IN THE SUPREME COURT OF THE STATE OF NEVADA

CATHY KOLSCH A/K/A CATHLEEN MICHELLE KOLSCH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51552

FILED

APR 14 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of attempted theft. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

The district court sentenced appellant Cathleen Michelle Kolsch to a maximum prison term of 32 months, with a minimum parole eligibility after 12 months. Kolsch appeals her judgment of conviction on various grounds, including the sufficiency of the evidence, the prosecution's questioning Kolsch about other witnesses' veracity, and the exclusion of certain evidence. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition. We determine that all of Kolsch's contentions are without merit. Therefore, we affirm the lower court's judgment of conviction.

Sufficiency of the evidence

Kolsch challenges the sufficiency of the evidence supporting her attempted theft conviction. After reviewing the record, we conclude that the State presented sufficient evidence for any rational trier of fact to convict Kolsch of attempted theft.

A conviction is supported by sufficient evidence if "'after viewing the evidence in the light most favorable to the prosecution, any

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Here, Kolsch was convicted of attempted theft under NRS 193.330[1] and NRS 205.0832.[2] Pursuant to those statutes, the State was required to prove that Kolsch intended, but failed, to accomplish control of "any property of [the County] with the intent to deprive [the County] of the property." NRS 205.0832(1)(a); see NRS 193.330. We determine that the State met this burden.

When Kolsch was out of the office on vacation, one of her supervisors discovered that nearly $500 was missing from the ambulance account. Kolsch testified that when she was on vacation, she received a phone call from her co-employee notifying Kolsch that supervisors were searching through her desk. Upon Kolsch's return, her supervisors questioned her about the missing money. Kolsch admitted to taking the money, stating that she needed it for a trip. She then handed her supervisors $500. Kolsch's supervisor testified that Kolsch was not authorized to take any money from the account.

Based on this evidence, we determine that the State demonstrated that Kolsch, by taking the County's money for her personal

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[1]The attempt statute, NRS 193.330(1), provides, "An act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime."

[2]NRS 205.0832(1) provides, in pertinent part: "[A] person commits theft if, without lawful authority, he knowingly: (a) Controls any property of another person with the intent to deprive that person of the property."

benefit, intended to control a portion of the County's funds, and to deprive the County of the money, but that she failed to deprive the County of the money because her supervisors discovered that the funds were missing, which forced Kolsch to return $500 to her supervisors. Because Kolsch had control of the money before she left for her vacation, the jury was entitled to believe that Kolsch intended to commit the theft, but that she failed to accomplish the crime because Kolsch's supervisors discovered that the money was missing. Moreover, while this court has stated that juries may not be instructed on the issue, this court has stated that "'a jury is entitled to extend lenity and convict of the lesser offense'" and has upheld convictions based on such. Cf. Fiegehen v. State, 121 Nev. 293, 301, 113 P.3d 305, 310 (2005) (quoting Graham v. State, 116 Nev. 23, 31 n.8, 992 P.2d 255, 260 n.8 (2000)) (where this court upheld a conviction of a lesser offense when the evidence supported both first- and second-degree murder). As a result, there was sufficient evidence to support Kolsch's attempted theft conviction.

The State's questioning about the veracity of other witnesses

Kolsch argues that the State asked her to comment on the credibility of the State's witnesses, in violation of this court's decision in Daniel v. State, 119 Nev. 498, 517-19, 78 P.3d 890, 903-04 (2003). While the State did question Kolsch as to the veracity of prior witnesses, we conclude that the questioning was proper under Daniel.

Kolsch failed to object to this line of questioning by the State in every instance; thus, we review Kolsch's challenge on appeal for plain error and whether that error affected her substantial rights. See Nelson v. State, 123 Nev. ____, ____, 170 P.3d 517, 524 (2007). In Daniel, this court adopted a rule that bars prosecutors from questioning a defendant about

"whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying." 119 Nev. at 519, 78 P.3d at 904. However, the prosecutor may ask the defendant about the veracity of other witnesses "where the defendant during direct examination has directly challenged the truthfulness of those witnesses." Id.

Here, the State questioned Kolsch about whether the testimony of three of the State's witnesses was untrue. However, in each instance where the State questioned Kolsch about another witness's veracity, the State's questioning followed Kolsch's answers on direct examination that contravened the prior witness's testimony. Accordingly, because Kolsch directly challenged the testimony from the prior witnesses, we conclude that the district court did not err by permitting the State to question Kolsch about the veracity of prior witnesses' testimony.

Exclusion of evidence

Kolsch argues that the district court's decision to exclude 36 checks that Kolsch had written to reimburse the County was error. We disagree.[3]

This court reviews a district court's decision to exclude evidence in a criminal case for abuse of discretion. Means v. State, 120 Nev. 1001, 1007-08, 103 P.3d 25, 29 (2004). Thus, "'this court will not

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[3]Kolsch also challenges the district court's decision to exclude the checks under NRS 48.035(1). The district court reasoned that exclusion was warranted because of the possibility that the checks would confuse the jury because, if Kolsch solely violated company policy (by cashing checks with the ambulance fund), then while she might have been reprimanded by the company, it would not have necessarily been a violation of the law. We agree with the district court, and conclude that the district court did not err by excluding the checks. See NRS 48.035(1).

overturn [the district court's] decision absent manifest error.'" Id. at 1008, 103 P.3d at 29 (alteration in original) (quoting Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000)).

NRS 174.295(1) provides that each party is under a continuing duty to disclose additional material that was previously requested and later discovered. Failure to comply with this duty permits the court to "order the party to permit the discovery or inspection of materials . . . , grant a continuance, or prohibit the party from introducing in evidence the material not disclosed [at trial], or it may enter such other order as it deems just under the circumstances." NRS 174.295(2).

In this case, Koslch presented the State with the 36 checks for the first time at the commencement of the second day of trial. Because Kolsch knew of the checks' existence long before the trial commenced (since they were her personal checks), the district court determined that the checks were known by the defense and could have been subpoenaed. Moreover, Kolsch acknowledges that she was allowed to call witnesses to testify about the practice of short-term loans and pay-backs in the office. Consequently, we conclude that the district court was acting within its discretion when it excluded the checks from admission at trial.

Having considered appellant's contentions and concluded that they are without merit,[4] we

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[4]Kolsch also raises separate challenges relating to the admission of her timesheets that were undisclosed by the State and a jury instruction stating that restitution or offers of restitution made after a theft is committed is not a defense to theft. Additionally, Kolsch complains that the court erred by failing to sua sponte instruct the jury on Kolsch's honest, good faith belief in the lawfulness of her acts, and that cumulative

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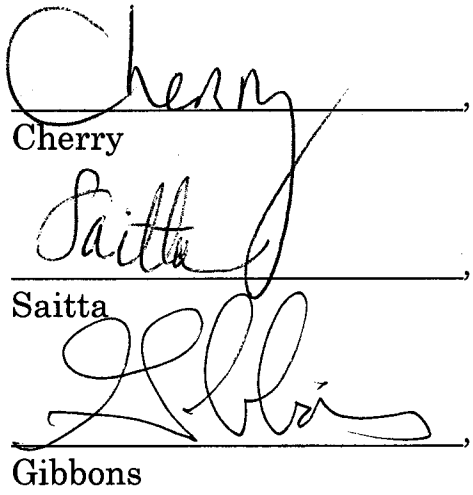
ORDER the judgment of the district court AFFIRMED.



Cherry, J.

Saitta, J.

Gibbons, J.

cc: Hon. Andrew J. Puccinelli, District Judge
Richard F. Cornell
Attorney General Catherine Cortez Masto/Carson City
Elko County District Attorney
Elko County Clerk

. . . continued

error warrants reversal. After having carefully considered each of Kolsch's challenges, we conclude that none of them warrant reversal.