STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARY DOROTHY SKORA,

Defendant-Appellant.

UNPUBLISHED
October 19, 2001

No. 229126
Houghton Circuit Court
LC No. 00-001689-FH

Before: Griffin, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant was convicted of armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a, following a jury trial. She was sentenced to two concurrent terms of 51 to 180 months' imprisonment. She appeals as of right. We affirm.

Defendant first argues that the trial court erred by admitting a hearsay statement in which the declarant implicated defendant in the robbery. The trial court's evidentiary ruling is reviewed for an abuse of discretion, *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26 (1999), amended 459 Mich 1276 (1999), but we review de novo the trial court's determination whether the hearsay statement was sufficiently reliable to protect defendant's constitutional right of confrontation. *People v Smith*, 243 Mich App 657, 681-682; 625 NW2d 46 (2000).

David Peterson was arrested on the day after the robbery. He admitted to robbing the pharmacy, claiming that the gun was not loaded and that he would not have harmed anyone, but that he was desperate for narcotics. He told a police detective that defendant had "virtually no part in the actual robbery. She just drove the car." Before trial, defendant moved to exclude this statement, arguing that it was inadmissible hearsay. The trial court admitted the statement under MRE 804(b)(3),[1] which provides that a statement against an unavailable declarant's penal interest is not excluded under the general hearsay rule. We conclude that the trial court did not abuse its discretion by allowing the statement.

[1] Defendant's reliance on FRE 804(b)(3) is misplaced because our court proceedings are governed by MRE 804(b)(3). *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000).

The parties agreed that Peterson would likely assert his Fifth Amendment privilege against self-incrimination, thus rendering him unavailable as a witness. *People v Meredith*, 459 Mich 62, 65-66; 586 NW2d 538 (1998). Moreover, the precise statement in question, although not expressly self-inculpatory, implied that Peterson had detailed knowledge of the circumstances of the robbery. Thus, it was a "brick in the wall" of proving Peterson's guilt, and it was sufficiently self-inculpatory to come within the purview of MRE 804(b)(3). *People v Barrera*, 451 Mich 261, 270-271; 547 NW2d 280 (1996). This case does not involve a non-self-inculpatory portion of an overall statement against penal interest. *People v Poole*, 444 Mich 151, 161; 506 NW2d 505 (1993).

We conclude, after evaluating the reliability factors set forth in *Poole*, *supra* at 165, that the trial court correctly held the statement was admissible. Although the statement was made in response to police questioning while Peterson was in custody, it did not attempt to shift the blame away from Peterson onto defendant; rather, Peterson was apparently attempting to minimize defendant's culpability in the robbery. The totality of the circumstances favors admission of the statement. Defendant's right of confrontation was not violated. *Id*.

Next, defendant argues that the evidence was insufficient to support her convictions. Defendant confuses the standards for granting a directed verdict based on insufficient evidence and for granting a new trial based on the great weight of the evidence. Defendant's issue on appeal is limited to the sufficiency of the evidence, and any argument about the weight of the evidence has not been properly preserved or presented for our review. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999); *People v Cain*, 238 Mich App 95, 116; 605 NW2d 28 (1999). We also note that defendant mistakenly claims that the trial court incorrectly viewed the evidence in the light most favorable to the prosecutor. This was, indeed, the appropriate standard for evaluating the sufficiency of the evidence. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

We conclude that defendant's convictions were supported by sufficient evidence. Defendant argues the prosecutor failed to prove that she conspired with Peterson to rob the pharmacy and failed to prove she aided and abetted the robbery. However, the prosecutor presented evidence that defendant knowingly planned and assisted with the robbery. Defendant drove Peterson to the pharmacy and parked her car away from the pharmacy, presumably to avoid detection. Also, just before the robbery, defendant purchased the ski mask that was used by Peterson during the robbery. Defendant claims that purchasing a ski mask in the winter is not unusual, but she was evasive when discussing this purchase with police officers. The prosecutor presented evidence that a telephone call was placed from defendant's home to the pharmacy on the day of the robbery, during which a woman asked for two specific narcotic drugs—the same drugs that Peterson later demanded during the robbery. Moreover, police officers found the stolen drugs inside defendant's home, and when defendant was arrested, she had the same kind of drugs in her pocket. Finally, Peterson told the robbery victims that his partner was waiting outside. Drawing all reasonable inferences in favor of the jury's verdict, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), we conclude the prosecutor presented sufficient evidence that defendant planned and assisted with the robbery.

Next, defendant argues that the trial court erred by denying her pretrial motion to suppress the evidence seized from her person during a patdown search and from her home during a consent-based search. We review the trial court's factual findings for clear error, *People v*

Attebury, 463 Mich 662, 668; 624 NW2d 912 (2001), but review the court's ultimate decision de novo. *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998). We conclude that the trial court did not err. Defendant concedes that a patdown search was proper, but insists that the police officer exceeded the permissible scope of that patdown when he demanded that she empty her pockets. However, when the officer felt a hard object in defendant's pocket that he could not immediately identify, the officer asked defendant what it was. This was a permissible inquiry, and defendant was not required to answer. See *People v Butler*, 223 F3d 368, 374 (CA 6, 2000). Defendant, instead of responding to the question, removed prescription pill bottles from her pockets. The officer believed that defendant was trying to grind up some loose pills in her hand, so he then demanded that she empty all her pockets. At this point, the officer's actions were justified to prevent the imminent destruction of evidence. *In re Forfeiture of $176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993).

Moreover, the trial court's finding that defendant voluntarily consented to a search of her home was not clearly erroneous. Although defendant was reluctant to give her consent, her stated reason for that reluctance was her home was not clean—she never expressly refused consent. Thus, the police officers acted appropriately in continuing to ask her for permission to search her home. Also, defendant signed a consent form clearly explaining she could refuse consent and that any evidence found during the search could be used against her in a legal proceeding. Under the totality of the circumstances, *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999), we cannot say the trial court erred by finding that defendant's consent was voluntarily given. Although defendant's account of the interview differed, we defer to the trial court's credibility evaluation. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

We also hold that defendant was not denied a fair trial by alleged prosecutorial misconduct. Our review of the challenged prosecutorial comments leads us to conclude that the prosecutor's arguments were proper. Defendant was not denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Moreover, defendant failed to object to most of the comments, and she has failed to demonstrate plain error affecting her substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Finally, we reject defendant's argument that a new trial is required because a police witness improperly commented on an outstanding misdemeanor warrant for defendant. Although the comment was improper, the trial court gave a detailed curative instruction. Defense counsel's expressed satisfaction with the trial court's resolution of the matter constituted a waiver of this issue. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Affirmed.

/s/ Richard Allen Griffin
/s/ Jane E. Markey
/s/ Patrick M. Meter