lie regarding a warehouse order only demonstrates that Pohl paid for the supplies he used on P.L.’s job. In short, none of the evidence the state cites establishes that Pohl obtained property or services from Heritage by swindle or any other means.

Finally, the state contends that this court should apply civil law principles governing an employee’s implied duty of loyalty to his employer when assessing a theft-by-swindle offense. *See Rehab. Specialists, Inc. v. Koering*, 404 N.W.2d 301, 304 (Minn. App. 1987) (stating employees owe their employers an implied duty of loyalty). The state notes that the statutory definition of this offense is intentionally broad and is “intended to reach cheats and swindlers of all kinds and descriptions.” *State v. Wells*, 265 Minn. 212, 214, 121 N.W.2d 68, 69 (1963). But we are not persuaded that this definition is broad enough to encompass an employee’s breach of loyalty that did not deprive the employer of property or services. We do not doubt Heritage’s assertion that Pohl usurped the opportunity to perform work for P.L., but any remedy lies in a civil action rather than in the criminal-justice system.

On this record, we discern no error by the district court in dismissing the theft-by-swindle charge for lack of probable cause.

Theft by False Representation

Theft by false representation³ occurs when a person obtains “possession, custody, or title to property of or performance of services by a third person by intentionally deceiving the third person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made.” Minn. Stat. § 609.52, subd. 2(a)(3) (2014). The state argues that much of the analysis under the theft-by-swindle charge applies to the theft-by-false-representation charge and that Pohl’s violation of his civil implied duty of loyalty to Heritage is enough for a district court to find probable cause.

We disagree. Heritage did not own or have a property interest in P.L.’s potential patronage at the time Pohl repaired P.L.’s cabin. And, more importantly, Heritage did not provide services to Pohl or anyone else in reliance on a knowingly false representation made by Pohl. In sum, Pohl did not obtain “possession, custody, or title to property of or performance of services by” the victim, Heritage. The district court did not err in determining that the charge of theft by misrepresentation is not supported by probable cause.

Affirmed.

³ The state’s brief refers to the charge as “theft by false misrepresentation,” whereas the district court terms the crime “theft of services.” Both the state and the district court are referring to the same statute.