COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP777-CR **Cir. Ct. No. 2005CF402**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARY C. CURRAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Mary Curran appeals from a judgment of conviction for embezzlement. She challenges the admission of gambling evidence, the propriety of the trial court questioning a rebuttal witness, and the

exclusion of character evidence. We conclude that there was no error in her jury trial and affirm the judgment of conviction.

¶2 Until October 5, 2005, Curran managed the cafeteria at the Mercury Marine manufacturing facility. Her daily duties included closing registers, counting cash receipts, and delivering the cash receipts and a daily cash report to the accounting department. In September 2005 an accountant examined the cafeteria operation since it was operating at a loss. The accountant testified at trial that Curran's daily cash reports consistently matched to the penny the amount of cash she turned in, a rare occurrence in retail cash sales. The accountant found that two "Z" tapes were run on the breakfast cash register and that one Z tape was always missing and not turned in with the daily cash report.[1] The accountant was told by Curran that she ran a Z tape from the breakfast register each day to determine what foods items sold and needed to be ordered. The accountant noticed that cumulative grand totals were missing from the Z tapes. He demonstrated how overcharges on catering services could allow someone to take cash from the cafeteria and not reflect poorly on the cafeteria's revenue. Curran was asked to stop running two Z tapes on the breakfast register on September 20, 2005. Reported cash sales from that register doubled after that and catering charges decreased. The accountant opined that the cafeteria suffered a cash

[1] A "Z" tape is paper cash register receipt that reflects the total purchases made by general categories and also lists the total sales of particular items. It is typically two to three feet long for a single day. Just after listing the category totals and before listing the particular items sold, a grand total of sales to date is reflected. The Z tapes submitted with Curran's daily cash reports were precisely cut just before the grand total and only provided the sales figures by categories.

shortage of approximately $254,335 for the days it was open between January 1 and September 21, 2005.[2]

¶3 The evidence Curran challenges on appeal is the testimony of a surveillance investigator at the Ho-Chunk Casino. He testified that Curran held a "player's club card" at the casino. Participation in the player's club is voluntary and the program tracks a patron's casino activity and provides rewards or cash back based on the number of points accumulated. A printed report indicates a patron's "coin in" on slot machines. "Coin in" is a combination of actual cash put into the slot machines and credits accumulated by winning. It reflects the amounts played in the machine. The investigator testified that the report on Curran's card demonstrates increased activity in 2004 and 2005. The report sent to the jury indicated that Curran's "coin in" for 2005 was $1,724,643.56.[3] Another report

[2] The prosecution's theory of the crime was summarized by the accountant in cross-examination:

> I believe that approximately 10:30 in the morning after the breakfast rush she would go out to that register and simply run a report, that Z report, take that report, not open the cash drawer at all, go into the back room by herself or with others, there is no cash, no big deal, and just have that Z tape, either throw that in the garbage there, put it in her purse, do something with it, but take it away. Then at the end of the day when both cash registers were Z'd out, she would have two Z tapes, but she would have the extra money in that original drawer that served breakfast. She would have two Z tapes that came to $500 and $500. She would go into the back room with all the cash, count out to the exact penny what those Z tapes say, for most practical purposes, and give that to accounting. The rest of the money went home.

[3] Curran moved in limine to exclude this evidence. She also renewed her objection during the trial. The trial court's pretrial ruling was that the "coin in" figure would be limited to 2005 activity. Although at trial the court found that the progression of activity was relevant, there was no evidence of Curran's "coin in" prior to 2005 and the investigator never testified to the cumulative number reflected on the report for activity from 2002 to October 1, 2005. A redacted reported limited to Curran's 2005 activity was sent to the jury room.

reflected jackpots in excess of $1,200 won by Curran which had to be reported to the Internal Revenue Service. In 2004 she reported three jackpot winnings in excess of $1,200 totaling $6,815. In 2005 forty-six jackpots in excess of $1,200 were reported to the IRS totaling $135,095. The investigator acknowledged that it was not known how much money Curran put into the machine to win those jackpots.

¶4 On appeal, we will affirm the trial court's admission of evidence if it is a proper exercise of discretion. ***State v. Webster***, 156 Wis. 2d 510, 514, 458 N.W.2d 373 (Ct. App. 1990). This requires the trial court to correctly apply accepted legal standards to the facts of record and reach a reasonable conclusion by a demonstrated rational process. ***Id.*** at 515.

¶5 Curran argues that there was not an adequate foundation for admission of the gambling evidence. Citing ***State v. Heidelbach***, 49 Wis. 2d 350, 355-56, 182 N.W.2d 497 (1971), she contends that evidence of the accused's "prior impecunious condition" is necessary to permit an inference that increased spending or large expenditures following a theft is circumstantial evidence of guilt. The ***Heidelbach*** court stated, "it is difficult to conceive of a case wherein some foundation evidence will not be presented, since without such additional evidence the state would fail to sustain its burden." ***Id.*** at 357. Indeed in ***Heidelbach*** there was such evidence in that the defendant's income for the six months prior to the burglary was $6,000, that he borrowed $3,000 from his father-in-law to purchase a mobile home, and prior to the burglary he had discussed purchasing a plane but didn't do it until he paid $8,250 in cash for the plane after the burglary. ***Id.*** at 357-58. However, ***Heidelbach*** does not hold that evidence of prior impecuniousness is an absolute prerequisite to the admission of evidence of large expenditures after the crime.

> We conclude therefore that the evidence of expenditures after an alleged crime is admissible without the state first laying a prior foundation of the prior relative impecuniousness of defendant before the event of the alleged crime. The evidence is relevant and admissible; the weight of such evidence is for the trier of fact.

Id. at 359.

¶6 To be admissible as circumstantial evidence, evidence of Curran's gambling need only constitute a link in the chain of evidence. *See* ***id.*** at 357. In the five years before discovery of the missing money from the cafeteria, Curran's earned income averaged $35,000. Her husband was unemployed since 2001. Curran was observed exchanging higher denomination bills in the cafeteria's cash drawer with cash gambling winnings from her pursue so that cafeteria employees would not have to run to the bank to get change. That suggests a great deal of cash at any given time in her purse. Further, Curran's gambling activity increased in 2004 and 2005, and yet her earned income remained the same. She had a substantial number more of reportable jackpots in 2005. The trial court observed that "it's common knowledge, common sense amongst ordinary jurors that the house has the odds. To get winnings in a machine takes money to get there." A connection exists between the ability to gamble regularly and achieve high payoffs and Curran's access to the cash missing from the cafeteria. Evidence that Curran played more than $1.7 million in cash or credits in 2005 to achieve her reported $135,095 winnings was relevant. Although Curran had big wins in early 2005, including a $20,000 video poker payoff, and she testified that she gambled on her winnings thereafter, it was for the jury to decide whether the amounts and

frequency of Curran's play was financed by just her earned income and reinvested gambling winnings.[4]

¶7 Curran argues that even if relevant, the probative value of the evidence of her gambling habits was substantially outweighed by the danger of unfair prejudice. *See* WIS. STAT. § 904.03 (2005-06).[5] This balancing test favors admissibility. ***Lievrouw v. Roth***, 157 Wis. 2d 332, 350, 459 N.W.2d 850 (Ct. App. 1990).

> "'Unfair prejudice' does not mean damage to a party's cause ...." Rather, unfair prejudice results where the proffered evidence, if introduced, would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.

State v. Mordica, 168 Wis. 2d 593, 605, 484 N.W.2d 352 (Ct. App. 1992) (citations omitted).

¶8 The gambling evidence was probative circumstantial evidence of guilt. It was also relevant to her motive for committing the crime and explained why Curran was not found in possession of the stolen money.[6] The "coin in"

[4] Curran argues that the evidence did not establish how much money she actually spent at the casinos in terms of cash out of her pocket and therefore was not evidence of expenditures. It was explained to the jury that the "coin in" was a combination of actual cash and credits accumulated. It was for the jury to decide the weight of the evidence. We do not, as Curran does, speculate as to why the jury requested a calculator during deliberations.

[5] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[6] Curran repeatedly attacks the admission of the evidence because it did not demonstrate a sudden influx of cash which was inexplicable absent the crime. Such a requirement does not apply because the crime itself was a not a sudden loss of a large sum of money but a pattern of missing cash. Curran's regular weekend casino activity was consistent with the pattern of loss.

evidence was limited to expenditures in 2005. It was highlighted for the jury that the "coin in" evidence did not reflect actual cash out of pocket. Curran's gambling was legal. There is little risk that the evidence would influence the jury to decide the case on extraneous factors other than the evidence presented at trial. We conclude the trial court properly exercised its discretion in admitting the gambling evidence and determining that it was not unfairly prejudicial.

¶9 In defense Curran offered character evidence under WIS. STAT. § 904.04(1)(a),[7] that she was trustworthy and honest. She complains that the trial court excluded testimony that friends and family believed that Curran was not the type of person who would commit the charged crime. She characterizes the ruling as an artificial line not justified under § 904.04(1)(a). However, in describing the type of evidence that was excluded Curran cannot avoid using the word "opinion"—that the witnesses would give their opinion that Curran would not commit the crime. Such testimony does nothing more than usurp the role of the jury to determine if Curran committed the crime. The intended opinion evidence was not truly evidence of a particular character trait. Further, since Curran testified, evidence that she would not commit the crime is akin to a witness giving prohibited opinion testimony about credibility of another witness. *See* ***State v. Romero***, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988); ***State v. Smith***, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App. 1992); ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) (it is well settled that a witness, expert or otherwise, may not testify that another physically and mentally competent witness

[7] WIS. STAT. § 904.04(1)(a) allows "[e]vidence of a pertinent trait of the accused's character offered by an accused."

is telling the truth). The trial court properly exercised its discretion in limiting the character evidence to specific traits.

¶10 The accountant was called as a rebuttal witness at the conclusion of trial. The prosecutor asked him about there not being overages or shortages in cash on the daily cash report and how pencil corrections were noted on the Z tapes. The accountant was also questioned about Curran's explanation for running a Z report on the breakfast cash register before lunch. The accountant repeated Curran's explanation that she would do that Z report to determine what food to order and he explained why her reason didn't make sense, adding that he later found out that Curran was not in fact the one doing the ordering. After brief cross-examination on whether Curran told the accountant she ran the Z report after breakfast every day, the following exchange took place with the trial court examining the accountant:

> TRIAL COURT: Well, rather than going through my notes, when you went through those Z tapes, how did you see or find those pencil corrections or changes by what you just testified about?
>
> WITNESS: How did I find them? Just pulling them off the back and look when I was creating my spreadsheet.
>
> TRIAL COURT: Did you testify earlier that you went through each one for all of 2005?
>
> WITNESS: Correct.
>
> TRIAL COURT: Were all the Z tapes missing the grand total bottom part torn off?
>
> WITNESS: If I remember, every one, except for we found that August 26th date.
>
> TRIAL COURT: Did the defendant talk about a Sigma Study to you? If so, what did she say?
>
> WITNESS: The Six Sigma Study?

> TRIAL COURT: I'm not sure the exact lingo, but that sounds—
>
> WITNESS: No. No. I never had a conversation with her about that. It wasn't till after that we found this embezzlement going on that—
>
> TRIAL COURT: Okay. I just asked if she talked about it.
>
> WITNESS: Okay.

¶11 After the jury was excused, Curran moved for a mistrial based on the trial court's examination of the accountant.[8] She argued that particular emphasis was given to those points because the trial court was doing the questioning and it was the last thing the jury heard. The trial court noted its responsibility to make sure the jury has the facts necessary for resolving the case and observed that in the court's experience, if the court is unsure of a particular point, jurors are also unsure. The court explained that the questions were asked because it was not clear to the court that the accountant had gone through every Z tape and a reasonable jury needed the other information produced as a result of the court's questions. The mistrial motion was taken under advisement and denied after the jury returned its guilty verdict. In denying the motion, the court reiterated that the questions it asked were necessary to clarify things that were confusing to the court and likely confusing to the jury as well.

¶12 "The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court. The trial court must determine, in light of the whole proceeding, whether the [claimed error] is sufficiently prejudicial to warrant a new trial." ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App.

[8] The motion for a mistrial was sufficient to preserve the issue for appeal. WIS. STAT. § 906.14(3).

1995) (citation omitted). We review for an erroneous exercise of discretion. ***Id.*** Where, as here, the ground for the mistrial request was not related to any conduct by or within control of the prosecution, we give the trial court's ruling great deference. *See* ***id.*** at 507.

¶13 Although the practice of judicial interrogation is a dangerous one, ***State v. Carprue***, 2004 WI 111, ¶43, 274 Wis. 2d 656, 683 N.W.2d 31, the trial judge may question any witness in a manner that doesn't appear to a jury as partisanship. *See* ***Schultz v. State***, 82 Wis. 2d 737, 741, 264 N.W.2d 245 (1978); WIS. STAT. § 906.14(2). "[T]he trial judge is more than a mere referee. The judge does have a right to clarify questions and answers and make inquiries where obvious important evidentiary matters are ignored or inadequately covered on behalf of the defendant and the state." ***State v. Asfoor***, 75 Wis. 2d 411, 437, 249 N.W.2d 529 (1976). We consider whether the trial court properly exercised its discretion in questioning a witness. ***Carprue***, 274 Wis. 2d 656, ¶43. To find reversible error we must be convinced that the cumulative effect of the trial court's questioning of witnesses had a substantial prejudicial effect upon the jurors. ***Schultz***, 82 Wis. 2d at 742.

¶14 We first observe that the trial court's examination was limited to four questions. The trial court found that it had asked the accountant questions necessary to clarify certain points of evidence. The accountant's direct and cross-examination had taken place over the first two days of trial and was interrupted by another witness. On one day he indicated that "just about every Z tape I looked at, we were missing the grand total." The next day he testified that he found one specific day with the grand total on the Z tape. Although the accountant testified that he looked at the Z tapes for each day of 2005, the rebuttal testimony was directed only at Z tapes that had pencil corrections and the accountant indicated

how he had pulled those off the daily cash reports to examine them. The rebuttal examination muddied the water on whether the accountant had examined every Z tape. Clarification of that point was appropriate.

¶15 We recognize that the trial court's inquiry whether Curran had told the accountant about providing the Z tapes' daily grand total for the Six Sigma study impeached Curran's testimony about what she told the accountant.[9] Testimony that the study was the genesis of cutting off the bottom of the Z tapes came long after the accountant's testimony. Despite cross-examination about Curran having told him that she used the Z tape for ordering purposes, the accountant had never been asked if he had been told the bottom of the Z tapes were used for the study. The trial court recognized it as a point that the jury would be curious about. The question was neutral in context in that the accountant could have answered yes or no. The trial court cut off further inquiry on the point. We are not convinced that the question demonstrated partiality to the jury or was improper advocacy on behalf of the prosecution. *See* ***Schultz***, 82 Wis. 2d at 743 (nothing in the language or timing of the trial court's questions evidence a motive or purpose other than that of eliciting relevant testimony).

¶16 Even if we consider the trial court's question to have suggested partisanship, there was no cumulative prejudicial effect warranting a new trial.

[9] Curran testified that in 2004 a Lean Six Sigma study was conducted in the cafeteria in order to cuts costs and waste. She explained that the leader of the project asked for the bottom half of the Z tapes because it reflected how much of particular products had sold. Although the study lasted only one month, Curran continued to cut the bottom off the Z tape to track inventory. She further testified that she told the accountant that the bottom of the Z tape was used for the Lean Six Sigma study and that after the study was done she continued to use the bottom of the tape for similar purposes. On cross-examination she said the accountant "didn't even listen about the Lean Six Sigma project, I don't think, because I never heard him say anything about that."

Curran's testimony that she cut the Z tapes for the study didn't explain why the bottom half of the tapes had been removed just before the grand total amount or how that grand total amount was necessary for the study or for her ordering purposes. Physical examination of the Z tapes suggests a logical cutting point below the grand total and just above a new heading marking the list of particular items sold where there was a significant gap in the paper. Rather, the tapes were precisely cut on a fine line between the daily total for categories and the grand total. Further, the accountant explained why Curran's continuing practice of cutting the Z tapes didn't make sense for the purpose of ordering. One cafeteria employee testified that she was responsible for ordering food products and never worked off a Z tape for the purpose of determining what to order. There was sufficient evidence for the jury to reasonably infer that the cutting of the Z tapes to remove the grand total was deliberate and not necessary for any purpose other than to conceal the crime. The point on which Curran was impeached by the trial court's question—that she told the accountant about using the bottom half of the Z tapes for the Six Sigma study—wasn't prejudicial in light of the other evidence about the practice of cutting off the Z tapes.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.