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NO. 62422-3-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FILED
COURT OF APPEALS
STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

KAREN M. PEACEY,

Appellant.

BRIEF OF RESPONDENT

JANICE E. ELLIS
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. The defendant told her employer that she had a drug problem and was checking herself into in patient treatment as an explanation for why she stole more than \$200,000 from the employer. Did the trial court abuse its discretion when it permitted that statement to be introduced into evidence?

2. Did the trial court abuse its discretion when it imposed an exceptional sentence?

II. STATEMENT OF THE CASE

Jerry Dalziel and John McDonald have owned Olympic Mechanical since 1992. The company provides heating and air conditioning products, and employs between 20 and 25 people. It has sales of three to four million dollars per year. 1 RP 58.

The company had prospered for the first eight years that Dalziel and McDonald owned it. Beginning in 2000 they struggled to make a profit. By December 2006 Dalziel and McDonald decided to borrow money in order to pay Christmas bonuses to employees. 1 RP 50, 59.

The defendant, Karen Peacey, worked for Olympic Mechanical as a bookkeeper among other things. She began in 1989 and worked for the company through August 2007. Her

duties included preparing and signing payroll checks, paying accounts payable, and paying the taxes. In order to perform her job the defendant had a company credit card and was authorized to sign checks on the company checkbook. 1 RP 109.

In 1992 when Dalziel and McDonald purchased the business the defendant earned \$30,000. She had incremental raises in the following years. By 2003 she earned \$62,000. In 2004 she earned \$74,000. She reported earning \$82,000 to the IRS in 2006. 2 RP 123-125.

In 2006 the defendant became active in an association designed to lobby for the HVAC industry in Olympia. She was required to be an officer in the business in order to hold an office in the association. In order to accommodate her Dalziel and McDonald had their attorney draft a consent resolution that created an office of special vice president. The duties of the special vice president were limited to representing the company in industry marketing and lobbying organizations. It gave the special vice president no other management rights, additional compensation, or ownership rights. The defendant was appointed special vice president of the company. 1 RP 54-57; 2 RP 42-44.

In 2006 Dalziel and McDonald began to have trouble getting monthly financial statements from the defendant. In 2007 the owners did not get statements for January until May. The defendant's failure to timely provide financial information made it difficult for the owners to make business decisions. 1 RP 59-60, 110, 112-113.

In August 2007 Emily Peacey, the defendant's daughter, worked for the company as a bookkeeping and office assistant. On August 13 Emily became upset when she saw charges on the company credit card statement for \$1559.37 and \$459.33 to BIDZ.com. That was a jewelry company that she knew her mother had purchased items from. The defendant was not authorized to make these charges. Besides the defendant, only Dalziel, and McDonald had a company credit card. Emily brought the charge to Dalziel's attention. 1 RP 9-13, 34-36.

Emily had also been paid for time that she had not worked because she was sick. When Emily asked Dalziel about whether she was entitled to sick pay for that time she learned that she was not. The defendant had previously told Emily that the sick pay had been authorized, but not to say anything to anyone about receiving it. 1 RP 14-15, 30, 34.

Dalziel and McDonald confronted the defendant about the unauthorized purchase from BIDZ.com two days later. The defendant denied that she had made the purchase and claimed that she did not know what the purchase was for. One hour after their meeting, the defendant returned to Dalziel and McDonald and confessed that she had made the purchase. She promised never to use the company credit card for personal purchases again, and she agreed to pay them back. The following Monday the defendant gave Dalziel and McDonald a cashier's check for \$2000. When she gave him the check the defendant said the reason she made the charge was that she had become addicted to prescription pain medication and that she needed treatment. 1 RP 37-38, 62-63.

Dalziel and McDonald contacted their lawyer and their bank. They employed a forensic accountant to review the books and reconstruct the company's finances. The accountant determined that in addition to their salary that she was entitled to the defendant paid herself in excess of \$166,000 in 2006 and \$67,000 in 2007. Ex. 17 and 18; 2 RP 22-28.

III. ARGUMENT

A. WHETHER EVIDENCE WAS PROPERLY ADMITTED ON THE GROUNDS ASSERTED ON APPEAL HAS NOT BEEN PRESERVED FOR REVIEW.

The defendant argued against admission of evidence that she had a drug problem on the two bases; (1) that the State had provided no discovery on the subject and (2) that the evidence was more prejudicial than probative. The prosecutor argued that she did not have proof of the defendant's actual drug problem. However the defendant's statements that her drug problem was the reason she stole from her employer was probative of the defendant's motive. The court limited admission of the evidence to the defendant's statements as they were statements against interest. 1 RP 6 – 7.

The defendant now argues it was error to admit her statement under ER 608 and ER 404(b). The defendant did not raise either of these rules as a basis for her objection.

"A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), State v. Powell, ___ Wn.2d ___, 206 P.3d 321, 327 (2009). Here this Court should reject the defendant's arguments that the defendant's statements

were inadmissible under ER 608 or ER 404(b) because she did not raise either basis as a ground to exclude the evidence. At best she argued the evidence should be excluded under ER 403, although she did not specifically identify the rule that she was relying on.

A Court may review an assignment of error for the first time on appeal if the defendant establishes that it is a manifest constitutional error. RAP 2.5(a)(3), State v. Gregory, 158 Wn.2d 759, 839, 147 P.3d 1201 (2006). Evidentiary errors, such as erroneous admission of ER 404(b) evidence, are not errors of constitutional magnitude. State v. Everybodytalksabout, 145 Wn.2d 456, 468-469, 39 P.3d 294 (2002). The defendant has not asserted a constitutional error.

Even if she had, the error is not manifest. Error is manifest when it had a practical and identifiable consequence in the trial of the case. State v. Kirkpatrick, 160 Wn.2d 873, 880, 161 P.3d 990 (2007). Even without evidence the defendant admitted to a drug problem, the case against her was strong.

There was no issue that the defendant had repeatedly over the course of two years written herself numerous checks, each for several thousand dollars, which were not payroll checks. In addition she had consistently written herself payroll checks for more

than she was entitled, without increasing her reported gross pay. The only issue to be decided was whether these checks represented legitimate reimbursements to her for funds advanced the company. While some checks written to the defendant indicated that they were for reimbursement of expenses, the vast majority had no such explanation. If they had been legitimate reimbursements they would have been for different amounts. The amount of the check that was more than her payroll was the same each pay period. 2 RP 25-26. Counsel for the company stated that no company allows its bookkeeper to advance the company money for business expenses and seek reimbursement. 2 RP 44. Given this evidence it is not likely the results at trial would have been different without the evidence the defendant argues should have been suppressed.

If this Court does elect to reach the merits of the defendant's arguments, they should be rejected.

B. THE DEFENDANT'S STATEMENT TO HER EMPLOYER WAS PROPERLY ADMITTED.

1. ER 403.

The defendant did preserve an objection to the evidence under ER 403. The trial court properly admitted the evidence

because it was relevant to an issue at trial and the probative value was not outweighed by any prejudice to the defendant.

There was no real dispute that the defendant had used the company credit card for personal purchases and had written checks to herself that were for more than her salary. The only issue was whether those checks and purchases were authorized. The defendant's explanation to her employer for making the unauthorized purchase was an acknowledgement that she knew that she was not entitled to use the company credit card to make the BIDZ.com purchase. The jury could have relied on her statement to convict her because one of the BIDZ.com purchases exceeded \$1500. The jury could have also used that evidence to infer the defendant knew she was not entitled to write additional checks to herself above her authorized salary.

Although highly probative of what the defendant knew at the time she was taking funds from the company, the evidence was not unduly prejudicial. To support her position the defendant cites on People v. Cardenas, 31 Cal.3d 897, 647 P.2d 569, 184 Cal. Rptr. 165 (1982). There the State was permitted to introduce evidence through a police officer that the defendant was a drug addict to support its theory that the defendant robbed the victim in order to

get money for drugs. The Court held the probative value of the evidence was substantially outweighed by the inflammatory effect on the jury. Cardenas, 31 Cal.3d at 906.

Unlike Cardenas the claimed drug use at issue involved legally obtained prescription pain killers. It is likely that many jurors have had some experience with that kind of medication, either personally or through some one they knew. In addition, the evidence came from the defendant, not from some third person. Although the prosecutor initially suggested it was probative to establish motive for the theft, as the defendant acknowledges this theory was abandoned.

2. ER 404(b).

The prosecutor abandoned any suggestion that the evidence was relevant to establish the defendant's motive for the theft. Nevertheless the defendant argues it was inadmissible under ER 404(b).

A person's motive in committing a crime may be proved by evidence of her other crimes, wrongs, or acts. ER 404(b). The defendant argues that because there was no evidence introduced that she had a drug habit, or that it was tied to the theft, her admission that her drug problem was the reason she stole from her

employer did not serve any legitimate purpose, but rather left the jury to speculate that she was stealing money to support her drug habit. BOA at 13. She relies on the Court of Appeals decision in State v. Powell, 139 Wn. App. 808, 162 P.3d 1180 (2008), reversed, ___ Wn.2d ___, 206 P.3d 321 (2009).¹ Powell does not supply support for the defendant's position because it presents different facts and circumstances than in her case.

In Powell the defendant was charged with attempting to burglarize his former girlfriend's home. The issue at trial focused on the defendant's intent when he went to her home. The court permitted a witness to testify that he saw the defendant using methamphetamine shortly before the defendant went to the victim's home. No expert testimony was admitted to explain the effects of methamphetamine. Without evidence to explain what drug use would do to the defendant evidence that he used drugs was not relevant to explain the defendant's purpose in being at the victim's home. Powell, 139 Wn. App. at 818.

The probative value of the evidence presented in this case

¹ The Supreme Court reversed the decision of the Court of Appeals after the defendant filed her opening brief. The court found the Defendant had not properly preserved the issue for review, and the error was not manifest constitutional error. Powell, 206 P.3d at 327-328.

did not depend on whether the defendant really was a drug addict. It was probative because it explained her state of mind at the time her employer caught her stealing from the company. Because the defendant herself asserted she had a drug problem that caused her to steal, jurors did not need to speculate as to why she stole from her employer in the absence of additional evidence tying an asserted drug problem to the theft. Jurors could properly use the evidence to evaluate her credibility and other evidence that supported the State's theory that she took unauthorized funds from the company.

The defendant also argues the court failed to engage in the analysis required by the Court in State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009). The trial court did not introduce the evidence pursuant to ER 404(b). Therefore the analysis necessary prior to admission of the defendants prior acts to prove some other purpose, such as motive, was unnecessary. Even when the court should have performed an analysis on the record, its failure to do so can be harmless where the record is sufficient to afford appellate review. State v. Acosta, 123 Wn. App. 424, 433, 98 P.3d 503 (2004).

Here, even if the court was required to conduct an analysis on the record any lack of analysis was harmless. The trial court did identify the probative value of the evidence; it was the defendant's own statement acknowledging she took money without authorization. The kind of drugs and the manner in which she claimed she became addicted were on the record. Therefore the court can evaluate any prejudice to the defendant and weigh it against its probative value.

3. ER 608.

The defendant also asserts the court erred in admitting the defendant's drug excuse under ER 608. The difficulty with this argument is that the evidence was not introduced pursuant to this rule. ER 608(b) permits specific instances of the conduct of a witness to be introduced if probative of truthfulness or untruthfulness. Here the evidence was not relevant to whether the defendant was generally truthful or not truthful. It was relevant to show that the defendant knew she was not authorized to make the purchase at the time.

Evidence admitted pursuant to ER 608 is introduced pursuant to cross examination of the witness. Here the evidence was introduced through Dalziel on direct examination.

Evidence must also bear on the character of either the witness who is being cross-examined, or on the character of a witness about whom the witness testified. This evidence had nothing to do with the defendant's character.

The defendant cites State v. Stockton, 91 Wn. App. 35, 955 P.2d 805 (1998) and State v. Renneberg, 83 Wn.2d 735, 522 P.2d 835 (1974). Neither of these cases are helpful to analyzing whether the evidence was properly admitted here. Although they relate to admission of evidence the defendant was a drug user, it was for a completely different purpose than what the defendant's admission was permitted for here.

In Stockton the defendant was charged with unlawful possession of a firearm. He supported a necessity defense by testifying that he took possession of a gun during an altercation with three people he believed approached him to conduct a drug deal. The prosecutor asked the defendant if he had some knowledge of how to purchase drugs on the street. This Court held the question could not be justified under ER 608 because evidence of drug use was not probative of truthfulness or untruthfulness. Stockton, 91 Wn. App. at 42. As noted the evidence here was not introduced to establish the defendant's character for untruthfulness.

In Renneberg the Court held it was permissible for the prosecutor to inquire into the defendant's drug use on cross examination because she had put her character in evidence. Renneberg, 83 Wn.2d at 738. The evidence was not admitted to rebut the defendant's character here. It was admitted for another proper purpose; to aid in evaluating her confession to her employer and the credibility of her testimony at trial.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THE LENGTH OF THE DEFENDANT'S EXCEPTIONAL SENTENCE.

The jury returned a finding that the defendant had committed the crime of Theft in the First Degree and used her position of trust, and fiduciary responsibility to facilitate the commission of the crime. 3 CP ____ (sub 32 Special Verdict Form A). It also found that the crime was a major economic offense or series of offenses. 3 CP ____ (sub 33 Special Verdict Form B).

At sentencing the defendant stated that "I have been convicted of a very serious crime, although the actual crime itself was much less than what I was convicted of, nonetheless a crime is a crime and I take responsibility for my actions." 9-10-08 RP 10. The trial court disagreed.

Your crime was 56 times what you were convicted of. You were convicted of stealing over \$1,500. Without any authorization or commission to do so, you wrote 56 checks over \$1,500. I do agree with the jury that this crime was a major economic offense. I also agree with the finding of theirs that you breached your fiduciary duty and violated a position of trust in order to facilitate the commission of the crime and I therefore find that there are exceptional circumstances allowing and demanding a sentence in excess of the standard range.

9-10-08 RP 13-14.

The court then entered findings and conclusions consistent with these remarks. 1 CP 16-17. The court sentenced the defendant to 60 months confinement. 9-10-08 RP 14; 1 CP 8.

The defendant does not dispute that there was sufficient evidence to support the finding that she abused her position of trust and that the abuse of her position of trust supported a finding that her crime was a major economic offense. BOA at 14. She takes issue with the length of the sentence imposed by the judge.

To reverse an exceptional sentence the reviewing court must find either (a) the reasons supplied by the sentencing judge are not supported by the record or that those reasons do not justify a sentence outside the standard range for that offense; or (b) the sentence imposed was clearly excessive or clearly too lenient. RCW 9.94A.585(4). The length of an exceptional sentence is

reviewed for an abuse of discretion. State v. Smith, 82 Wn. App. 153, 167, 916 P.2d 960 (1996). “A sentence is not clearly excessive unless it is clearly unreasonable, that is, it was imposed on untenable grounds or for untenable reasons or is a sentence that no reasonable person would have imposed.” State v. Souther, 100 Wn. App. 701, 998 P.2d 350 (2000).

First Degree Theft is a class B felony with a maximum penalty of 120 months. RCW 9A.56.030(2), RCW 9A.20.021(1)(b). The monetary threshold for commission of that crime is \$1,500. RCW 9A.56.030(1). The standard range for sentence for one with no prior criminal history is 0-90 days in custody. RCW 9.94A.510, RCW 9.94A.515. The sentence imposed represents the mid-point between the least and the most amount of time the defendant could have received in custody.

The defendant suggests in a query that because the sentence imposed is 20 times the high end of her standard range that the court abused its discretion in setting the term of confinement. BOA at 17. The Court rejected placing a limitation on a trial court’s exercise of discretion based on a mathematical formula. State v. Oxborrow, 106 Wn.2d 525, 531, 723 P.2d 1123

(1986). Thus, whether the sentence imposed is two times or twenty times the top end of the standard range is irrelevant.

Nor does it matter that the defendant was a first time offender. The Court found no abuse of discretion when it sentenced the defendant to the maximum term of confinement for First Degree Theft in Oxborrow. Even though the defendant had no prior criminal history his theft constituted a major economic offense under each of the criteria which could satisfy that finding. Oxborrow, 106 Wn.2d at 532-533.

Similarly this Court found the trial court did not abuse its discretion when it imposed ten years confinement after finding the defendant's convictions for six counts of first degree theft and eleven counts of securities fraud in State v. Argo, 81 Wn. App. 552, 915 P.2d 1103 (1996). The trial court focused on specific factors, such as the defendant's abuse of trust, the amount of money stolen and the manner in which the defendant stole it. Id. at 572.

Here the court focused on the numerous incidents that the defendant committed a theft of more than \$1500. The court's reference to the "56 times" of what the defendant was convicted of is supported by the forensic accountant's testimony and the exhibit he prepared showing at least 45 checks the defendant drew on the

company's account which were neither payroll nor was there any evidence it was a legitimate reimbursement in 2006 alone. 11 more checks included payment in excess of the defendant's bi-monthly paycheck for that year. In 2007 there were 13 checks in addition to payroll checks which met the threshold for first degree theft. Ex. 17, 18, 2 RP 22-28.

Multiple incidents per victim is one of the factors that may be considered when determining the offense constitutes a major economic offense. RCW 9.94A.535(3)(d)(i). The court did not set the term of the defendant's sentence based on untenable grounds. Thus the trial court did not abuse its discretion when it set the term of confinement.

The defendant concedes the record in this case was sufficient for the trial court to find there were reasons for imposing an exceptional sentence and that those reasons were sufficiently substantial and compelling to justify an exceptional sentence. However she argues that the record is insufficient to review whether the court abused its discretion in setting an exceptional sentence on the basis that it constituted a major economic offense. She asserts it was necessary to have a special interrogatory for

jurors to identify what facts were considered when they found that the defendant's crime constituted a major economic offense.

This argument should be rejected. Whether the offense constitutes a major economic offense is the ground that justifies imposing an exceptional sentence, not the specific considerations that went into that finding. In Hagar the defendant stipulated to certain facts when he pled guilty to three counts of first degree theft. State v. Hagar, 158 Wn.2d 369, 144 P.3d 298 (2006). While those facts could have supported a finding that he committed a major economic offense, he did not stipulate to the specific finding that he committed a major economic offense. The trial court violated the defendant's right under Blakely² when it used the facts stipulated to find the defendant had committed a major economic offense. Id. at 374.

An interrogatory is also not necessary to determine whether the judge abused his discretion in setting the term of the exceptional sentence because the jury did not need to unanimously find any of the four factors that could constitute a major economic offense. It was sufficient that each juror found at least one

² Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

alternative had been found beyond a reasonable doubt. WPIC 300.13. There was ample evidence which proved the crime involved multiple incidents per victim, that it involved a monetary loss substantially greater than typical for the crime, and that the defendant has used her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime. Because the evidence was sufficient to support the jury verdict that the defendant committed a major economic offense, the trial court did not abuse its discretion when it imposed an exceptional sentence based on that finding.

IV. CONCLUSION

The defendant failed to object to evidence that she told her employer that she had a drug problem as her explanation for why she stole from the company on the grounds she asserts on appeal. She has failed to preserve the issue she seeks to have reviewed. Alternatively, because the statement was a statement against interest, and its probative value in assessing the credibility of her statement to her employer and her statements at trial outweighed any prejudice to her the trial court did not abuse its discretion in admitting that statement into evidence. Finally, the trial court did not abuse its discretion when it set the term of the defendant's

exceptional sentence upon the jury's finding that the defendant abused her position of trust and the crime was a major economic offense.

For the forgoing reasons the State asks the Court to affirm the defendant's conviction and sentence.

Respectfully submitted on June 17, 2009.

JANICE E. ELLIS
Snohomish County Prosecuting Attorney

By: *Kathleen Webber*
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent