

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WENDY SALAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63532

FILED

JAN 21 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of two counts of embezzlement. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Sufficiency of the evidence

Appellant Wendy Salas claims that there was insufficient evidence to support her conviction because there was no direct evidence that she took any money, the circumstantial evidence gave equal or nearly equal support to the State's theory of guilt and her theory of innocence, and the State failed to prove the corpus delicti of the crimes independent of her extrajudicial admissions.

We review the evidence in the light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). The Nevada Supreme Court has held that "[c]ircumstantial evidence alone can . . . sustain a criminal conviction," *Buchanan v. State*, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (footnote omitted), and "that the corpus delicti of a crime must be proven

independently of the defendant's extrajudicial admissions," *Byars v. State*, 130 Nev. ___, ___, 336 P.3d 939, 948 (2014).¹

The State presented evidence that Robin Pagni, the Silver Legacy's security investigator, was asked to investigate Salas' performance as a cashier at the Flavors Buffet. Pagni learned that guests pay for the buffet with cash, credit cards, comps, room charges, coupons, or some combination of these methods. During a sales transaction, a cashier prints out two receipts: one is given to the customer who in turn gives it to the hostess who seats him or her and the other is kept for auditing purposes and placed in a drawer under the cash register. When a cashier gets busy, she stacks the receipts near the register and waits until things slow down before placing them in the drawer.

Pagni reviewed Salas' activities through Smart Connect, a video surveillance system that simultaneously records the cashier point and the entries made on the cash register. Pagni observed that Salas printed extra receipts from prior transactions and placed them under the receipt stack near her register. When a buffet was paid for with cash, Salas entered the sale on the register, made change for the customer, handed the customer a previously-printed receipt, and then cancelled the sale on the register so that there was no record that it ever occurred. Salas printed extra receipts and refreshed her receipt stack several times during her shift so that receipts had recent time stamps and did not arouse the hostess' suspicions. Pagni kept track of all of Salas' cash transactions for a two-day period, he compared the number of transactions

¹To the extent that the State invites us to revisit Nevada's corpus delicti rule, we note that the Nevada Supreme Court's decisions are binding on this court, and we decline the State's invitation.

she made with the number of transactions she cancelled, and he observed that for every valid transaction there was a fraudulent transaction. The jury was shown a video depicting the Smart Connect recording of Salas' cashier point and the transactions she made on the register.

Pagni reported his findings and a decision was made to remove Salas from the floor. Pagni told Salas that she appeared to be manipulating receipts and cancelling transactions, and he asked her if she was embezzling money. In the presence of Silver Legacy's restaurant manager, Cynthia Olmstead, Salas admitted to embezzling money, explained how she reprinted old receipts for the customers and cancelled their sales on the register, and described how she collected the embezzled money from the cash drawer while counting out the money received as gratuities. Salas said that she embezzled between \$300 and \$900 a day and had taken between \$50,000 and \$55,000 over the course of a year and a half. Salas' written statement admitting to the theft was read to the jury.

We conclude that the State presented sufficient evidence to permit the admission of Salas' confessions into evidence. *See Doyle v. State*, 112 Nev. 879, 892, 921 P.2d 901, 910 (1996) (describing the independent proof necessary to satisfy the corpus delicti rule), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004). We conclude that a rational juror could reasonably find that the evidence excluded any theory of innocence and demonstrated beyond a reasonable doubt that Salas embezzled money from the Silver Legacy, *see* NRS 205.300(1); *Batin v. State*, 118 Nev. 61, 65, 38 P.3d 880, 883 (2002) (discussing the elements of embezzlement). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's

verdict will not be disturbed on appeal where, as here, substantial evidence supports its verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Discovery ruling

Salas claims that the district court erred by allowing the State to introduce a video recording into evidence because she did not receive timely discovery of the exhibit. We review a district court's resolution of a discovery violation for an abuse of discretion. *See Evans v. State*, 117 Nev. 609, 638, 28 P.3d 498, 518 (2001). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal quotation marks omitted). Here, Salas objected to the late discovery of a video recording that the State intended to exhibit during Robin Pagni's testimony. After considering the recording, Pagni's voir dire testimony, and the parties' arguments, the district court ruled that the recording could be exhibited but Pagni's testimony must be halted so that Salas would have the evening to review the recording and an unfettered opportunity to cross-examine Pagni the following day. We conclude that the district court did not abuse its discretion in this regard. *See NRS 174.295(2)* (identifying the remedies for a party's failure to comply with discovery rules).

Evidentiary decisions

Salas claims that the district court erred by refusing to allow her to challenge the State's video exhibit with expert testimony and by preventing her from presenting evidence of bias. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Here, the

record demonstrates that the district court considered Salas' motions in limine concerning several proposed witnesses and found that Salas had failed to show that the Silver Legacy's bankruptcy status and insurance claim were relevant to the issue of witness bias. The district court did not deny the motions; instead, it determined that Salas could raise these issues again if they became relevant during the course of the trial. Salas did not renew the issues during the trial and she has not demonstrated that the district court abused its discretion in this regard. *See generally Libby v. State*, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993) (where a trial court determines that evidence is irrelevant but states that defendant can renew the issue if it becomes relevant, defendant waives review of the issue by failing to renew it during the trial), *vacated on other grounds by sub nom. Libby v. Nevada*, 516 U.S. 1037 (1996).²

Motion for mistrial

Salas claims that the district court erred by denying her motion for mistrial based on juror misconduct. We review a district court's ruling on a motion for mistrial for an abuse of discretion. *Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006). Here, the record demonstrates that after being seated on the jury panel and hearing some of the evidence, Genci Huynh informed the district court that she used to work for the Silver Legacy as a cashier. The district court questioned Huynh, determined that Huynh's experience would influence how she

²To the extent that Salas claims that the district court abused its discretion by excluding Exhibit 12, she did not provide this exhibit for our review and has not overcome the presumption that the district court did not commit error in its ruling. *Cf., Lee v. Sheriff of Clark Cnty*, 85 Nev. 379, 380-81, 455 P.2d 623, 624 (1969).

viewed the evidence, and opined that Huynh should not remain on the jury panel. Salas did not formally object to the removal of the juror as a remedy, nor does she argue on appeal that the removal of the juror was improper. Instead, Salas moved for a mistrial. Salas argued that she would have used her peremptory challenges differently if she had known that Huynh was disqualified. The district court determined that there was no prejudice at that stage of the proceeding, replaced Huynh with the alternate juror, and denied Salas' motion for a mistrial. We conclude that the district court did not abuse its discretion in this regard. *See generally Meyer v. State*, 119 Nev. 554, 563-64, 80 P.3d 447, 455 (2003) (To prevail on a claim of juror misconduct, a "defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial").

Restitution award


Salas claims that the district court erred by ordering her to pay \$195,000 because the State's own witness estimated the amount of embezzled money to be around \$100,000. As a general rule, we will not disturb a district court's restitution determination unless it "rest[s] upon impalpable or highly suspect evidence." *Martinez v. State*, 115 Nev. 9, 12-13, 974 P.2d 133, 135 (1999); *see also Major v. State*, 130 Nev. ___, ___, 333 P.3d 235, 238 (2014). Here, the Silver Legacy's director of internal audit, Ron Ellis, testified at sentencing. He calculated that Salas embezzled approximately \$195,000 during the relevant timeframes. Salas did not challenge this calculation in the district court and she has not

demonstrated that the calculation is impalpable or highly suspect in this court. Accordingly, we conclude that this claim is without merit.³

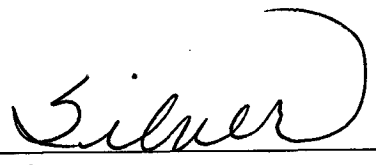
Cumulative error

Salas claims that cumulative error deprived her of a fair trial and warrants reversal of her conviction. However, because Salas has failed to demonstrate any error, she cannot be the victim of cumulative error.

Having concluded that Salas is not entitled to relief, we
ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Connie J. Steinheimer, District Judge
Law Office of Thomas L. Qualls, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

³To the extent that Salas further argues that the district court's restitution award was error because an insurance company covered the Silver Legacy's loss, we note that "[a] defendant's obligation to pay restitution to the victim may not . . . be reduced because the victim is reimbursed by insurance proceeds." *Martinez*, 115 Nev. at 12, 974 P.2d at 135.