STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 22, 2010
v	No. 290472 Muskegon Circuit Court
TRACY JODETTE AUGUST, Defendant-Appellant.	LC No. 08-056330-FH

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant Tracy August appeals as of right her jury conviction of unarmed robbery.[1] The trial court sentenced August as a fourth habitual offender[2] to 9 to 22 years' imprisonment. This case arises out of August's offense of shoplifting at the J.C. Penney store at the Lakes Mall in Muskegon, Michigan. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In January 2008, J.C. Penney loss prevention employee Wendy Hendryx noticed August while watching a video surveillance feed. Hendryx noticed August because August was carrying a bag, pressed flat underneath her coat. Hendryx watched as August selected some articles of clothing from the racks, including two $200 suits. August then walked into a fitting room area. Hendryx called the training supervisor, Judy Field-Lampman, for backup. Field-Lampman took over monitoring the surveillance feed, and Hendryx headed to the fitting room area.

On arriving at the fitting room area, Hendryx confirmed August's location within one of the fitting rooms and then busied herself cleaning up merchandise from the fitting room area. August remained in the fitting room for approximately 10 minutes. When August exited the fitting room, she had an armful of clothing, which she placed on a rack and then left the fitting room area. Hendryx then saw that the bag August had been carrying was no longer flat, but instead was "pretty full. It was round and full."

[1] MCL 750.530.

[2] MCL 769.12.

After August left the immediate area, Hendryx entered the fitting room area to check whether August had left all of the merchandise behind. According to Hendryx, August's fitting room was empty, and hanging on the rack were a few shirts and one suit. Hendryx noted that the second suit and several shirts that she had seen August enter the fitting room with were not present. Hendryx then called Field-Lampman and advised her that she believed August "has our merchandise." Hendryx testified that, while Field-Lampman continued to monitor August via the surveillance feed, she double-checked the fitting room area to confirm her suspicions. No stop was made at that point, however, because store policy was to wait to stop suspected shoplifters "right outside the store" in order to give them a chance to either pay for the items or put them back.

Hendryx and Field-Lampman watched August as she purchased a pair of clearance shoes and then continued to browse through the store. Finally, August headed to the store exit that led into the adjacent mall area. Hendryx testified that the bag August was carrying was still as full as it had been when she left the fitting room and that she had not seen August "dump" any of the missing items.

As August exited the store, Hendryx approached her. Hendryx was dressed in plain clothes. But she testified that she identified herself as J.C. Penney security and asked August to come back into the store. According to Hendryx, August first asked, "why?," then said, "no," and then ran away. Hendryx gave chase and told August that she was calling the police. August responded, "I don't care." Hendryx chased August to the area just outside the mall entrance, where she was finally able to grab the bag that August was carrying. August then began yelling and wrestling with Hendryx over the bag. During the altercation, August punched Hendryx in the face. At that point, the bag ripped open and the stolen merchandise fell to the ground. August then ran into the parking lot, got into a truck, and drove away. Hendryx was able to report the license plate number to the police. Police later arrested August.

August testified that she entered the J.C. Penney store on the day in question with several items in a bag. August claimed that the bag she was carrying contained a suit, some shirts, and a make-up bag, which contained the receipts for these items. She claimed that she brought the items with her because she was either going to exchange them or find an undergarment to wear underneath the suit for an interview she had later that day. August claimed that she left the store without making any exchanges because she did not think she had enough time before her interview. August acknowledged that Hendryx stated that she needed to talk to her, but August declined because she was in a hurry to get to her interview. August denied that Hendryx identified herself as a J.C. Penney employee. According to August, she continued walking to the mall exit, where she was suddenly jumped from behind. She denied hitting Hendryx, but admitted to trying to defend herself because she thought Hendryx was a mugger. August claimed that she lost the make-up bag containing the receipts during the scuffle with Hendryx.

After trial, the jury found August guilty of unarmed robbery. She now appeals.

II. APPELLATE COUNSEL'S BRIEF

A. OTHER ACTS EVIDENCE

1. STANDARD OF REVIEW

August's appellate counsel argues that the trial court unlawfully deprived her of her due process, equal protection, and other protected rights under the United States and Michigan constitutions when it admitted other acts evidence. The decision whether to admit evidence is within the trial court's discretion, and we will not disturb that decision absent an abuse of that discretion.[3] A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes.[4]

2. UNDERLYING FACTS

During trial, the prosecution introduced evidence regarding a March 2005 incident involving August shoplifting from a Meijer store. During that incident, loss prevention employee Rebecca Langlois first noticed August because she had 13 packs of cigarettes in her cart, which were placed next to a big black purse. A toddler draped with a blanket was also in the cart. Langlois took notice because of the large size of the purse and the ease of concealing cigarettes. Langlois watched August as she shopped through the store, placing various items in her cart. In the grocery section, Langlois saw August moving her arms around in her cart, but she could not see what August was doing. August then stopped at the butcher counter and ordered some meat. Langlois was able to get next to August's cart and saw that the cigarettes were not visible anymore. Langlois believed that August had concealed the cigarettes because she had not seen August discard anything from her cart.

After placing the meat in her cart, August proceeded to the infant department and picked up a package of diapers. She then walked to the front of the store, where she met a young girl. August gave the diapers to the girl, who then went to the Service Desk. Langlois contacted the Service Desk to find out what the girl was doing. According to the Service Desk employee, the girl said that she needed to exchange the diapers and had them tagged. Langlois explained that when a customer brings an item into the store, the store will tag it so that other employees will know that the item belongs to the customer. After having the diapers tagged, the girl then returned to August, who put the diapers in her cart.

August proceeded to the checkout lanes, where Langlois saw her wrap the meat and some sinus pills in the blanket. August then went to the next lane and grabbed some plastic shopping bags. When she got back to her cart, she began putting items from her cart into one of the plastic bags. At one point, August dropped something, and as she reached to picked it up, she made eye contact with Langlois. Apparently realizing that she was being watched, August then took the items out of the plastic bag and put them on a newspaper stand. August also took a shirt out of

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[3] *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

[4] *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

her cart and put it on a nearby shelf. August then returned to her cart and began placing items on the checkout belt. After August purchased those items, Langlois stopped August, identified herself as security, and asked to speak to August about the items that she failed to pay for. August cooperated, and the stolen items—diapers, meat, sinus pills, and cigarettes—were recovered.[5]

At a motion hearing regarding the admissibility of this evidence, the prosecution argued that the evidence would demonstrate that August was "a professional shoplifter in what she does when she's doing it." The prosecution opined that August's presumed defense would be that she did not know that Hendryx was a loss prevention employee, but the other acts evidence would support that loss prevention personnel had stopped her before and, therefore, she "had every knowledge of what was going on[.]" The trial court ruled that the evidence was admissible under MRE 404(b) "to show a plan, scheme, to show intent."

3. ANALYSIS

MRE 404(b)(1) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In evaluating a challenge brought under MRE 404(b)(1), this Court must take a four-pronged approach:

> First, the prosecutor must offer the "prior bad acts" evidence under something other than a character or propensity theory. Second, "the evidence must be relevant under MRE 402, as enforced through MRE 104(b)[.]" Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105.[6]

"[T]he prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact within one of the exceptions to the general exclusionary rule of MRE 404(b)."[7] "'Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less

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[5] August also failed to pay for a candy bar, which she had already eaten.

[6] *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (internal citation omitted).

[7] *Id*.

probable than it would be without the evidence.'"[8] Further, "[e]vidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury."[9]

With respect to evidence sought to be admitted to show scheme, plan, or system, "'evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.'"[10] "'[G]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts.'"[11]

With respect to the first two prongs of the test,[12] August's appellate counsel argues that the J.C. Penney incident and the Meijer incident did not have a concurrence of common features enabling them to logically be seen as part of a general plan, scheme, or design. We disagree. The evidence of the Meijer incident was offered for the proper purpose of showing August's plan of concealing items to shoplift and her knowledge/experience of being stopped by loss prevention personnel. Moreover, evidence that she had been stopped for shoplifting before was relevant in that it made it more probable than not that she knew Hendryx was a loss prevention employee when Hendryx approached her and asked her to come back into the store.

With respect to the third prong,[13] August's appellate counsel further argues that even assuming a proper purpose and relevance for admission of the evidence, its probative value was still outweighed by unfair prejudice when the evidence did nothing more than attempt to show August's criminal propensity. We again disagree. MRE 404(b) only prohibits relevant evidence if "it is offered *solely* to show the criminal propensity of an individual to establish that he acted in conformity therewith."[14] And, as we have concluded above, the evidence was not offered solely to show August's criminal propensity, but rather to show her knowledge and plan when committing the act of shoplifting. Therefore, we conclude that the evidence was more than marginally probative and not substantially outweighed by unfair prejudice.

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[8] *Id*., quoting *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998).

[9] *Crawford*, 458 Mich at 398.

[10] *Knox*, 469 Mich at 510, quoting *People v Sabin* (*After Remand*), 463 Mich 43, 63; 614 NW2d 888 (2000).

[11] *Id*., quoting *Sabin*, 463 Mich at 64.

[12] *Id.* at 509 ("First, the prosecutor must offer the 'prior bad acts' evidence under something other than a character or propensity theory. Second, 'the evidence must be relevant under MRE 402, as enforced through MRE 104(b)[.]'").

[13] *Id.* ("Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403.").

[14] *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993) (emphasis added).

Finally, with respect to the fourth prong,[15] the trial court gave the jury a limiting instruction under MRE 105, informing them that they could not use evidence of the Meijer incident to conclude that August was a bad person or likely to commit crimes. "It is well established that jurors are presumed to follow their instructions."[16]

Moreover, even assuming that admission of the evidence was in error, admission of other acts evidence does not require reversal unless the defendant affirmatively establishes that it is more probable than not that the error was outcome determinative.[17] Here, August's appellate counsel has not made such a showing.

Accordingly, we conclude that the trial court did not abuse its discretion in the admission of evidence under MRE 404(b) and that August suffered no violation of her United States or Michigan constitutional rights.

B. SENTENCING

August's appellate counsel argues that the trial court unlawfully deprived her of her due process, equal protection, and other protected rights under the United States and Michigan constitutions when it scored 15 points for offense variable (OV) 19, when it failed to take into account all mitigating evidence in sentencing her, and when it sentenced her as a fourth habitual offender to a prison term of 9 to 22 years for the unarmed robbery conviction.

1. OV 19 SCORING

A party may not raise on appeal an issue challenging the scoring of the guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand.[18] Thus, a sentence within the appropriate guidelines range is subject to review only if preserved at sentencing, in a motion for resentencing, or in a motion to remand.[19] Here, August failed to preserve her arguments at sentencing, in a motion for resentencing, or in a motion to remand. And her sentence was within the appropriate guidelines range. Therefore, we need not review her appellate counsel's arguments regarding sentencing.

Regardless, we disagree that the trial court erred in scoring 15 points for OV 19. A trial court should score 15 points for OV 19 when "[t]he offender used force . . . against another

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[15] *Knox*, 469 Mich at 509 ("Finally, the trial court, upon request, may provide a limiting instruction under MRE 105.").

[16] *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

[17] *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

[18] MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); see also MCR 6.429(C).

[19] *Kimble*, 470 Mich at 310-312.

person . . . to interfere with, attempt to interfere with, or that results in the interference with the administration of justice[.]"[20] August's appellate counsel argues that, although not defined, the Legislature's use of the term "administration of justice" contemplated that there be interference with state action—that is, police action. Therefore, August's appellate counsel argues that OV 19 does not apply to interference with a private security guard. But this argument is without merit. This Court has specifically made clear that OV 19 applies to loss prevention personnel.[21]

2. MITIGATING EVIDENCE

August's appellate counsel fails to provide any factual basis supporting a claim that the trial court failed to consider certain mitigating evidence.[22] Therefore, that argument is abandoned.[23]

3. HABITUAL OFFENDER ENHANCEMENT

The sentencing guidelines ranges are properly subject to enhancement if the defendant is a habitual offender.[24] And this Court has held that the habitual offender enhancement statute is constitutional.[25] Therefore, to the extent August's appellate counsel argues to the contrary, the argument is without merit.

C. MISCELLANEOUS ISSUES

1. INEFFECTIVE ASSISTANCE OF COUNSEL

Within the body of his brief, August's appellate counsel argues that, for various reasons, August's defense counsel was ineffective during the lower court proceedings. However, August's appellate counsel has not properly presented these arguments to this Court because he failed to identify them as issues in his statement of questions presented. Therefore, these arguments are waived.[26] Regardless, because we have found no error in August's appellate counsel's underlying claims, defense counsel had no obligation to object.[27]

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[20] MCL 777.49(b).

[21] *People v Passage*, 277 Mich App 175, 179-181; 743 NW2d 746 (2007).

[22] *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000).

[23] *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

[24] MCL 777.21(3); *People v Houston*, 261 Mich App 463, 474; 683 NW2d 192 (2004), aff'd 473 Mich 399 (2005).

[25] *People v Wells*, 103 Mich App 577, 580; 303 NW2d 243 (1981); *People v McGilmer*, 96 Mich App 433, 435; 292 NW2d 700 (1980).

[26] MCR 7.212(C)(5); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

[27] *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

2. *BLAKELY-APPRENDI* ARGUMENT

August's appellate counsel also inserts a *Blakely-Apprendi*[28] argument into the body of his brief. However, like the ineffective assistance claim, this argument is waived due to August's appellate counsel failure to properly present it in the statement of questions presented.[29] And, regardless, the Michigan Supreme Court has clearly held that *Blakely-Apprendi* does not apply to Michigan's indeterminate sentencing scheme.[30]

III. AUGUST'S STANDARD 4 BRIEF

August raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. None of these issues have merit.

A. OTHER ACTS EVIDENCE

August provides a "supplemental" argument to her appellate counsel's other acts evidence argument, arguing that the evidence was inadmissible character evidence that prejudiced her case by showing her propensity towards committing this type of crime. However, as we concluded previously, the evidence was admissible under MRE 404(b) because the evidence was not offered solely to show August's criminal propensity, but rather to show her knowledge and plan when committing the act of shoplifting.

B. RIGHT TO CONFRONT WITNESS

August argues that the trial court violated her due process right to confront a witness in open court when it allowed the prosecutor to introduce inadmissible testimonial hearsay. More specifically, August points out that during the prosecutor's opening statement he told the jury that they would hear testimony from a witness named Tasha Hardy, who would testify that she saw August hit Hendryx and then drive away. August takes issue with the fact that Hardy did not actually end up testifying during trial.

When a prosecutor states that evidence will be presented that later is not presented, reversal is not required if the prosecutor acted in good faith[31] and the defendant was not prejudiced by the statement.[32] At the time that the prosecution rested its case, the prosecutor informed the trial court that, although he had originally intended to call Hardy as a witness, she was unable to be located on the day of trial. The prosecutor explained, "I'd had contact with her

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[28] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004); *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000).

[29] MCR 7.212(C)(5); *Caldwell*, 240 Mich App at 132; *Brown*, 239 Mich App at 748.

[30] *People v McCuller*, 479 Mich 672, 683-691; 739NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 148, 155, 156; 715 NW2d 778 (2006).

[31] *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991).

[32] *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997).

as well as the officers that arranged for her to be here and picked up at 9:00. We have not been able to locate her. She has failed to show." The prosecutor then added that, regardless, her testimony would have been cumulative of Hendryx's and Yonker's testimonies. On the basis of this explanation, we conclude that the prosecutor acted in good faith when referring to Hardy during opening statement and that his statement, which was merely cumulative of other witness testimony, did not prejudice August.

Moreover, "[i]t is the *testimonial* evidence in court to which the Sixth and Fourteenth Amendment right to confrontation applies."[33] And, as the trial court instructed the jury, the prosecutor's statements were not evidence.[34] Therefore, because Hardy did not testify nor was her testimony formally sought to be admitted into evidence, August's right to confrontation was neither triggered nor violated. In other words, the prosecutor did not admit an out-of-court testimonial statement against August, but merely referred to anticipated testimony.

Additionally, in light of our conclusion, we find no merit to August's claim that her defense counsel was ineffective for failing to object to the prosecutor's statement.[35]

C. INTIMIDATION AND COERCION

August argues that the trial court violated her due process rights to fair trial and to present a defense when it allowed the prosecutor to intimidate and coerce a witness, thereby forcing her not to testify on August's behalf. More specifically, August contends that the prosecutor threatened defense witness, Barbara Peavey, that he would charge her with perjury regarding her anticipated testimony. As a direct result, August argues, Peavey declined to testify.

"The right to present a defense has only been invoked to reverse a conviction when the defendant was completely precluded from offering relevant and material evidence or testimony on the basis of a rule or decision that was '"arbitrary" or "disproportionate to the purposes they are designed to serve."'"[36] Although a prosecutor may not intimidate a witness to keep him or her from testifying,[37] he may caution a witness regarding the consequences of perjury.[38] Indeed, "under certain circumstances, the prosecutor, as an officer of the court, has a duty to inform the

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[33] *People v Mallory*, 421 Mich 229, 264; 365 NW2d 673 (1984) (BOYLE J., *dissenting*) (emphasis added).

[34] *People v Dobek*, 274 Mich App 58, 66 n 3; 732 NW2d 546 (2007).

[35] See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) ("Counsel is not ineffective for failing to make a futile objection.").

[36] *People v Shahideh*, 482 Mich 1156, 1176 n 32; 758 NW2d 536 (2008), quoting *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998), quoting *Rock v Arkansas*, 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37 (1987).

[37] *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003).

[38] *People v Layher*, 238 Mich App 573, 587; 607 NW2d 91 (1999), aff'd 464 Mich 756 (2001).

court that it may be necessary for the court to inform a witness of his rights under the Fifth Amendment."[39]

Here, before the prosecution rested, while outside the presence of the jury, the prosecutor informed the trial court of his concerns regarding Peavey's testimony:

> I do believe that it would be appropriate for this Court to advise Ms. Peavey of her 5th Amendment Right against self-incrimination. I do believe in the information I have that either she is going to change the story completely or provide false information when she testifies. . . . [T]here is a concern that there could be a charge of a false report. There's going to be a charge of false report of material facts in a felony or that there could be perjury charges.

Upon questioning by the trial court, defense counsel then explained that the allegation stemmed from Peavey's statement to an investigating officer that she had actually purchased one of the stolen items for August as a Christmas gift. The trial court then questioned Peavey regarding her desire to testify and advised her regarding her Fifth Amendment right:

> *THE COURT:* All right. Now you're going to be called as a witness in this case in a few minute [sic]. I understand [defense counsel] is going to call you as a witness to testify on behalf of Ms. August. Do you understand that?
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> *THE WITNESS:* Okay.
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> *THE COURT:* Now, . . . the Prosecutor, says to me as he's obligated to do that he thinks I need to talk to you about your Fifth Amendment Right. For example, his concern is this, and that's all it is, that's why we're doing this out the presence of the jury. He's concerned that you might lie up here on the witness stand and if you do, you could be charged with making a false report of a felony and you could be charged with perjury. Okay. So all I'm doing right now is telling you that—
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> *THE WITNESS:* I can plead the Fifth?
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> *THE COURT:* You can plead the Fifth and not—
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> *THE WITNESS:* Then I'm going to plead the Fifth and not testify.

After this exchange between Peavey and the trial court, the court then turned its attention back to the prosecutor to confirm his concerns:

> *THE COURT:* . . . [L]ast question is yours essentially. At some point down the road some Appellant Attorney is probably going to say that you dropped this dime on Ms. Peavey as a litigation tactic to chill her testimony and defeat Ms. August's

[39] *People v Callington*, 123 Mich App 301, 306-307; 333 NW2d 260 (1983).

> right to call witnesses. So my question for you is, you have an honest good faith basis that Ms. Peavey might be saying these things and you're not saying this just as a technique to scare her off, a tactic to scare her off the stand?
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> *THE PROSECUTOR:* No, you honor.
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> * * *
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> *THE PROSECUTOR:* . . . In reviewing the video, you can see the sequin shirt there on a hanger. . . . [W]hen I was provided Ms. Peavey's name, I sent Detective Morningstar out to interview Ms. Peavey. She then represented to . . . Detective Morningstar that she bought that . . . sequin shirt for Ms. August. But when questioned further by Detective Morningstar, she couldn't provide any other description except that it was black and it was sequin [sic] and that it was a sweater.
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> *THE PROSECUTOR:* So there is a concern there that what's on the video is different then [sic] what's being said.

The trial court then accepted Peavey's invocation of her Fifth Amendment right and excused her from testifying.

Based on the record, we conclude that the prosecutor acted in good faith and did not intimidate Peavey with improper threats. Indeed, the prosecutor never directly spoke to Peavey regarding her Fifth Amendment right; he merely informed the trial court of his concerns and then the court exercised its discretion to advise and question Peavey regarding her rights.[40] The record evidences that Peavey voluntarily chose to exercise her right against self-incrimination; therefore, neither the prosecution nor the trial court deprived August of her right to present a defense.

Moreover, the prosecutor had no duty to grant Peavey immunity so that she could testify for August.[41] And because a defendant lacks power to immunize witnesses,[42] we find no merit to August's claim that her defense counsel was ineffective for failing to request that Peavey be granted immunity.[43]

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[40] See *id.* at 307.

[41] See *People v Lawton*, 196 Mich App 341, 346; 492 NW2d 810 (1992).

[42] *Id.*; *People v Watkins*, 78 Mich App 89, 95; 259 NW2d 381 (1977) ("[O]nly the prosecuting attorney is vested with discretionary authority to seek a grant of immunity in a criminal case.).

[43] See *Thomas*, 260 Mich App at 457.

D. INADMISSIBLE EVIDENCE

August argues that the trial court violated her due process rights when it allowed the presentation of inadmissible, unauthorized evidence to the jury. More specifically, August argued that there was no foundation, no evidence of chain of custody, and obvious tampering with evidence of the articles of clothing that she was accused of stealing. August argues that the clothing items remained in possession of the J.C. Penney store from the date of the incident until the date of trial and at no time were the items taken by the police to formally be logged as evidence. Accordingly, August argues that the prosecution failed to prove that the clothes presented at trial were "the 'REAL' clothes taken at the time of the incident."

August offers no supporting authority for her contention that the clothing evidence was required to held in *police* custody in order to preserve its admissibility;[44] therefore, we deem this argument abandoned.[45]

Regardless, we find it significant that Hendryx specifically testified that, following the incident, she placed the subject items in a locked room at the store and that they had remained in that room ever since, until the day of trial. There is no evidence on the record that the items were not what they were purported to be or that that they had been tampered with. Therefore, we find no plain error in the trial court's decision to admit them.[46]

Additionally, in light of our conclusion, we find no merit to August's claim that her defense counsel was ineffective for failing to object to admission of the evidence.[47]

E. WITNESS TAMPERING

August argues that the trial court violated her due process right to a fair trial when it allowed witness tampering. More specifically, August argues that Hendryx tampered with prosecution witness Janell Yonker by telling Yonker her account of the events that transpired and "putting words in Yonkers [sic] mouth that Wendy Hendryx wanted testified to." August claims that Hendryx was without authority to discuss the case with Yonker.

At trial, Yonker testified that, on the day of the incident, she was at the mall on her lunch break. As she was walking into the mall, she saw an altercation between two women by the mall entrance. One of the women yelled that the other woman had hit her and asked for someone to call the police, but Yonker did not call because she unsure about what exactly was transpiring. According to Yonker, one of the women, a heavy-set blonde, then ran to her truck, and the other woman then identified herself as J.C. Penney security and stated that the blonde woman had just

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[44] MCR 7.212(C)(7); *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003); *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987).

[45] *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

[46] *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

[47] See *Thomas*, 260 Mich App at 457.

stolen merchandise. Yonker stated that the security woman—Hendryx—then showed her scratches on her arm and said that she was just trying to get the merchandise back. At trial, Yonker identified August as the blonde woman that she saw that day, and she testified that she did not see August hit the security guard. Yonker also specifically denied that she had spoken to Hendryx since the day of the incident.

August points to no evidence to show that Hendryx engaged in any improper contact with Yonker.[48] Hendryx's only contact with Yonker was in the immediate aftermath of the incident in which Hendryx was relating her experience in the heat of the moment. There is no indication that Hendryx was attempting to influence, intimidate, or interfere[49] with Yonker's testimony in any way. Therefore, we find no merit to this claim.

F. LIMITATION OF JURY VOIR DIRE

August argues that the trial court violated her due process rights when it limited jury voir dire to one hour rather than order a continuance so that he could attend a personal, family court luncheon. More specifically, August argues that one hour was insufficient for defense counsel to perform a proper jury voir dire.

August fails to provide any factual basis supporting her claim that her defense counsel was unable to perform a proper voir dire.[50] Therefore, that argument is abandoned.[51] Additionally, we find no merit to August's claim that her defense counsel was ineffective for failing to object or request a continuance.[52]

G. ATTORNEY OF CHOICE

August argues that the trial court violated her right to retain an attorney of her choice when she and her appointed counsel had an irreconcilable conflict, yet the trial court ignored and refused her repeated requests to fire her appointed counsel in order to hire a retained attorney.

On the morning of the second day of trial, the trial judge indicated that, during a brief recess, August had attempted to speak to him; however, he told her that such contact was not permitted. It is not apparent on the record what August wished to discuss with the judge. Later that morning, immediately after the trial judge excused Peavey from testifying, August interjected and asked the judge if she could fire her attorney. The trial court admonished August that she was not allowed to speak directly to the court and suggested that she take a moment to speak to her attorney. August and her attorney then spoke off the record, and there is no record of what was discussed during this meeting. That afternoon, August testified in her defense;

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[48] *Elston*, 462 Mich at 762.

[49] See MCL 750.122.

[50] *Elston*, 462 Mich at 762.

[51] *Harris*, 261 Mich App at 50.

[52] See *Thomas*, 260 Mich App at 457.

notably, she made no further mention of seeking alternative counsel. It was not until the sentencing hearing that August again raised the issue of replacing her appointed counsel. The trial court essentially responded that the matter was moot.

The constitutional right to counsel encompasses the right of a defendant to choose his own retained counsel.[53] However, the right is not absolute, and a trial court must balance the defendant's right to choice of counsel against the public's interest in the prompt and efficient administration of justice.[54] A court's exercise of discretion regarding a defendant's choice of counsel is reviewed for an abuse of discretion.[55]

Although August did briefly express a desire to "fire" her defense counsel, she did not make a formal motion to do so. And, even if we were to conclude that her statement was a proper request to retain alternative counsel, we would conclude that the trial court did not abuse its discretion in denying the request in the interest in the prompt and efficient administration of justice.[56] August's request did not come until trial was already well underway and any alleged deficiencies in defense counsel's performance were not apparent on the record.[57] Moreover, August has failed to establish on appeal that an actual conflict adversely affected her counsel's performance.[58]

H. EFFECTIVE ASSISTANCE OF COUNSEL

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that defense counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different,[59] and (3) that the

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[53] US Const, Am VI; US Const, Am XIV; 1963 Const, art 1, §§ 13 and 20; *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557, 2561; 165 L Ed 2d 409, 416 (2006); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009).

[54] *Aceval*, 282 Mich App at 386-387; *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003).

[55] *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999).

[56] *Aceval*, 282 Mich App at 386-387; *Akins*, 259 Mich App at 557; *Echavarria*, 233 Mich App at 368.

[57] *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

[58] *People v Young*, 181 Mich App 728, 731; 450 NW2d 43 (1989).

[59] *Strickland v Wash*, 466 US 668, 688, 694; 104 S Ct 2052, 2064-2065, 2068; 80 L Ed 2d 674, 693-694, 698 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

resultant proceedings were fundamentally unfair or unreliable.[60] Effective assistance of counsel is presumed, and the defendant bears a heavy burdenof proving otherwise.[61]

1. PRESENTATION OF EXCULPATORY EVIDENCE

August argues that the trial counsel violated her due process rights when he failed to show the jury the entire J.C. Penney surveillance video, which would have shown inconsistencies in Hendryx's testimony. More specifically, August argues, "Hendryx testified that [August] pushed her and bolted which if this video would have been allowed to continue would have disproved that testimony[,] exonerating [August]."

We find no merit to August's claim. Decisions regarding what evidence to present are presumed to be matters of trial strategy.[62] And this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.[63]

2. PRESENTATION OF WITNESSES

August argues that her trial counsel violated her right to present a defense when he failed to call exculpatory witnesses and failed to interview them before deciding not to call them. We find no merit to this claim. Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy.[64] And this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.[65] Moreover, August fails to explain how failure to call the witnesses deprived her of a substantial defense.[66]

3. ADDITIONAL ISSUES

August also argues that her trial counsel was ineffective for the following list of reasons: (1) "failure to impeach witnesses"; (2) "failure to communicate"; (3) "defendant was forced to testify by trial counsel"; (4) "failure to call defendant's exculpatory witnesses"; (5) "failure to object to witness tampering"; (6) "failure to object to prosecutorial misconduct"; (7) "failure to present exculpatory video evidence"; (8) "failure to object to prosecutor's witness intimidation"; (9) "failure to object to judicial limiting voir dire"; (10) "failure to object to 'no' chain of custody"; (11) "failure to object wrong evidence"; (12) "failure to object to the lost evidence"; (13) "failure to request an adjournment"; (14) "failure to present exculpatory evidence"; (15)

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[60] *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

[61] *Knowles v Mirzayance*, ___ US ___; 129 S Ct 1411, 1420; 173 L Ed 2d 251, 263 (2009); *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

[62] *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

[63] *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

[64] *Dixon*, 263 Mich App at 398.

[65] *Payne*, 285 Mich App at 190.

[66] *Id*.

"Cobbs agreement error"; (16) "PSI errors / other mitigating factors at sentencing"; (17) "scoring error"; and (18) "trial counsel's unprofessional conduct."

To the extent that we have addressed some of these claims in our analyses above, we find no merit. With respect to the remaining issues, August has failed to provide any admissible factual basis supporting her claims,[67] and we find no plain error apparent on the record.[68] Moreover, as stated, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy,[69] and declining to raise objections to procedures, evidence, or argument can be sound trial strategy.[70] The defendant's evaluation of counsel's performance is irrelevant.[71]

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

[67] *Elston*, 462 Mich at 762; *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990) (stating that this Court's review is limited to the trial court record).

[68] *Jordan*, 275 Mich App at 667; *Carines*, 460 Mich at 763-764.

[69] *Dixon*, 263 Mich App at 398.

[70] *People v Unger*, 278 Mich App 210, 242, 253; 749 NW2d 272 (2008).

[71] *United States v Cronic*, 466 US 648, 657 n 21; 104 S Ct 2039; 80 L Ed 2d 657 (1984).