

IN THE COURT OF APPEALS 04/09/96
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00191 COA

JEANETTE PINTER

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MARCUS D. GORDON

COURT FROM WHICH APPEALED: SCOTT COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ROY NOBLE LEE, JR.

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: JOLÉNE M. LOWRY

DISTRICT ATTORNEY: KEN TURNER

NATURE OF THE CASE: CRIMINAL: EMBEZZLEMENT (>\$250.00)

TRIAL COURT DISPOSITION: GUILTY VERDICT; SENTENCED TO SIX YEARS IN
CUSTODY OF MISSISSIPPI DEPARTMENT OF CORRECTIONS, ORDERED TO PAY
RESTITUTION AND FINED \$1,000.00.

BEFORE THOMAS, P.J., BARBER, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Jeanette Pinter was convicted of embezzling money from her employer and sentenced to serve six years in prison, ordered to pay restitution and fined \$1,000.00. She appeals her conviction, contending that opinion evidence was improperly admitted, that a discovery violation should have precluded the testimony of one witness, and challenging the weight and sufficiency of the evidence. We affirm.

FACTS

While working at a convenience store in Morton, Pinter was the subject of video surveillance by one of the store's owners. The owner was convinced that Pinter was embezzling from the business when she noticed Pinter using a calculator following some cash transactions. The tapes were shown to the Morton Police Department, which arrested Pinter.

A private investigator specializing in white collar crime was retained by the business owners. He concluded that, while charging customers the proper amount for their purchases, Pinter was ringing up less than the charged amount. By keeping track on her calculator of the difference between the amount charged and the amount rung up, Pinter could take the difference in cash from her register and balance the register at the close of her shift. The investigator supported his testimony with a comparison between the price of items that could be seen as the subject of sales in the surveillance videos and the amount rung up on the register. The investigator testified concerning at least sixty-eight transactions amounting to shortages of \$277.82.

DISCUSSION

1. Opinion Evidence

On appeal, Pinter challenges the admissibility of the private investigator's testimony. The investigator walked the jury through the evidence by pointing out what was occurring on the videotape and correlating it to the tape from the cash register. There was a clock visible on the videotape, and times for each transaction were recorded on the cash register tapes. The investigator was not allowed to testify as to his opinion regarding Pinter's actions, such as whether Pinter was hesitating or showing other culpability. Pinter's trial counsel stated that this approach seemed "fair." There was no objection to the accuracy of the investigator's descriptions.

Because Pinter did not challenge the admissibility of this testimony at trial, and indeed accepted it as reasonable, whatever defects there might be in this approach are waived. *See Wells v. State*, 521 So. 2d 1274, 1276 (Miss. 1987) (citations omitted).

2. Discovery Violation

Pinter contends that she was not told that the investigator would give testimony until the trial had begun. Accepting her version of events as true, this issue is likewise unavailing. Faced with a discovery violation, Pinter's trial counsel had an obligation to ask for a continuance. *Cole v. State*,

525 So. 2d 365, 370 (Miss. 1987), *cert. denied*, 488 U.S. 934 (1988). A trial court is not charged with *sua sponte* ordering a continuance. After the trial court afforded an opportunity to interview the witness, Pinter's trial counsel failed to request a continuance. Consequently, the objection based on the purported discovery violation was waived. *Dycus v. State*, 440 So. 2d 246, 253-54 (Miss. 1983).

3. Weight and Sufficiency of the Evidence

Pinter lastly contends that the evidence of her guilt was insufficient to support a charge of embezzlement and that the jury's verdict was contrary to the overwhelming weight of the evidence. We disagree.

In this case, on the charge of embezzlement, the prosecution was faced with the burden of proving that Pinter took money entrusted to her care. Miss. Code Ann. § 97-23-19 (1972). Video and audiotape evidence was presented of transactions in which Pinter accepted the correct amount of money from customers. However, upon analysis of register receipts, Pinter was shown to be consistently ringing up less than the amount of money received. The videotape showed her running a calculator following each transaction. The amount of money in the cash register balanced with the amount rung up, so the jury was entitled to conclude that the difference between the amount collected and the amount rung up was embezzled by Pinter. A verdict of guilty based on this evidence is not contrary to the overwhelming weight of the evidence.

Pinter also argues that the evidence supported neither the charge nor the conviction because the State failed to prove that she had embezzled over \$250.00. The investigator testified, based on the videotape and cash register tapes, that the embezzled amount totaled \$277.82. Pinter does not dispute the accuracy of the arithmetic. She does argue that the investigator was including as part of the embezzled amount the entire, correct price of an item, not just the difference between the correct amount and the price rung up by Pinter. We have examined each of the transactions raised by Pinter in her appeal. In none of them does the investigator commit the error alleged. What the investigator stated is that if a sale of groceries was instead rung on the register as a gasoline sale, the full price of the groceries was lost to the grocery side of his running total. In that way the actual price of grocery items sold and the amounts rung up as groceries could be compared. The same comparison was made between the value of gasoline actually sold and the amount rung up by Pinter as gasoline sales. The \$277.82, however, only represents the difference between the combined sales Pinter rang up for gasoline and groceries and the amounts she collected for the combined sales.

THE JUDGMENT OF CONVICTION OF THE SCOTT COUNTY CIRCUIT COURT AND SENTENCE OF SIX (6) YEARS WITH 3 YEARS SUSPENDED AND 5 YEARS PROBATION IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS; ORDER OF PAYMENT OF RESTITUTION AND A FINE OF ONE THOUSAND DOLLARS (\$1,000.00), ARE AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.

