

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 2, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP1233-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2009CM419

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEA B. KOLNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Lea Kolner appeals a judgment convicting her of theft by false representation. Kolner argues the trial court should have granted her

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

motion for a mistrial after the prosecutor commented on her pre-arrest refusal to speak to police. Kolner also argues the evidence was insufficient to support her conviction. We disagree on both points and affirm.

BACKGROUND

¶2 Shortly before noon on March 30, 2009, Kolner entered a Kwik Trip convenience store in Eau Claire. Several minutes after entering the store, Kolner approached the cash register to purchase a few small items and placed a ten-dollar bill on the counter to pay for them.

¶3 Kolner then produced a hundred-dollar bill and asked the cashier, Andrew Califf, if he would exchange it for two fifty-dollar bills. Califf responded he could not give her two fifties, and Kolner took back the hundred-dollar bill. While Califf was counting out the change for Kolner's purchase, she asked if he could give her five twenty-dollar bills instead. Califf responded that he could, but he wanted to finish making change for her purchase first.

¶4 After Califf gave Kolner her change, he counted out five twenty-dollar bills and placed them on top of the cash register. Califf then asked Kolner to give him the hundred-dollar bill, but she asserted she had already done so. Califf proceeded to look in and around his register for a hundred-dollar bill, and he found one under a stack of twenties. However, Califf testified the bill he found in the register could not have been Kolner's because it was not marked with a Verimarker, a pen used to distinguish counterfeit currency. Califf testified that, had Kolner given him a hundred-dollar bill, he would have immediately marked it with the Verimarker, as was his routine practice.

¶5 Kolner continued to assert she had given Califf the hundred-dollar bill, and she never offered to look for it in her purse, wallet, coat, or on the floor. Califf ultimately asked his supervisor how to handle the situation, and she told him to give Kolner one hundred dollars. Califf testified this was because Kwik Trip has a policy that “[t]he customer is always right.” At the end of his shift, Califf counted the money in his register and found it was just over one hundred dollars short.

¶6 The matter was reported to the police department. Officer Sean Lester reviewed a surveillance video showing the cash register and counter during Kolner’s transaction.² The day after the incident Lester went to Kolner’s residence to question her. Kolner admitted she had been at Kwik Trip the day before and said she had used a hundred-dollar bill to purchase juice and water. Lester pointed out that the surveillance tape showed her using a ten-dollar bill to make her purchase. Kolner then said she must have made a mistake and offered to contact the store to straighten out the situation. Lester informed her that would not be possible because a criminal complaint had already been filed.

¶7 Kolner was charged with theft by false representation. A jury trial was held on January 12, 2010. During his opening statement, the prosecutor commented on Kolner’s initial refusal to speak with police about the incident, stating:

They go to her residence, two police officers in full uniform, the next day. They knock on her door. They see her. Now, they could be knocking on her door for, hey,

² Both parties acknowledge that, not long after the beginning of the transaction, Califf moved in front of the surveillance camera, partially blocking its view of Kolner and the counter. Thus, the video does not definitively show whether Kolner gave Califf the hundred-dollar bill.

somebody is hurt, somebody stole your car, somebody has an accident. She wouldn't let them in. She wouldn't let them in because she knew.

So the second time, they didn't even get an explanation. She closed the door and locks her door on them. It is a miserable day. About half an hour later, she calls dispatch, and she finally talks to the officer, okay? She talks to the officer, but she won't allow him in.

....

Eventually, she won't allow them in the house. They talk to her out in the 32-degree weather in the rain.

Kolner's counsel objected, and the trial court sustained the objection. Kolner's counsel later moved for a mistrial, arguing the prosecutor had improperly commented on Kolner's refusal to speak to the officers. The court denied the motion, but instructed the jury to disregard the prosecutor's entire opening statement.

¶8 After deliberating for about one-and-a-half hours, the jury returned a guilty verdict. Kolner now appeals.

DISCUSSION

I. Mistrial

¶9 Kolner first argues the trial court should have granted her motion for a mistrial because the prosecutor's opening statement improperly commented on her pre-arrest refusal to speak to police. Kolner contends the prosecutor's comments violated her Fifth Amendment right to remain silent, but the State argues the comments did not implicate the Fifth Amendment.

¶10 We need not determine whether the prosecutor's comments violated Kolner's right to remain silent because, even assuming a Fifth Amendment

violation, the trial court properly exercised its discretion by denying Kolner's motion for a mistrial. A motion for a mistrial is addressed to the sound discretion of the trial court, and its decision will be reversed only upon a clear showing of an erroneous exercise of discretion. *Haskins v. State*, 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980). In considering a motion for a mistrial, the "trial court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." *State v. Sigarroa*, 2004 WI App 16, ¶24, 269 Wis. 2d 234, 674 N.W.2d 894.

¶11 Not all errors warrant a mistrial, and "the law prefers less drastic alternatives, if available and practical." *State v. Bunch*, 191 Wis. 2d 501, 512, 529 N.W.2d 923 (Ct. App. 1995). For instance, there is no erroneous exercise of discretion when, in lieu of a mistrial, the court cures potential prejudicial effect by instructing the jury to disregard an improper statement. *Haskins*, 97 Wis. 2d at 420. "Where the trial court gives the jury a curative instruction, [we] may conclude that such instruction erased any possible prejudice, unless the record supports the conclusion that the jury disregarded the trial court's admonition." *Sigarroa*, 269 Wis. 2d 234, ¶24.

¶12 Here, the trial court properly exercised its discretion by issuing a curative instruction rather than granting Kolner's motion for a mistrial. The court instructed the jury to disregard not just the prosecutor's improper comments, but his entire opening statement. The court also gave the standard jury instruction that attorney comments are not evidence. *See* WIS JI—CRIMINAL 157 (April 2000). Taken together, these instructions were sufficient to obviate any potential prejudice to Kolner. Kolner has not pointed to any evidence that the jury disregarded the court's instructions.

II. Sufficiency of the evidence

¶13 Kolner next argues there was insufficient evidence to support her conviction.

The standard of review in determining whether the evidence was sufficient to support a conviction is that “an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.”

State v. Hayes, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203 (quoting *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). Our review of a sufficiency of the evidence claim is therefore very narrow. We give great deference to the jury’s determination, and we examine the record to find facts that support the jury’s decision to convict. *Id.*, ¶57.

¶14 The State charged Kolner with one count of theft by false representation, contrary to WIS. STAT. § 943.20(1)(d). To obtain a conviction, the State was required to prove seven elements beyond a reasonable doubt: (1) Kwik Trip was the owner of property; (2) Kolner made a false representation to a Kwik Trip cashier; (3) Kolner knew the representation was false; (4) Kolner made the representation with intent to deceive and defraud the Kwik Trip cashier; (5) Kolner obtained permanent possession of Kwik Trip’s property by the false representation; (6) the Kwik Trip cashier was deceived by the false representation; and (7) Kwik Trip was defrauded by the false representation. Kolner argues the evidence related to the second, third, and fourth elements of the offense was insufficient to convict her.

¶15 With respect to the second element of the offense, there was sufficient evidence for the jury to find beyond a reasonable doubt that Kolner made a false representation to Califf when she stated she had given him the hundred-dollar bill. The jury heard Califf testify he was certain Kolner never gave him the money. It also heard him testify that the unmarked hundred-dollar bill in his register could not have come from Kolner because he always marks large bills with the Verimarker. Califf also testified his register was just over one hundred dollars short at the end of his shift. A reasonable inference from Califf's testimony is that Kolner never gave him the hundred-dollar bill and therefore made a false representation when she said that she had.

¶16 Additionally, while Kolner argues the surveillance video provides no evidence that she failed to give Califf the money, we disagree. It is true that Califf moved in front of the camera relatively early in the transaction, partially blocking the camera's view of Kolner. However, the State argued, and the jury could have reasonably concluded, that the visible portion of Kolner's body never made any movement that could be interpreted as giving the hundred-dollar bill to Califf. Viewing the surveillance video in this light, the jury could reasonably conclude Kolner's statement that she gave Califf the hundred-dollar bill was false.

¶17 There was also sufficient evidence for the jury to find beyond a reasonable doubt the third and fourth elements of the offense—that Kolner knew the representation was false and that she made it with intent to deceive and defraud Califf. Officer Lester described a “quick change” scheme to the jury. He testified that in a quick change scheme, a suspect quickly shows a bill to a cashier, then distracts the cashier and never actually hands over the money. The suspect then falsely claims to have given the cashier the bill and demands change for it. After viewing the surveillance video and listening to Califf's testimony, the jury could

have reasonably concluded Kolner's actions were consistent with such a scheme. This conclusion is bolstered by the fact that, if all Kolner wanted was to make change, she could have simply paid for her purchases with the hundred-dollar bill. The jury could have concluded that, by conducting multiple transactions, Kolner was attempting to confuse Califf in the manner Lester described.

¶18 The jury also heard testimony that Kolner traveled over three-and-a-half miles from her residence to Kwik Trip, even though there were about ten businesses within a mile of her home where she could have changed a hundred-dollar bill. A reasonable inference from this evidence is that Kolner deliberately targeted a busy store where the cashier would be harried and where she would be less likely to be recognized.

¶19 Additionally, Califf testified that Kolner never offered to look for the hundred-dollar bill in her purse, coat, wallet, or on the floor. The jury could have concluded that an honest person, when confronted with a potential mistake, would have offered to look for the money. Thus, a reasonable inference from Kolner's failure to look for the money is that she knew she had not given it to Califf.

¶20 Finally, Lester testified Kolner gave contrary explanations for her behavior when confronted by police. Initially, she stated she had paid for her purchases with a hundred-dollar bill. When Lester pointed out that the surveillance tape showed her paying with a ten-dollar bill, she said she must have made a mistake. Given that the incident had only occurred one day earlier, and that it is not common for a person to use a hundred-dollar bill at a convenience store, the jury could have reasonably concluded Kolner was lying when she initially told Lester she paid with a hundred-dollar bill. The jury could reasonably

infer that Kolner lied because she knew she had never given Califf the money and was trying to hide her guilt.

¶21 There was ample evidence to support Kolner's conviction for theft by false representation. Accordingly, we affirm the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

