IN THE SUPREME COURT OF THE STATE OF NEVADA

JILL JETER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39626

FILED

JAN 24 2003

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of five counts of embezzlement. The district court sentenced appellant Jill Jeter to serve concurrent prison terms of 12-30 months for count I[1] and 12-36 months each for counts II-V; the district court suspended the execution of the sentences for counts II-V and placed Jeter on probation with special conditions for a period not to exceed 5 years.[2] Jeter was also ordered to pay restitution in the amount of $17,000.00.

First, Jeter contends the district court erred in admitting hearsay evidence pursuant to NRS 51.135 (business records exception).[3]

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[1]Count I charged Jeter with embezzlement of $250.00 or more by separate acts within a 6 month period. The remaining four counts charged Jeter with embezzlement.

[2]Jeter was remanded to custody in order to serve the sentence imposed for count I.

[3]NRS 51.135 states: "A memorandum, report, record or compilation of data . . . made at or near the time by . . . a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person, is not inadmissible under the hearsay rule unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." (Emphasis added.)

03-01327

Jeter argues on appeal that an audit report prepared by the victim for purposes of litigation only two days before trial "lacked the indicia of trustworthiness" required by statute, and therefore, was inadmissible hearsay evidence. Initially, we note that Jeter has changed her theory of error on appeal – after objecting at trial, Jeter argued that the report was not generated during the ordinary course of business. This court has consistently held that an appellant "cannot change her theory underlying an assignment of error on appeal."[4] Nevertheless, our review of Jeter's contention reveals that it is without merit.

A district court has considerable discretion in determining the relevance and admissibility of evidence.[5] Moreover, a district court has considerable discretion in determining whether the requisite foundation has been laid to deem evidence admissible at trial as a business record exception to the proscriptions against hearsay.[6] The business records exception "generally permits a party to introduce as evidence reports made during the regularly conducted course of business."[7] "'The basis for the business record exception is that accuracy is assured because the maker of the record relies on the record in the ordinary course of business

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[4]Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995); see also Garrettson v. State, 114 Nev. 1064, 1068 n.2, 967 P.2d 428, 430 n.2 (1998).

[5]See Sterling v. State, 108 Nev. 391, 395, 834 P.2d 400, 403 (1992).

[6]Thomas v. State, 114 Nev. 1127, 1148, 967 P.2d 1111, 1125 (1998); see also People v. Beeler, 891 P.2d 153, 167-68 (Cal. 1995).

[7]Miranda v. State, 101 Nev. 562, 566, 707 P.2d 1121, 1124 (1985).

activities.'"[8] Accordingly, this court accords substantial weight to a district court's decision to admit or exclude evidence, and we will not reverse a district court's decision absent manifest error.[9]

In this case, although a document was generated by the victim only two days before trial for its admission as an exhibit by the State, we conclude that the district court did not commit manifest error in admitting the document. The document was merely the manifestation of information already existing in an audit report gathered during the regular course of business, long before the instant litigation, at the time of Jeter's acts of embezzlement. The report reflected changes made by Jeter to the victim's firm's accounting system. Thus, the relevant information in the report was created nearly simultaneously with Jeter's offenses, and not for purposes of litigation. And therefore, we conclude that the audit report contained the necessary indicia of trustworthiness and was properly admitted at trial by the district court.

Second, Jeter contends the district court erred by imposing an illegal sentence. Jeter argues that by granting probation for counts II-V and ordering the terms of probation to run concurrently with a term of incarceration, her sentence violates NRS 176A.400(3). We note that Jeter

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[8]DeRosa v. Dist. Ct., 115 Nev. 225, 232, 985 P.2d 157, 161 (1999) (quoting Clark v. City of Los Angeles, 650 F.2d 1033, 1037 (9th Cir. 1981)) (citation omitted).

[9]Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000), cert. denied, 532 U.S. 978 (2001).

cites to no authority in support of her interpretation of the statute, and further, we disagree with her contention.[10]

NRS 176A.400(3) states: "The court shall not suspend the execution of a sentence of imprisonment after the defendant has begun to serve it." Jeter was ordered to serve a term of incarceration for count I while the sentences for counts II-V were suspended. Although all of the sentences were ordered to run concurrently, the terms remain separate and distinct.[11] Therefore, the district court did not impose an illegal sentence and Jeter's contention is without merit.

Third, Jeter contends the district court erred in its determination of the restitution award. Jeter argues that she was convicted of embezzling a total of $3,581.70, and that any award of restitution is limited to that amount pursuant to NRS 176.033. We agree with Jeter's contention and conclude that the district court committed plain error.[12]

"[A] defendant may be ordered to pay restitution only for an offense that [she] has admitted, upon which [she] has been found guilty, or

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[10]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

[11]See State, Dep't of Prisons v. Kimsey, 109 Nev. 519, 521, 853 P.2d 109, 111 (1993).

[12]Emmons v. State, 107 Nev. 53, 60-61, 807 P.2d 718, 723, (1991) ("As a general rule, failure to object below bars appellate review; but, we may address plain error or issues of constitutional dimension sua sponte.").

upon which [she] has agreed to pay restitution."[13] A district court retains the discretion "to consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant."[14] A district court, however, must rely on reliable and accurate information in calculating a restitution award.[15] Absent an abuse of discretion, "this court generally will not disturb a district court's sentencing determination so long as it does not rest upon impalpable or highly suspect evidence."[16]

In this case, we conclude that the district court erred. As the State concedes, Jeter was ordered to pay restitution for alleged acts of embezzlement for which she was never charged, let alone convicted. Further, we disagree with the State's contention that Jeter agreed to pay the amount of restitution ordered - although Jeter did not dispute the amount, she also expressly did not admit to it. Jeter cannot be ordered to pay restitution for an offense which she has not admitted or been found guilty of. The district court's award of restitution for alleged acts of embezzlement beyond those of which Jeter was convicted was an abuse of discretion. Therefore, we conclude that the restitution award must be

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[13]Erickson v. State, 107 Nev. 864, 866, 821 P.2d 1042, 1043 (1991); see also NRS 176.033(1)(c) ("If a sentence of imprisonment is required or permitted by statute, the court shall: . . . [i]f restitution is appropriate, set an amount of restitution for each victim of the offense.").

[14]Martinez v. State, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998).

[15]See Martinez v. State, 115 Nev. 9, 13, 974 P.2d 133, 135 (1999).

[16]Id. at 12-13, 974 P.2d at 135.

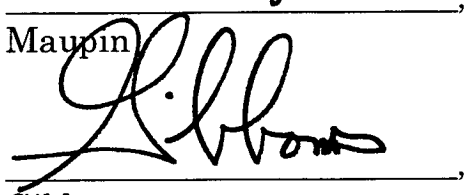
vacated and the case remanded to the district court for a new sentencing hearing in order to set a proper award of restitution.

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[17]

_____, J.
Rose

_____, J.
Maupin



_____, J.
Gibbons

cc: Hon. Michael R. Griffin, District Judge
Robert B. Walker
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk

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[17]Although the parties have submitted documentation sufficient for the disposition of this appeal, we note that neither party has complied with the requirements of the Nevada Rules of Appellate Procedure. See NRAP 3C(e)(2); NRAP 30(b)(2). Specifically, the parties have not provided this court with any of the documents required for inclusion in the appendix. Counsel for the parties are cautioned that failure to comply with the requirements for appendices in the future may result in the imposition of sanctions by this court. NRAP 3C(n).