

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN MARGARET DESANDO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37726

FILED

NOV 21 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
DEPUTY CLERK

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of possession of stolen property. The district court sentenced appellant Susan Desando to a maximum term of thirty months in prison, suspended with probation not to exceed eighteen months.

Desando was charged with one count of grand larceny and one count of possession of stolen property. Prior to trial, Desando filed a notice of alibi, asserting that her employer would testify that she did not have an opportunity to commit the crimes charged because she was at work at PC Supplies when the incident occurred. During trial, Desando filed a motion in limine to suppress evidence that PC Supplies sold adult pornographic videos and novelty items. The district court denied the motion but permitted Desando to prepare a cautionary jury instruction. When Desando renewed the motion the following day, the district court once again denied it but offered to give the jury a cautionary instruction. Thereafter, Desando's supervisor testified that PC Supplies sold pornographic videos and adult novelty items and that pornographic videos were played on monitors throughout the building during the day. The jury acquitted Desando on the grand larceny charge but convicted her on the possession of stolen property charge.

Desando filed a motion for a new trial based upon alleged juror misconduct where she asserted that, during a discussion with the jurors after they had rendered their verdict and were discharged, a juror, known only as "Juror No. 4," announced to counsel and the district court that she had colored her hair and asked fellow jurors whether they recognized or could identify her. After the verdict was read, each juror was polled, and each juror acknowledged the verdict. The district court denied Desando's motion for a new trial after determining that the alleged juror misconduct was unreliable and harmless.

Desando first contends that there was insufficient evidence to support her conviction. "[W]hen the sufficiency of the evidence is challenged on appeal in a criminal case, '[t]he relevant inquiry for this court is "whether, 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.'"¹ Moreover, it is for the jury to determine what weight, credibility and credence to give to witness testimony and other trial evidence.² Finally, circumstantial evidence alone may sustain a conviction.³ Our review of the record reveals sufficient evidence from which the jury, acting reasonably and rationally, could have found the elements of possession of stolen property beyond a

¹Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979).

²See id. at 107, 867 P.2d at 1139.

³McNair v. State, 108 Nev. 53, 61, 825 P.2d 571, 576 (1992).

reasonable doubt. Accordingly, we conclude that Desando's conviction was supported by substantial evidence.

Next, Desando contends that the district court erred by denying her motion in limine and admitting evidence that PC Supplies sold adult pornographic videos and novelty items because it was irrelevant and highly prejudicial.

Relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice.⁴ Evidence is relevant if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."⁵ The determination of whether to admit evidence is within the sound discretion of the district court and that determination will not be disturbed unless it is "manifestly wrong."⁶

The evidence that loud music and pornographic videos were played throughout the day at PC Supplies suggested that Desando worked in a distracting environment. Moreover, it rebutted her supervisor's testimony that she was able to strictly monitor each employee and that the work environment was very structured. Additionally, there was no graphic description of the pornography sold by PC Supplies or any inference that Desando was watching the videos. Accordingly, we conclude that the district court did not err by admitting evidence that PC Supplies sold adult pornographic videos and novelty items.

⁴NRS 48.025(1); NRS 48.035(1).

⁵NRS 48.015.

⁶See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

Lastly, Desando contends that Juror No. 4's experiment constitutes juror misconduct and warrants reversal of her conviction. Desando further contends that she was prejudiced by the juror misconduct because identification was crucial and the hair color of the individual who committed the crime was bleached blond, yet all of the photographs in the photo line-up, including Desando's, were of women with brown hair.

A new trial may be granted due to juror misconduct.⁷ However, not every incidence of juror misconduct requires the granting of a new trial, and a new trial need not be granted if no prejudice occurred.⁸ The question of misconduct and any resulting prejudice is ultimately a question of fact for the district court, and this court will not disturb the determination of the district court absent an abuse of discretion.⁹ In reaching a verdict, jurors are confined to the facts and evidence regularly elicited in the course of the trial proceedings.¹⁰ Further, jurors are prohibited from conducting independent investigations of evidence presented in trial testimony and informing other jurors of the results of that investigation.¹¹

After carefully reviewing the record, we conclude that Juror No. 4's actions do not rise to the level of experimentation warranting juror

⁷See Tanksley v. State, 113 Nev. 997, 1003, 946 P.2d 148, 151 (1997).

⁸Id.

⁹Id.

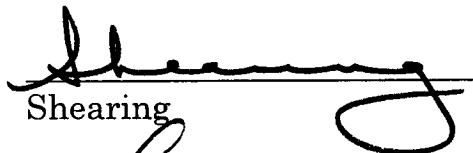
¹⁰State v. Thacker, 95 Nev. 500, 501, 596 P.2d 508, 509 (1979).

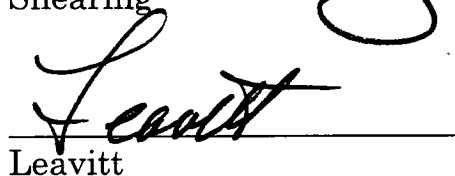
¹¹See Rowbottom v. State, 105 Nev. 472, 486, 779 P.2d 934, 943 (1989); see also NRS 175.121.

misconduct. However, even if Juror No. 4's actions had risen to the level of experimentation warranting juror misconduct, we conclude that the misconduct did not warrant a new trial. The evidence of guilt was overwhelming. Desando had access to the victim's home. She was identified as the woman who sold the stolen property to a local store by the owner of the store. The owner identified her from a photo lineup and specifically noted her face and the fact that the woman who sold him the merchandise had bleached blond hair with brown roots. The knowledge that a person with dyed hair may show the natural hair color at the roots is knowledge of common experience. So is the concept that a person may or may not be unrecognizable with dyed hair. Thus, the "experiment" simply attempted to apply common knowledge to the owner's testimony.

We conclude, beyond a reasonable doubt, that any misconduct did not contribute to the verdict and

ORDER the judgment of the district court AFFIRMED.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Mark W. Gibbons, District Judge
Peter L. Flangas
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk