

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEAN EWALD KORTH,

Defendant-Appellant.

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UNPUBLISHED

May 27, 2004

No. 245625

Delta Circuit Court

LC No. 02-006818-FH

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant Dean Ewald Korth appeals as of right his jury conviction of embezzlement<sup>1</sup> that occurred while he was the manager of the Country Kitchen restaurant. We affirm.

I. Basic Facts And Procedural History

Korth was hired at the Country Kitchen restaurant in Escanaba in August 1999, and was promoted to manager in August 2000. As manager, Korth was responsible for the day-to-day operations of the restaurant, including reconciling the amount of money in the cash register with the transactions recorded on the cash register tape and depositing the money in the bank. To do so, Korth completed a form to balance the register at the end of each day and prepare the deposits. The form included spaces to enter the amount of food that had been sold to customers, half-price meals purchased by employees, coupons received, credit card and cash payments, and amount of money that the register was over or short.

In January 2002, the restaurant owner, Peter Palm, asked his operations manager, Debbie Chartier, to perform detailed inspections of the restaurant's daily deposit bags, which contained documentation of the transactions that were entered into the cash register and how much money was received. When Chartier checked the deposit paperwork from the Escanaba restaurant for that week, she found that for five of the seven deposits, the register tape of the employee meals and coupon numbers did not match the numbers that had been entered on the deposit form. Chartier determined that there had been no recording errors, nor was there any documentation for the altered figures.

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<sup>1</sup> MCL 750.174(4)(a) (more than \$1,000 but less than \$20,000).

These discrepancies led to an investigation of the Escanaba restaurant. On inquiry, Korth told Chartier that he was the only one who did the deposits unless he was on vacation. When Chartier directly confronted Korth with the discrepancies in his paperwork, he was unable to offer her any explanation. As a result, Chartier notified Palm. Palm and Chartier began reviewing Korth's paperwork with the help of Gretchen Gryzb, who worked with Korth at the restaurant. The three discovered many instances in which the dollar value of coupons received had been inflated, as well as inflated dollar amounts of meals that employees ate while at work. In many instances, Korth had added the numeral "1" in front of the correct amount of employee meals so that, for example, a figure of \$6.50 would be made to read "\$16.50." The paperwork contained no documentation to support the inflated figures and no explanation why the changes were made. Moreover, they observed that when the kitchen manager, Rob McCarty, prepared the deposit, the numbers were generally accurate. According to Palm, when he confronted Korth with these discrepancies, Korth admitted inflating the figures on the deposit paperwork and told Palm that he would pay him back. Palm fired Korth the same day and promoted Gryzb to his position.

At trial, five examples of falsified deposit bags were introduced. In each case, Korth had entered inflated figures for the employee meals and coupons. Gryzb explained that in preparing the deposit forms, one would add the food and the tax to get the dining room sales, subtract the discounted employee meals and coupons, and the total amount would be the "cash to account for," which is the amount that would have to be deposited to make the register balance. Gryzb testified that if that number was lower than the actual amount of money in the register, one could "take that extra money and just put it in your pocket." A lower figure would result by inflating the amount of employee meals and coupons.

Gryzb computed the total amount of money that had been inaccurately recorded on the deposit bags by reviewing the contents of each bag from September 2001 through January 2002 and adding the inflated figures together, which resulted in a total of over \$2,000 that would have been available to misappropriate. During this five-month period, ten dollars had been added to the employee meal amount on over half the days.

Gryzb testified when she became general manager, her daily bags include the register tape that records each button that was pushed throughout the day, the "Z" tape showing the total of the day's transactions, reports run after each shift, credit card receipts, coupons or money discounts, tickets, and employee meal break tickets. Gryzb stated, however, that when Korth was manager, he instructed his employees not to retain the register tapes or redeemed coupons. Gryzb explained that the only way to determine whether employees were properly accounting for items paid by coupon would have been to have the register tapes and the coupons themselves. Gryzb acknowledged that the cooks would occasionally eat food without paying for it, a practice known as "grazing" or "munching," and that sometimes an "open ticket" – that is, a ticket that had been entered but not yet paid for – would result from a server losing a customer's ticket or a customer leaving without paying. To determine whether these open tickets were resolved, it would be necessary to refer to the daily register reports, which Korth did not retain.

On cross-examination, Gryzb agreed that there were many different types of Country Kitchen coupons in circulation; however, she stated that it was not difficult to correctly ring up coupons because there was only one coupon button on the register, and she never saw a server or manager incorrectly ring a coupon into the cash register. Gryzb explained that if a customer had

a twenty-dollar meal and paid for it with a ten-dollar bill and a ten-dollar coupon, the register would not open unless the server pushed buttons indicating that the equivalent of twenty dollars had been received. Gryzb further explained that the proper procedure was to staple any coupons to their corresponding guest checks and place them under the register. Gryzb acknowledged that the restaurant was hectic at certain times of day, and also admitted that she had attended a meeting regarding a problem with suspected employee drug use during breaks.

Chartier testified that she had trained Korth to record the deposits accurately, and that Korth initially had done so, and had included coupons in each deposit bag. However, as time went on, Chartier noticed fewer items of documentation in the bags. Chartier agreed that by eliminating documentation in the bag and inflating the numbers, it would make money available to steal and leave no way to trace it. Chartier testified that because there is no “no sale” key on the register, there is no way to open the cash register without either recording a transaction or using a key, and only the managers have keys.

John Bellefeuille, who worked at the Country Kitchen from 2000 through 2002, testified for the defense. Bellefeuille’s duties included running the register report at the end of the day, leaving the proper amount of money in the till, and putting the documentation in the bag for whoever prepared the deposit. Bellefeuille testified that he encountered instances of employees improperly ringing items into the register, including hitting the cash button instead of the check button and vice versa. Bellefeuille estimated that customers would leave without paying their bill at least three times a month. Bellefeuille also noted that Korth would sometimes change the policy with regard to coupons, and he confirmed that for a time, Korth had told his employees not to retain coupons after taking them in.

Korth testified that he never stole money from the Country Kitchen and never made money available to steal. Korth testified that he wanted to report accurate information to Palm, but felt that the information on the register slip was inaccurate because the coupon numbers “just didn’t add up to me,” so he would add numbers to the coupon line of the deposit form to resolve the discrepancy. Korth stated that he had been under the impression that he “had to adjust numbers to make things come out.” Korth asserted that to the best of his knowledge, he was entering correct information. Korth acknowledged that he was never told to adjust the numbers to make the till balance, and also acknowledged that he never informed anyone, either verbally or by indicating on the form itself, that he was inflating the figures to make the numbers appear to balance.

Korth also admitted regularly adding a “1” in front of the figure representing employee meals, but he stated that this was to account for employee “grazing.” Korth explained that he received bonuses based on keeping his food costs low, and in trying to determine why his food costs had been increasing, Korth noticed that there were days for which the amount reported for employee meals was negligible or nothing. After finding out from Chartier that employee meals at the other restaurants was generally over twenty dollars, which Chartier’s testimony at trial confirmed, he began adjusting the amount by ten dollars, “basically accounting for myself that the people did eat this ten dollars worth of food.” When confronted with the idea that this practice decreased the amount of cash to be accounted for, Korth testified that he “did not even think about that at the time.” Korth denied telling Palm he would pay him back after Palm confronted him about the altered figures, and stated that he only asked Palm what he had to do to keep his job.

Korth testified that he had made efforts to determine why the till was not balancing, including doing “shift pulls” in which he would count the cash in the register at various times during the day and making sure it matched the subtotal on the register tape. Korth noted that he had high employee turnover, and that it was difficult to keep them all adequately trained. Korth also testified that there was “a lot of drug use” by restaurant employees.

Korth stated that after consulting with Chartier sometime in November or December, he instituted the policy that coupons should be stapled to each bill, but after skimming through the coupons and bills, he would throw them away because he was never told to save them. Korth explained that Chartier would change the policy regarding taking and retaining coupons from time to time. Korth stated that he would have managers’ meetings to address problems with balancing the till, and at one of these meetings, he brought in some of the paperwork and delegated the responsibility of resolving the issue with the dining room manager. Korth admitted that he did not follow up to see how the problem was addressed.

After the jury returned a guilty verdict, Korth moved for a directed verdict of acquittal and for a new trial. In support of the motion for acquittal, defense counsel argued that the prosecutor failed to prove that Korth converted the money to his own use, which is an element of embezzlement, and that the prosecutor improperly omitted this element when describing the crime of embezzlement to the jury. Defense counsel also argued that Korth should be granted a new trial because, after the trial was complete, Gryzb pleaded no contest to embezzling from the Country Kitchen after she had been made manager. Defense counsel asserted that Gryzb was the “key witness” around whom the case was built, and had the prosecutor been aware of her misconduct, he would likely not have called her as a witness or, if he did, her testimony would have been compromised, making a different outcome likely. The trial court denied both motions.

## II. Denial Of Motion For New Trial

### A. Standard Of Review

We review the trial court’s decision to grant or deny a motion for new trial for an abuse of discretion.<sup>2</sup>

### B. Gryzb’s Embezzlement

After the trial in this case, Gryzb pleaded no contest to embezzling money from the Country Kitchen after she became the manager. It is undisputed that Gryzb’s embezzlement occurred after Korth had been fired, and Korth does not argue that Gryzb was responsible for the embezzlement for which he was convicted. Rather, Korth argues that if the prosecutor had been aware of Gryzb’s embezzlement, he either would not have called her as a witness or her testimony would have been “severely compromised.”

For a new trial to be granted on the basis of newly discovered evidence under MCR 6.508(D), a defendant must show that:

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<sup>2</sup> *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

(1) “the evidence itself, not merely its materiality, was newly discovered”; (2) “the newly discovered evidence was not cumulative”; (3) “the party could not, using reasonable diligence, have discovered and produced the evidence at trial”; and (4) the new evidence makes a different result probable on retrial.<sup>[3]</sup>

We are not persuaded that the evidence of Gryzb’s embezzlement would have led to a different result on retrial. First, the prosecutor opted to call Gryzb as a witness despite the fact that she had a previous embezzlement conviction. Accordingly, Korth’s speculation that Gryzb would not have been called as a witness if her embezzlement had been discovered before trial is dubious. Second, although Korth offers instances in which Gryzb’s police statement apparently contradicted her testimony at trial, newly discovered evidence is not ground for a new trial if it would only be used to impeach the witness.<sup>4</sup> To the extent that an embezzlement conviction affects a witness’s general credibility, the jury was already aware that Gryzb had been convicted of embezzlement at a previous job. Finally, Korth himself admitted to altering figures on the deposit report without notifying anyone that he was doing so, and further admitted that these alterations effectively made money available to take. The jury’s determination that Korth altered the figures for criminal purposes hinged on the credibility of his own testimony, not Gryzb’s. Under these circumstances, the trial court did not abuse its discretion in denying Korth’s motion for a new trial.

### III. Denial Of Motion For Directed Verdict

#### A. Standard Of Review

When reviewing a trial court’s denial of a motion for a directed verdict, we “review the record de novo and consider the evidence presented by the prosecution in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt.”<sup>5</sup>

#### B. The Element Of Conversion

Korth was convicted of embezzlement under MCL 750.174, which provides in part:

A person who as the agent, servant, or employee of another person, governmental entity within this state, or other legal entity or who as the trustee, bailee, or custodian of the property of another person, governmental entity within this state, or other legal entity fraudulently disposes of or converts to his or her own use, or takes or secretes with the intent to convert to his or her own use without the consent of his or her principal, any money or other personal property of his or her principal that has come to that person’s possession or that is under

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<sup>3</sup> *Cress*, *supra* at 692, quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996).

<sup>4</sup> See *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

<sup>5</sup> *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

his or her charge or control by virtue of his or her being an agent, servant, employee, trustee, bailee, or custodian, is guilty of embezzlement.

The elements of statutory embezzlement are:

(1) the money in question must belong to the principal, (2) the defendant must have a relationship of trust with the principal as an agent or employee, (3) the money must come into the defendant's possession because of the relationship of trust, (4) the defendant dishonestly disposed of or converted the money to his own use or secreted the money, (5) the act must be without the consent of the principal, and (6) at the time of conversion, the defendant intended to defraud or cheat the principal.<sup>6</sup>

Korth argues that the prosecutor provided no evidence that Korth converted the money to his own use. We disagree. At trial, Korth admitted altering figures on the deposit forms that would make extra money available to take from the till. Although Korth testified that he altered the numbers to make them more accurate, he did not notify anyone that he was doing so, and he decided not to keep the coupons or other documentation that could have substantiated his claim that his alterations accurately reflected the transactions that occurred. It was uncontested that Korth, as manager in charge of depositing the money from Country Kitchen's till, was in a position to take the extra money that his alterations had made available. Viewing this evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could find that the conversion element of embezzlement was proved beyond a reasonable doubt.<sup>7</sup>

We recognize that the evidence supporting this element was circumstantial. However, "[c]ircumstantial evidence and the reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."<sup>8</sup> In our view, when a person who is entrusted with accounting for and depositing money from a cash register consistently falsifies the figures on a deposit slip in a way that makes money available to embezzle, it is reasonable to infer that the person took advantage of the resulting discrepancy by taking that money. We also note that the prosecutor did not have the burden to disprove those theories that supported Korth's innocence; rather, it was for the jury to determine whether any reasonable theories of innocence were negated.<sup>9</sup> In this case, the jury did not believe Korth's testimony that he altered the figures in an attempt to be accurate rather than to make funds available for him to embezzle, and we will not interfere with this determination.<sup>10</sup> Accordingly, we conclude that the trial court did not err in denying Korth's motion for a directed verdict of acquittal.

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<sup>6</sup> *People v Lueth*, 253 Mich App 670, 683; 660 NW2d 322 (2002).

<sup>7</sup> *Mayhew*, *supra* at 124.

<sup>8</sup> *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

<sup>9</sup> See *People v McIntosh*, 103 Mich App 11, 19; 302 NW2d 321 (1981).

<sup>10</sup> See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

#### IV. Prosecutorial Misconduct

##### A. Standard Of Review

We review de novo allegations of prosecutorial misconduct while reviewing the trial court's factual findings for clear error.<sup>11</sup> Because no objection was made to the challenged remarks, we will reverse only for plain error, placing the burden on the defendant to show that error occurred, that the error was clear or obvious, and that the plain error affected his substantial rights.<sup>12</sup> Moreover, if a curative instruction could have alleviated the prejudicial effect of the challenged remarks, error requiring reversal did not occur.<sup>13</sup>

##### B. Prosecutor's Omission Of Conversion Element

Korth argues that a new trial should be granted because, once during voir dire and once during closing arguments, the prosecutor described embezzlement without making reference to the element of conversion. During voir dire, the prosecutor stated: "The Judge will define it for you more particularly, but essentially it's the taking of something that belongs to typically an employer and that comes into your possession by virtue of the relationship of trust that the employer has." In his closing argument, the prosecutor told the jury that he was "required to prove that [Korth] took or hid the money with the intent to convert it to his own use," which Korth argues implied that only an *intent* to convert, not actual conversion, was necessary to convict.

It is true that a prosecutor's "clear misstatement of the law" may deprive a defendant of a fair trial if it remains uncorrected.<sup>14</sup> In this case, while the prosecutor's statements may have been incomplete descriptions of embezzlement, they were not inaccurate. Furthermore, even if the prosecutor had misstated the law, that error was cured when the trial court properly instructed the jury regarding the elements of embezzlement and told them to disregard any conflicting version of the law that the attorneys may have given.<sup>15</sup> Therefore, we find no error requiring reversal.

Affirmed.

/s/ William C. Whitbeck

/s/ Richard Allen Griffin

/s/ Stephen L. Borrello

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<sup>11</sup> *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

<sup>12</sup> *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999).

<sup>13</sup> *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

<sup>14</sup> *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002).

<sup>15</sup> See *id.*