STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 4, 2004
v	No. 246001 Wayne Circuit Court
TEVYA G. URQUHART, Defendant-Appellant.	LC No. 02-009124-01

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 five months in jail on each count and three years' probation. 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 Kimberly Sykes, and Kim Holmes.

Defendant argues that there was insufficient evidence to support her conviction of larceny by conversion either as a principal or under an aiding and abetting theory. 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).

There was no evidence introduced at trial by which a rational trier of fact could have found beyond a reasonable doubt that defendant took Sprint's money with the intent to defraud. The evidence at trial was that defendant, codefendant, and Holmes, arrived at work in the early morning, approached the entrance to the store together and were followed into the store by two men who were unknown to the women and who were armed. The men made the women lie on the floor and ordered one of them to open the safe. Defendant went into the safe room, opened the safe in which there were two deposit bags with $27,000 and $14,000, took out what looked like either a white envelope or one of the deposit bags, and slid it toward one of the men. Defendant closed the safe. After the two men left the store, Holmes and codefendant joined defendant in the safe room and all three women went under the table where they telephoned the police and spoke to the store's manager. After calling the police, Holmes was seen on the videotape opening the safe and taking out a white deposit bag. According to the testimony of the store manager, the videotape does not show what happened to the bag, whether it was returned to the safe or whether Holmes secreted it on her person. Holmes returned under the table. The police eventually arrived and led the women out of the safe room. Defendant and codefendant gave statements asserting that they were robbed. Codefendant testified that she did not know what Holmes took out of the safe because codefendant was talking on the phone and trying to calm down defendant. Both women appeared shaken, especially defendant who was pregnant, upset and crying, and who became physically ill. It was determined that the deposit bag containing $27,000 was missing from the safe but the deposit bag containing $14,000 was not taken. Records from the Motor City Casino showed that Holmes gambled approximately $23,000 in the three days subsequent to the robbery.

It is true that defendant was seen on the videotape tossing a white envelope/deposit bag toward the door of the safe room where an unidentified man wearing a baseball cap was standing. However, there was no indication that, if it was the deposit bag that defendant tossed to the unknown men, she did it for her own purposes and not under duress during a robbery. A police detective testified that he was almost sure that defendant threw the bag under the counter/table and retrieved the bag later but provided no factual basis for this belief. The detective admitted that he had no evidence that defendant, codefendant, and Holmes conspired to take Sprint's money and there was no evidence that defendant ever came into possession of any of the missing money. The prosecution's assertion that defendant took the money is based on pure speculation.

To establish defendant was guilty of larceny by conversion under an aiding and abetting theory, the prosecutor must provide 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 crime. *Id.*

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 and that defendant aided and abetted this scheme either by (1) sliding an empty envelope to the unidentified men knowing that the men were not robbers, thus setting up the scenario where Holmes could make off with a deposit bag under the pretense of a robbery; or (2) that defendant believed it was a real robbery but aided and abetted Holmes in taking the money by failing to tell the police that Holmes took the money.

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. Nevertheless, 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 further asked the jury to assume that Holmes took the deposit bag containing $27,000 to infer that defendant did not pass a deposit bag to the robbers, but rather, passed a decoy envelope. The prosecution then inferred from the assumption that defendant passed a decoy envelope, that the robbery was faked and that defendant knew the robbery was faked. From the "fact" that the robbery was faked, the prosecution inferred that defendant passed the envelope to assist Holmes in taking the deposit bag containing $27,000. Thus the prosecution concluded that defendant knew of Holmes' intent to convert the money and aided and abetted defendant by handing off a decoy envelope to one of the robbers, knowing that the robbery was a sham. However, we conclude that there is no evidence that defendant planned a faked robbery, knew the robbery was faked, knew that Holmes intended to take the money, or shared in any of the proceeds of the robbery. The conclusion that defendant aided and abetted Holmes in taking the money was supported only by impermissible 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 if 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.

We also find that there was insufficient evidence to support defendant's conviction of false report of a felony.

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:
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> (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).

Here, it is undisputed that defendant made a report to the police that she was forced to hand over money from the Sprint PCS safe at gunpoint. 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 a 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. The videotape showed her being walked back to the safe, removing a white bag/envelope and sliding it towards an unidentified man. The videotape then showed that she was very upset, crying, and ill. Codefendant testified that defendant was hyperventilating after the robbery under the counter and the police officer who interviewed defendant conceded that it was difficult to take defendant's statement because she was so upset. 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 was no evidence that defendant knew it was a faked robbery.

Because we reverse defendant's convictions and sentences based upon insufficient evidence, we need not address defendant's four remaining issues.

Reversed and discharged.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood