

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIMBERLY SYKES,

Defendant-Appellant.

UNPUBLISHED

May 4, 2004

No. 245079

Wayne Circuit Court

LC No. 02-009124-02

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of larceny by conversion of more than \$20,000, MCL 750.362, and false report of a felony, MCL 750.411a(1)(b). Defendant was sentenced to three months in jail, three years' probation and restitution in the amount of \$9,254. We reverse.

This case arose out of the robbery of a Sprint PCS store in the city of Detroit during which a deposit bag containing \$27,762 went missing. Three employees were charged in the theft: defendant, codefendant Tevya Urquhart, and Kim Holmes.

Defendant argues that there was insufficient evidence to support her convictions of larceny by conversion under an aiding and abetting theory and false report of a felony. We agree.

A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine whether any rational factfinder could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

The statute defining larceny by conversion reads:

Any person to whom any money, goods or other property, which may be the subject of larceny, shall have been delivered, who shall embezzle or fraudulently convert to his own use, or shall secrete with the intent to embezzle, or fraudulently use such goods, money or other property, or any part thereof, shall be

deemed by so doing to have committed the crime of larceny [MCL 750.362.]

The elements of larceny by conversion are: (1) the property at issue must have some value; (2) the property belonged to someone other than the defendant; (3) someone delivered the property to the defendant, by either legal or illegal means; (4) the defendant embezzled, converted to his own use, or hid the property with the intent to embezzle or fraudulently use it; and (5) the defendant intended to defraud the owner permanently of that property at the time the property was embezzled, converted or hidden. MCL 750.362; *People v Mason*, 247 Mich App 64, 72; 634 NW2d 382 (2001).

A conviction of aiding and abetting requires proof that (1) the underlying crime was committed by either defendant or some other person, (2) the defendant performed acts or gave encouragement that aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. *People Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999). Such intent can be inferred from circumstantial evidence. *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). “Aiding and abetting” describes all forms of assistance, including all words and deeds that may support, encourage, or incite the commission of a crime. *Id.*

MCL 750.411a provides in pertinent part:

(1) Except as provided in subsection (2), a person who intentionally makes a false report of the commission of a crime to a member of the Michigan state police, a sheriff or deputy sheriff, a police officer of a city or village, or any other peace officer of this state knowing the report is false is guilty of a crime as follows:

* * *

(b) If the report is the false report of a felony, the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$2,000.00 or both.

The elements of this offense are the making of a report to a police officer, the falsity of the report, and knowledge by the defendant that the report was false. *People v Lay*, 336 Mich 77, 82; 57 NW2d 453 (1953).

The main theory of the prosecution was that Holmes, acting as the principal, took the deposit bag containing \$27,000, and split the money with defendant and codefendant. The prosecution further asserted that defendant aided and abetted this scheme by failing to tell the police that Holmes took the money and by reporting details of the robbery to the police when she knew the robbery was faked.

A thorough review of the record finds no evidence, beyond speculation, to support defendant’s conviction of larceny by conversion under an aiding and abetting theory. The prosecution used the fact that \$23,000 was processed through Holmes’ account at the Motor City

Casino in the three days following the robbery to infer that Holmes took a deposit bag from the safe. However, according to the testimony at trial, the videotape did not show what happened to the bag after Holmes was seen holding it in front of the safe. The prosecution inferred from the close quarters of the safe room that defendant must have known that Holmes took the money from the safe. The prosecution asserts as incriminating the fact that defendant did not tell the police that Holmes took the money or opened the safe after the robbery. But defendant's testimony, which was uncontradicted at trial, was that defendant told the police that Holmes opened the safe after the robbery, and that she saw Holmes put whatever she had taken out of the safe back into the safe. There was simply no evidence that defendant knew that Holmes took the money. There was no evidence that defendant planned the robbery or that she shared in any proceeds of any robbery. Defendant's testimony, which was supported by her cell phone records, was that she was on the phone under the table for the majority of time the three women were locked in the safe room. The conclusion that defendant aided and abetted Holmes in taking the money was supported only by impermissibly layered inferences and not by evidence.

The prosecution argued in closing that it would have been impossible to be in the small safe room and not see that Holmes went to the safe, took something out of the safe and what she did with the object. Even if this were true, and Holmes did take the money, defendant's silence to the police is insufficient to establish that she aided and abetted Holmes in taking the money. Mere presence, even with the knowledge that a crime is being committed, is insufficient to establish that a person is an aider and abettor. *Wilson, supra*, 196 Mich App 614. Although this Court has held that the difficulty of proving a defendant's state of mind makes minimal circumstantial evidence sufficient, *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984), the evidence presented at trial fails to meet even this low standard.

With regard to defendant's conviction of false report of a felony, defendant's cell phone records, which were admitted at trial, indicated that defendant called the police to report the robbery. She also gave a statement to the police that the Sprint store was robbed by two armed men. However, as discussed *supra*, there was no evidence, besides the layers of impermissible inferences built upon the fact that \$23,000 was processed through Holmes' account at the Motor City Casino in the three days after the robbery, to establish that the robbery was faked. There was no statement by defendant that she knew the robbery was faked. Even if it could be inferred that the robbery was a sham from the fact the robbers failed to conceal their faces from defendant, codefendant and Holmes, there is no evidence that defendant knew it was a faked robbery. The testimony by the store manager was that defendant, who usually had a calm demeanor, was distraught when she was let out of the safe room. In fact, the prosecutor, in closing argument, acknowledged that defendant and codefendant may not have known that the robbery was faked. Without some indication that she knew the robbery was a sham, defendant's conviction of false report of a felony cannot withstand a challenge on sufficiency of evidence grounds.

Because we reverse defendant's convictions and sentences for insufficiency of the evidence, we need not address defendant's remaining issues.

Reversed and discharged.

/s/ Hilda R. Gage

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood