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DISTRICT II

December 28, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP2377-CR

State of Wisconsin v. Daniel L. Nettesheim (L.C. #2013CF94)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Daniel Nettesheim appeals a judgment convicting him of theft in a business setting in an amount between \$2,500 and \$5,000, contrary to WIS. STAT. § 943.20(1)(b), (3)(bf) (2013-14),¹ and an order denying his postconviction motion to amend the conviction to a misdemeanor. Based on our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Nettesheim was a meat cutter and cashier at Wilson Meats (Wilson) in Elkhorn. Since 2003, Wilson allowed Nettesheim to sell beef from his farm at the store in exchange for Wilson taking a ten percent cut of sales. In 2011, a new manager, Bob Schmaling, wanted the store to realize a larger profit from Nettesheim's beef sales. When Nettesheim refused, the store no longer provided retail shelf space for his beef; customers had to ask for it to purchase it.

Between May and July 2011, shortages began to show on the books and, although Nettesheim's beef was not displayed in the retail area, sales of his product seemed to increase. Wilson installed a surveillance video camera. It recorded Nettesheim conducting improper register entries, using two methods to falsify transactions: "void correct" sales in which he entered sales into the cash register then voided them for a larger amount and kept the difference at the end of the workday, and a "Department 21" code to indicate a sale of his beef. Each month, Nettesheim was paid his ninety-percent cut of the prior month's Department 21 sales. Nettesheim had begun entering the code on sales of meat he did not supply. Schmaling and Nancy Bassett, Wilson's bookkeeper, investigated \$7,166.77 in irregular register entries by matching surveillance video with cash register receipts. By the time of trial, \$3,362.33 of the entries had been verified; the spreadsheet was admitted as Exhibit S-1. Another exhibit, Exhibit S-11 listed an additional \$3804.44 in questionable transactions as "pending further scrutiny." The jury found Nettesheim guilty.

Postconviction, Nettesheim moved to have the judgment amended to reflect a conviction for misdemeanor theft of less than \$2,500, *see* WIS. STAT. § 943.20(3)(a), arguing that he actually received and used only \$2,435.27, as Wilson refused to pay him his cut of June and July Department 21 sales. The court rejected his argument. Nettesheim appeals.

Nettesheim's sole appellate argument is that there was insufficient evidence for a reasonable trier of fact to find that he converted more than \$2,500 to his own use.

When a defendant challenges a verdict based on sufficiency of the evidence, we give deference to the jury's determination and view the evidence in the light most favorable to the State. If more than one inference can be drawn from the evidence, we must adopt the inference that supports the conviction.

State v. Long, 2009 WI 36, ¶19, 317 Wis. 2d 92, 765 N.W.2d 557 (citations omitted). "We will not substitute our own judgment for that of the jury unless the evidence is so lacking in probative value and force that no reasonable jury could have concluded, beyond a reasonable doubt, that the defendant was guilty." *Id.* (citation omitted). We may not overturn the verdict if there is any possibility that the jury could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

The State alleged that Nettesheim intentionally used money belonging to Wilson with intent to convert it to his own use. *See* WIS. STAT. § 943.20(1)(b). The State thus had to prove four elements: (1) that by virtue of his employment, Nettesheim had possession of money belonging to another; (2) that he intentionally used the money contrary to his authority and without Wilson's consent; (3) that he knew that using the money was contrary to his authority and without Wilson's consent; and (4) that he intended to convert the money to his use. *See id.*; *see also* WIS. JI-CRIMINAL 1444 (2006) at 1-2. For felony theft, the State had to prove beyond a reasonable doubt that the total value of the money he used was over \$2,500. *See* § 943.20(3)(bf). Nettesheim concedes that the evidence was such that the jury could find that the State proved the four elements. He disputes only that he used more than \$2,500.

Nettesheim contends that under any reasonable view of the evidence, he converted only \$2,435.47 to his own use. He concedes that when he put Department 21 sales money in the register he intended to convert it at a later date, but claims he did not convert it to his use until he received a check from Wilson for his cut. Accordingly, he asserts, the June and July entries for which he was not paid were only attempts to convert.

As the State suggests, Nettesheim conflates the terms “intentionally uses” with “with intent to convert [it] to his ... own use.” *See* WIS. STAT. § 943.20(1)(b). He intentionally used the money when, as part of his embezzlement scheme, he falsified sales. Regardless that he never realized “his” cut of the June and July receipts, he undeniably intended to convert those monies to his use when he falsely entered Department 21 codes, thus committing a completed violation of § 943.20(1)(b).

The evidence showed that Nettesheim entered \$1,993.79 in “void correct” transactions, that Wilson paid him \$1973.43 for his May Department 21 sales, for a total of \$3,967.22, and that Exhibit S-11 listed \$234.24 in additional May sales Basset did not include on Exhibit S-1 as she could not match receipts with video showing the sales. Even without Exhibit S-11, the evidence allowed the jury to reasonably conclude that Nettesheim misappropriated over \$2,500.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals