

jc  
per 8-24-01  
mdk

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLON JAVAR BATIN,  
~~MARLON I. BATIN,~~

No. 36525

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

**JUL 12 2001**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of embezzlement. The district court sentenced appellant to serve three concurrent terms of 24 to 60 months in prison, suspended execution of the sentence, and placed appellant on probation. The district court further ordered appellant to pay a \$500.00 fine and \$44,046.00 in restitution.

Appellant first contends that to prove that he was guilty of embezzlement, the State was required to establish that appellant had sole access to the funds and that there was something more than a mere "unexplained" shortage of funds. This contention lacks merit. The State presented sufficient circumstantial evidence from which the jury could find that appellant converted the missing funds. This evidence included, among other things, that appellant had access to all the slot machines with shortages, that appellant was the only employee that had opened and turned off the power to each machine with a shortage, that appellant had lost large sums of money gambling, and that appellant had offered to repay the money. Although appellant presented explanations for his conduct, the jury rejected appellant's theories, and its

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finding that appellant was guilty of embezzlement is supported by the evidence presented at trial.<sup>1</sup>

Appellant next contends that his conviction should be reversed because there was insufficient evidence of an essential element of embezzlement. Namely, appellant contends that there was no evidence to support the jury's finding that appellant's employer "entrusted" him with possession of the paper currency inside the slot machine. We conclude that appellant's contention lacks merit.

An essential element of the crime of embezzlement is that the money or property converted must have been "deposited or entrusted" with the individual who converted it.<sup>2</sup> To establish this element, there must be some evidence presented that the accused was in lawful possession of the property prior to its conversion.<sup>3</sup> The defendant's possession of the property, however, need not be actual, and constructive possession of the property alleged to be embezzled is sufficient to sustain an embezzlement conviction.<sup>4</sup>

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<sup>1</sup>See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (holding that it within the province of the jury "to assess the weight of the evidence and determine the credibility of witnesses," and that the jury's verdict will not be disturbed on appeal where supported by substantial evidence).

<sup>2</sup>NRS 205.300(1); see also Livingston v. State, 84 Nev. 403, 405, 441 P.2d 681, 683 (1968) (defining embezzlement as the "the act of appropriating to himself that which he receives in trust" (quoting State v. Trolson, 21 Nev. 419, 423, 32 P. 930, 931 (1893))).

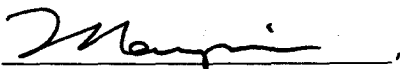
<sup>3</sup>See 3 Charles E. Trocia, Wharton's Criminal Law § 393 (15th ed. 1995); see also State v. Superior Court, 555 P.2d 898 (Ariz. Ct. App. 1976); State v. Smitherman, 356 P.2d 675 (Kan. 1960); State v. Doucet, 14 So.2d 917 (La. 1943); State v. Haynes, 80 N.W.2d 859 (Minn. 1957).


<sup>4</sup>See Trocia, supra note 3, at § 393.

In viewing the evidence in a light most favorable to the prosecution, there is sufficient evidence to support the jury's verdict that appellant was guilty of embezzlement. The State proffered evidence that appellant was entrusted with constructive possession of the currency inside the bill validator, including that appellant safeguarded the funds contained inside the bill validator when making a slot machine repair and when supervising non-employee slot machine repairmen. In so doing, appellant was exercising dominion and control over the currency inside the bill validator sufficient to support a finding of constructive possession.<sup>5</sup>

Accordingly, because there was sufficient evidence of the essential elements of the crime of embezzlement, we

ORDER the judgment of conviction AFFIRMED.

  
Maupin, C.J.

  
Becker, J.

cc: Hon. Connie J. Steinheimer, District Judge  
Attorney General  
Washoe County District Attorney  
Richard F. Cornell  
Washoe County Clerk

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<sup>5</sup>See Palmer v. State, 112 Nev. 763, 768, 920 P.2d 112, 115 (1996) (defining constructive possession as "'both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons'" (quoting Black's Law Dictionary 1163 (6th ed. 1990))).

LEAVITT, J., dissenting:

Respectfully, I dissent. It is axiomatic that the State must prove every element of a crime beyond a reasonable doubt.<sup>1</sup> Here, the State charged appellant with embezzlement.<sup>2</sup> Embezzlement is not an offense at common law, but rather is a statutory crime.<sup>3</sup> The crime of embezzlement requires a wrongful appropriation of entrusted funds, the possession of which, was lawful prior to the conversion.<sup>4</sup> The requisite intent for embezzlement occurs when the defendant uses money "entrusted" or "deposited" with him for a purpose other than that for which it was designated.<sup>5</sup> In contrast, larceny requires a wrongful, trespassory taking of property with the intent to permanently deprive the owner thereof.<sup>6</sup>

There is insufficient evidence in this case to sustain a conviction for embezzlement because the undisputed evidence presented at trial compels a conclusion that appellant was never entrusted with lawful possession of the currency he took from the bill validator boxes. In fact, both appellant and his supervisor testified that appellant had no job duties whatsoever involving this currency and that it

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<sup>1</sup>Watson v. State, 110 Nev. 43, 45, 867 P.2d 400, 402 (1994).

<sup>2</sup>I note that had the State charged appellant pursuant to NRS 205.0832, the Omnibus Theft Crime statute, the evidence presented at trial would have clearly supported a conviction, as there was sufficient evidence to support a finding that appellant was guilty of larceny.

<sup>3</sup>State v. Trolson, 21 Nev. 419, 422, 32 P. 930, 931 (1893).

<sup>4</sup>NRS 205.300(1); see also Livingston v. State, 84 Nev. 403, 405, 441 P.2d 681, 683 (1968) (defining embezzlement as the act of appropriating for himself money held in trust for another).

<sup>5</sup>See NRS 205.300(1); Barron v. State, 105 Nev. 767, 783 P.2d 444 (1989).

<sup>6</sup>State v. Slingerland, 19 Nev. 135, 7 P. 280 (1885); State v. Ward, 19 Nev. 297, 10 P. 133 (1886).

"wasn't to be touched." Further, appellant had absolutely no power to exercise control over this currency, as appellant was required to contact his supervisor for any job task involving the currency inside the bill validator, such as a cash refund to a customer. Because the aforementioned testimony was not contradicted at trial, I do not agree that there was sufficient evidence that appellant had constructive possession of these funds.

The majority concludes that there was sufficient evidence of constructive possession<sup>7</sup> because appellant had access to the inside of the slot machine where the bill validator was located and, occasionally, observed non-employee slot repairmen work on the slot machine. However, mere access to property converted is insufficient to support a finding of entrustment of such property.<sup>8</sup> For example, if you give your neighbor a key to your house to let the plumber in to fix a leaky faucet and the neighbor steals your television set, the crime is larceny not embezzlement because your neighbor was never entrusted with possession of your television.

To support a finding of entrustment, there must be some evidence that the accused possessed the property lawfully or at least had the authority to do so at the time of


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<sup>7</sup>Constructive possession requires "'both the power and the intention'" to exercise dominion and control over a thing. Palmer v. State, 112 Nev. 763, 768, 920 P.2d 112, 115 (1996) (quoting Black's Law Dictionary 1163 (6th ed. 1990)).

<sup>8</sup>See United States v. Selwyn, 998 F.2d 556, 557-58 (8th Cir. 1993) (holding that maintenance person at post office could not be guilty of embezzling mail because he never had lawful possession of the mail); United States v. Sayklay, 542 F.2d 942, 944 (5th Cir. 1976) (holding that bookkeeper at bank could not be guilty of embezzling funds derived from blank counter checks because she never had lawful possession of the checks).

conversion.<sup>9</sup> There was no such evidence presented at appellant's trial.

Accordingly, I would reverse appellant's conviction because the State failed to prove the entrustment element of the crime of embezzlement. I simply cannot conclude that an individual is entrusted with possession, constructive or otherwise, of property that he is prohibited from touching and is not authorized to control.

  
\_\_\_\_\_, J.  
Leavitt

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<sup>9</sup>See Selwyn, 998 F.2d at 557-58; Sayklay, 542 F.2d at 944.