

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AWILDA J. SUMMERS,

Defendant-Appellant.

UNPUBLISHED

March 7, 1997

No. 188430

Oakland Circuit Court

LC No. 93-129074 FH

AFTER REMAND

Before: MacKenzie, P.J., and Holbrook, Jr., and T.P. Pickard,* JJ.

PER CURIAM.

Defendant was convicted by a jury of embezzlement by an agent over \$100, MCL 750.174; MSA 28.371. On defendant's motion, this Court remanded the matter to the trial court to permit defendant to file a motion for an evidentiary hearing on her claim that she was denied effective assistance of counsel at trial. On remand, the trial court granted defendant's motion for an evidentiary hearing, but at the conclusion of the hearing the court denied her motion for a new trial. She now appeals as of right and we affirm.

On appeal, defendant argues that the trial court erred in denying her motion for a new trial on the basis of ineffective assistance of counsel. In order to establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced her as to deprive her of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). (1994). A defendant must overcome a strong presumption that the assistance of her counsel constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant first argues that trial counsel was ineffective in not calling a witness who would have corroborated defendant's theory of the case. We disagree. The testimony of defendant and her counsel regarding attempts to secure the witness' presence at trial conflicted on key points. Where conflicting evidence is presented, this Court generally defers to the superior ability of the trial court to assess the credibility of witnesses who appear before it. *People v Crowell*, 186 Mich App 505, 507; 465 NW2d 10 (1990). MCR 2.613(C). We therefore agree with the trial court's finding on

* Circuit judge, sitting on the Court of Appeals by assignment.

remand that defendant has failed to satisfy her burden of proving that counsel “did anything that was ineffective or failed to do something that should be effective.”

Second, defendant argues that trial counsel was ineffective in not procuring any videotapes showing defendant’s mother-in-law coming into the store. If defense counsel had done so, defendant argues, it would have corroborated defendant’s explanation for processing refunds without a customer or the merchandise present. We disagree. Trial counsel testified that he requested from the prosecution all videotapes relating to defendant’s case and that he and defendant viewed the single fifteen minute videotape that was produced. About nine minutes into the tape, defendant was shown being escorted away after processing the refunds. The remainder of the tape contained nothing which would support defendant’s theory of the case. Again, defendant has failed to sustain her burden that counsel’s performance was deficient.

Third, defendant argues that defense counsel was ineffective because he did not ask defendant’s husband whether his credit cards were credited. We disagree. It is no defense to a charge of embezzlement that a defendant’s employer was able to avert financial loss after discovering the defendant’s fraudulent conduct. Here, trial counsel testified that it was not part of his trial strategy to ask defendant’s husband whether his credit cards were credited because it was immaterial to defendant’s case. Upon discovering defendant’s embezzlement, defendant’s employer had averted loss by reversing the credit charges fraudulently made by defendant. Thus, defendant has not overcome the strong presumption that counsel’s decision was sound trial strategy. *People v Stewart (On Remand)*, 219 Mich App 38, 41-42; ___ NW2d ___ (1996). Defendant was not denied effective assistance of counsel.

Defendant next argues that insufficient evidence was presented to sustain her conviction. We disagree. The elements of embezzlement in this case are: (1) money or personal property must belong to the principal, (2) the defendant must have had a relationship of trust with the principal because she was an employee, (3) money or property must have come into the defendant’s control because of that relationship of trust with the principal, (4) money or property must have been dishonestly disposed of or converted to the defendant’s own use, and (5) at the time of the appropriation to her own use the defendant must have intended to defraud the principal of some property. *People v Wood*, 182 Mich App 50, 53-54; 451 NW2d 563 (1990).

The existence of the first three elements is not disputed in this case. Rather, defendant argues that she did not convert money to her own use because her husband’s credit cards were never credited. We find no merit to this argument. Defendant effectuated a credit to her husband’s accounts by processing the credit refunds. Defendant’s criminal act is not negated by the fact that her husband’s accounts were never credited because defendant’s employer reversed the charges. Contrary to defendant’s claim, the evidence did not indicate that defendant looked outside or made any eye contact with her mother-in-law before processing the refunds. Instead, the evidence indicated that as defendant processed a normal refund for one customer she immediately began to process two other refunds, crediting her husband’s accounts without returning any merchandise. Moreover, defendant used two false names in processing the refunds. Thus, viewing the evidence in a light most favorable to the

prosecution, defendant's intent to defraud could be inferred from the circumstances. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

Finally, defendant argues that the trial court abused its discretion in admitting evidence of defendant's prior bad acts. We disagree. The evidence was a part of the res gestae of the offense, explaining to the jury why defendant was being videotaped in the first instance. A jury is entitled to hear the "complete story," *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978), including any facts or circumstances that illustrate or characterize the events surrounding the offense. *People v Bostic*, 110 Mich App 747, 749-750; 313 NW2d 98 (1981). Accordingly, we find no error requiring reversal.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Timothy P. Pickard