

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LINDA SHRUM,

Defendant-Appellant.

UNPUBLISHED

January 19, 1999

No. 198505

Mecosta Circuit Court

LC No. 95-003635 FH

Before: Talbot, P.J., and McDonald and Neff, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of conspiracy to commit embezzlement, MCL 750.157a; MSA 28.354(1), and seven counts of embezzlement by an employee, MCL 750.174; MSA 28.371. The convictions arose from defendant's conspiracy with her former supervisor, Norman Sievert, to embezzle money from their employer, Ferris State University. Defendant appeals as of right. We affirm.

Defendant first argues the trial court erred in failing to instruct the jury sua sponte on her claim of right defense. A trial court is under no duty to instruct sua sponte on a defendant's theory of the case when no request has been made for the instruction. MCR 2.516(B)(3); *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). In such a case, appellate review is limited to whether manifest injustice occurred. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Here, the undisputed evidence at trial established that defendant intended to conceal her partnership with Norman Sievert and the external bank accounts from her employer, thus refuting her assertion of a good faith, bona fide claim of right defense. *People v Douglass*, 293 Mich 388, 391; 292 NW 341 (1940); *American Life Ins Co v US Fidelity & Guar Co*, 261 Mich 221, 224-225; 246 NW 71 (1933). Accordingly, the trial court was under no duty to give the instruction sua sponte. See *People v Freeman*, 149 Mich App 119, 126; 385 NW2d 617 (1985). Moreover, defendant's right to present a defense of lack of intent was not infringed because the trial court did instruct the jury that the crime of embezzlement required proof that defendant specifically intended to defraud or cheat her employer of money or property. Therefore, the jury could not have convicted defendant without finding that she entertained the requisite specific intent. Given the

foregoing, defendant has not demonstrated entitlement to appellate relief on the basis of instructional error.

Next, defendant argues the trial court erred in excluding from evidence the administrative deposition taken of Norman Sievert. We disagree. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). We cannot say the trial court abused its discretion in finding the deposition did not have "equivalent circumstantial guarantees of trustworthiness" to justify admission under the "catch-all" exception to the hearsay rule, MRE 804(b)(6). In any event, even if we found an abuse of discretion, we would find the error harmless because, in our opinion, a high probability exists that admission of the deposition would not have affected the judgment. *People v Gearns*, 457 Mich 170, 204-205; 577 NW2d 422 (1998); *People v Harris*, 458 Mich 310, 320; 583 NW2d 680 (1998).

Next, defendant argues the trial court abused its discretion in admitting defendant's testimony regarding statements made to her by Sievert for the limited purpose of explaining defendant's subsequent conduct. We disagree. A declarant's out-of-court statements that are offered to explain their effect on another person's course of conduct, rather than offered to prove the truth of the matter asserted, are not hearsay. MRE 801(c); *People v Garcia*, 31 Mich App 447, 454-455; 187 NW2d 711 (1971). Hence, it was proper for the trial court to limit defendant's testimony solely to the fact that the statements were made, without reference to the irrelevant and prejudicial substance or content of those statements. *People v Knolton*, 86 Mich App 424; 272 NW2d 669 (1978).

Lastly, defendant argues she was denied effective assistance of counsel. To establish this claim, defendant must show that counsel's performance was so deficient that counsel was not functioning as guaranteed by the Sixth Amendment, and that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). After reviewing the existing record, we conclude that defendant has not established entitlement to appellate relief on this basis.

Affirmed.

/s/ Michael J. Talbot
/s/ Gary R. McDonald
/s/ Janet T. Neff