IN THE SUPREME COURT OF THE STATE OF NEVADA

SHERRY L. BURNS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39800

FILED

DEC 03 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury trial, of forty-one counts of unlawful use of public money. The district court sentenced Sherry L. Burns to prison for a maximum term of four years with a minimum parole eligibility of twelve months for each of the forty-one counts, with counts one, two and three running consecutively, and the remaining counts running concurrently with count three. However, the district court imposed a suspended sentence with conditions.

Burns now raises several issues on direct appeal.

First, Burns argues that there was insufficient evidence to sustain her conviction. In reviewing a challenge to sufficiency of the evidence in a criminal case, the relevant inquiry 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] We have held that "the jury must be given

[1]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original)).

the right to make logical inferences which flow from the evidence,"[2] and "circumstantial evidence alone may sustain a conviction."[3]

Here, although the case involves circumstantial evidence, we conclude that there was sufficient evidence to sustain Burns' conviction. Between July 1, 1994, and June 30, 1995, Burns was the lead cashier and was entrusted with the money at the Clerk's Office. Burns also completed the deposit slips each day, and she testified that she verified the cash sheets when she completed the deposit slips. Although the safe was open during business hours allowing for the possibility that money could be taken, witnesses Gary Cordes and Fern Lee testified that if money had been taken from the safe after the cashiers completed the cash sheets, Burns would have been the first person to discover the missing money when she completed the deposit slips. Cordes and Lee maintained that Burns never informed anyone that money was missing. Additionally, Burns' initials were on the deposit slips for each of the counts for which Burns was found guilty.

Renee Olkein, an employee of Advance Data Systems, investigated discrepancies discovered in the general ledger and found that several adjustment entries had been made between July 1, 1994, and June 30, 1995. Olkein testified that the adjustments reduced the cash and increased the accounts receivable in the general ledger without affecting the accounts receivable in the utility billing system, as the adjustments did not have a customer number. Olkein testified that the adjustments were made with Burns' pin number and at Burns' workstation. Even

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[2]Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981).

[3]Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980).

though Burns and another clerk testified that pin numbers were shared among the clerks, Lee and Cordes testified otherwise.

Moreover, David Alfred, an investigator for the Nevada Division of Investigation, testified that when he interviewed Burns, Burns changed her story several times. Also, when Alfred informed Burns her replacement, Lucherini, did not have any problems with missing money, Burns responded that Lucherini was more efficient.

Although the State did not provide direct evidence regarding Burns' unlawful use of public money, the State presented the theory that Burns had a gambling problem. In support of its theory, the State presented testimony from various witnesses who had observed Burns gamble on numerous occasions.

Despite the fact that all the evidence was circumstantial, the jury was permitted to draw logical inferences that flowed from the evidence. Additionally, although Burns testified that there were other explanations for the loss of the money, the jury had every right to reject her testimony and draw the conclusion that Burns unlawfully used public money.[4] Thus, we conclude, after viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to sustain Burns' conviction.

Second, Burns contends that the district court violated the best evidence rule when it admitted exhibits 47 and 48. She asserts that the State failed to provide sufficient reasons why the originals were

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[4]See Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994) (noting that "it is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony").

unavailable and there were genuine issues regarding the authenticity of exhibits 47 and 48.

The determination of whether to admit evidence is within the sound discretion of the district court, and we will not disturb that determination on appeal unless manifestly wrong.[5] We have also noted that an improper evidentiary ruling is subject to harmless-error analysis.[6]

NRS 52.235 requires that the party seeking to prove the content of a written document must produce the original.[7] However, NRS 52.245 provides:

> [A] duplicate is admissible to the same extent as an original unless:
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> (a) A genuine question is raised as to the authenticity of the original; or
>
> (b) In the circumstances it would be unfair to admit the duplicate in lieu of the original.

Here, although Burns objected to the admission of exhibits 47 and 48 on the basis that the originals were not produced, the best evidence rule was not an absolute bar to their admission, since NRS 52.245 allows for the admission of duplicate copies provided no authenticity or fairness issues exist.

Additionally, authentication is satisfied when there is sufficient evidence to support a finding that the document is what the

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[5]Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000).

[6]Smith v. State, 111 Nev. 499, 506, 894 P.2d 974, 978 (1995).

[7]See Young v. Nevada Title Co., 103 Nev. 436, 440, 744 P.2d 902, 904 (1987).

proponent claims it to be.[8] We have indicated that "[t]he government need only make a prima facie showing of authenticity so that a reasonable juror could find that the document is what it purports to be."[9] We have also required a "qualified person" to authenticate the document.[10]

In this case, the State presented the testimony of Olkein, that she created the computer query system which produced the results found in exhibits 47 and 48. She also testified that the exhibits were true and correct copies of what was in the computer and that if she entered the same criteria and information, the computer would again produce identical information as shown in exhibits 47 and 48. Given the nature of Olkein's job as a program analyst and the fact the she created the query system, we conclude that she was a "qualified person" able to authenticate exhibits 47 and 48 and that there was sufficient evidence to support a finding that they were what they purported to be. Accordingly, we hold that the district court did not violate the best evidence rule when it admitted exhibits 47 and 48.

Third, Burns contends that the district court erred in denying her motion for a new trial because newly discovered evidence – a backup tape and worksheet – would have changed the outcome of her case.

The district court has wide discretion in granting or denying a motion for a new trial based on newly discovered evidence.[11] Accordingly,

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[8]See Thomas v. State, 114 Nev. 1127, 1147-48, 967 P.2d 1111, 1124 (1998).

[9]Id. at 1148, 967 P.2d at 1124.

[10]Id.

[11]Servin v. State, 117 Nev. 775, 792, 32 P.3d 1277, 1289 (2001).

absent an abuse of discretion, we uphold the district court's decision regarding such a motion.[12]

NRS 176.515 allows the district court to grant a new trial based on newly discovered evidence. We have indicated that the district court should consider the following factors before granting a new trial based on newly discovered evidence:

> "(1) the evidence must be newly discovered;
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> (2) it must be material to the defense;
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> (3) it could not have been discovered and produced for trial even with the exercise of reasonable diligence;
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> (4) it must not be cumulative;
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> (5) it must indicate that a different result is probable on retrial;
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> (6) it must not simply be an attempt to contradict or discredit a former witness; and
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> (7) it must be the best evidence the case admits."[13]

Here, the district court found that the worksheet and backup was newly discovered evidence, which would have been "material to a defense of confusion but not for substantive evidence." The district court also found that the State did not intentionally hide or fail to provide the evidence and that the evidence not only could have been discovered and produced, but in fact was produced at trial, although in a different form. The district court concluded that the newly discovered evidence was

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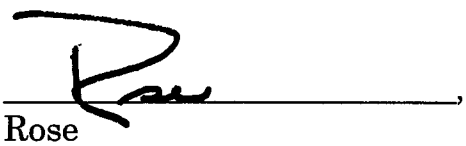
[12]Id.

[13]Hennie v. State, 114 Nev. 1285, 1290, 968 P.2d 761, 764 (1998) (placed in list format) (quoting Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995)).

cumulative and would not have changed the outcome of the trial. Finally, the district court found that the newly discovered evidence would have been used in an attempt to discredit a former witness, and that it was not the best evidence the case admits. We conclude that the district court did not abuse its discretion in denying Burns' motion for a new trial. The district court made findings related to each of the factors we instructed the district court to examine and we conclude that these findings are supported by substantial evidence.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose

_____, J.
Leavitt

_____, J.
Maupin

cc: Hon. Archie E. Blake, District Judge
Richard F. Cornell
Attorney General Brian Sandoval/Carson City
Churchill County District Attorney
Churchill County Clerk