

IN THE SUPREME COURT OF THE STATE OF NEVADA

LADELL LEAVITT,

No. 37999

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

NOV 15 2001

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury trial, of one count of burglary and one count of attempted theft. The district court sentenced appellant Ladell Leavitt to serve two concurrent prison terms of 12 to 30 months.

Leavitt first contends that he could not be found guilty of the crime of forgery as a matter of law because there was no evidence that he made a false writing and no evidence that he possessed the requisite intent to defraud. Further, Leavitt contends that the trial court erred in permitting him to be convicted of both forgery and attempted theft because attempted theft is a lesser-included offense of forgery. We need not address Leavitt's contentions with respect to the forgery count because the jury actually found Leavitt not guilty of forgery.

Leavitt next contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty of attempted theft. Specifically, Leavitt contends that the fact that he signed his own name, presented his own identification, and used his own checking account as a guarantee for the validity of the check, which he alleged he was cashing for his roommates, Larry and Rae Daniels, created an "irrefutable presumption that Mr. Leavitt lacked the necessary mens rea to commit the crime of attempted theft." We conclude that the State presented sufficient evidence that Leavitt possessed the requisite intent to be guilty of attempted theft.

The crime of attempted theft requires a person to attempt to "[c]ontrol any property of another person with the intent to deprive that

person of the property."¹ The record reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.² Particularly, the evidence demonstrated that Leavitt attempted to cash two counterfeit payroll checks that were written out to Leavitt and drawn on a business where Leavitt was never employed. Both checks contained a fictitious address and were written for identical amounts of just under \$1000.00, the threshold amount at most banks for prompting supervisor approval. Leavitt cashed the checks in two different Bank of America branches on the opposite ends of town about one hour apart. Although Leavitt testified that he was guaranteeing the checks against funds in his account for the Daniels, a married couple who lived with him for a week and who had no identification, the jury could reasonably infer from the evidence presented that Leavitt knew the checks were false and intended to deprive a business of approximately \$2000.00. The jury determines the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict.³

Leavitt next contends that the "white heart empty head" doctrine warrants reversal of his conviction. We conclude that the doctrine is inapplicable. The "white heart empty head" doctrine is utilized in civil cases that concern negotiable instruments within the purview of Article 3 of the Uniform Commercial Code and allows a good faith exception to certain conduct.⁴ The "white heard empty head" doctrine, however, has no applicability in a criminal case where circumstantial evidence alone can support a conviction.⁵ Accordingly, we conclude that Leavitt's contention that this doctrine warrants reversal of his conviction lacks merit.

Finally, Leavitt contends that his conviction should be reversed because the district attorney engaged in prosecutorial misconduct

¹NRS 205.0832(1); see also NRS 193.330(1) (defining an attempt crime).

²See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

³Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

⁴See Wohlraabe v. Pownell, 307 N.W.2d 478 (Minn. 1981).

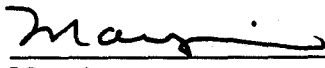
⁵McNair v. State, 108 Nev. 53, 825 P.2d 571 (1992).

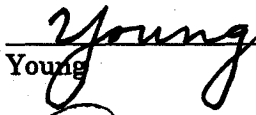
that prevented Leavitt from receiving a fair trial. In particular, Leavitt alleges that the prosecutor made arguments in closing that gave the jury the false impression that Leavitt had been purchasing counterfeit checks. Additionally, Leavitt contends that the prosecutor attempted to impermissibly shift the burden of proof to the defendants by characterizing the defense witnesses as "eleventh-hour witnesses" and by trying to "blame" Leavitt for failing to produce the Daniels to corroborate Leavitt's testimony that they gave Leavitt the forged checks.

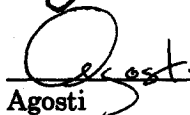
We conclude that any prejudice arising from the prosecutor's conduct was cured when the district court sustained defense counsel's objections and admonished the jury that "closing argument is not evidence" and to "disregard the statement" made by the prosecutor that "Mr. Leavitt apparently made no effort to locate [the Daniels]." We also conclude that the prosecutor's remarks did not rise to the level of improper argument that would justify overturning Leavitt's conviction.⁶

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

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Maupin


_____, J.
Young


_____, J.
Agosti

cc: Hon. Lee A. Gates, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Clark County Clerk

⁶See Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997), modified prospectively on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000) ("the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process").