IN THE SUPREME COURT OF THE STATE OF NEVADA

MESFIN HAGOS GOITOM,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34765

FILED

MAR 30 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of theft. The district court sentenced appellant to serve twelve (12) to thirty-two (32) months in prison. The court suspended the sentence and placed appellant on probation for a period of two (2) years.

Appellant contends that the district court erred by refusing to instruct the jury on misdemeanor embezzlement as a lesser related offense of theft and/or grand larceny. We disagree.

As a general rule, a defendant is not entitled to present the jury with a "shopping list" of alternatives to the crimes charged by the prosecution. Moore v. State, 105 Nev. 378, 383, 776 P.2d 1235, 1238-39 (1989). Nonetheless, a defendant is entitled to an instruction on a lesser related offense when: (1) the lesser offense is closely related to the offense charged; (2) the theory of defense is consistent with a conviction for the related offense; and (3) evidence of the lesser offense exists. Id. at 383, 776 P.2d at 1239.

Here, appellant's theory of defense was that he did nothing illegal. This theory is not consistent with a conviction for embezzlement. Therefore, appellant was not

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entitled to a lesser related offense instruction under the test set forth in Moore.

Additionally, we conclude that appellant was not entitled to a separate instruction on embezzlement because the conduct that would support a conviction for embezzlement was covered by the theft charge. NRS 205.0832 consolidates embezzlement, larceny and other similar offenses under the rubric of theft. Walch v. State, 112 Nev. 25, 32, 909 P.2d 1184, 1188 (1996). So long as the State charges the appropriate subsection or subsections of the statute, there is no need to "struggle with technical distinctions" between embezzlement, larceny and theft. Id. Here, appellant was charged under subsections 1 and 2 of NRS 205.0832. Subsection 2 is the embezzlement paragraph of the omnibus theft statute. See id. at 34, 909 P.2d at 1190 (Springer, J., dissenting). Thus, the crime of embezzlement was already charged within the theft charge and, therefore appellant was not entitled to a separate instruction on embezzlement as a lesser related offense.

Appellant also contends that the district court abused its discretion by denying appellant's motions to dismiss made at the conclusion of the State's case-in-chief and again before the case was submitted to the jury, and by denying appellant's alternative motion for a directed verdict. Again, we disagree. Appellant's motions were based on the view that the State had, at most, proved embezzlement, not the charged offenses of theft or grand larceny. As explained above, the theft charge included the common law offense of

embezzlement. Accordingly, we conclude that the district court properly denied appellant's motions.[1]

Having considered appellant's contentions and concluded that they lack merit, we

ORDER this appeal dismissed.

Maupin, J.
Maupin

Shearing, J.
Shearing

Becker, J.
Becker

cc: Hon. J. Michael Memeo, District Judge
Attorney General
Elko County District Attorney
Elko County Public Defender
Elko County Clerk

[1]We note that NRS 175.381(1) permits the district court to give an advisory instruction to acquit where the court deems that the evidence is insufficient to warrant a conviction. However, the jury is not bound by such advice. NRS 175.381(1). This statute does not permit the court to prevent the jury from giving its verdict. See State v. Corinblit, 72 Nev. 202, 298 P.2d 470 (1956); see also State v. Wilson, 104 Nev. 405, 407, 760 P.2d 129 (1988) ("In Nevada, the power to direct the verdict because of insufficiency of the evidence does not exist prior to the submission of the case to the jury.").