STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 14, 2012
v	No. 303378 Wayne Circuit Court
CYNTHIA ULDINE LALONE, Defendant-Appellant.	LC No. 10-011323-FH

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant Cynthia Lalone stole women's clothing from a Kohl's Department Store and forcibly resisted the store security guard who pursued her into the parking lot. The prosecutor charged Lalone with unarmed robbery in violation of MCL 750.530. Her counsel urged the jury to acquit her of unarmed robbery, arguing that she merely committed a larceny. The jury convicted Lalone as charged. Lalone now maintains that her trial counsel performed ineffectively by failing to request jury instructions concerning the lesser offenses of larceny and attempted unarmed robbery, and that sentencing counsel rendered ineffective assistance by inadequately advocating for mitigation of her sentence. We affirm.

I. FACTS AND PROCEEDINGS

Cynthia Lalone selected some clothing at a Kohl's Department Store and brought it into a fitting room. Based on the speed with which Lalone pulled the clothing from the racks and her apparent disregard of the items' sizes and prices, store security had identified her as a shoplifting suspect before she entered the fitting room. Once inside the fitting room, Lalone ripped the tags from the merchandise and shoved the items inside a large handbag. She then exited the store. Jason Maben, a Kohl's loss prevention manager, testified that only empty hangers and some tags remained in Lalone's fitting room.

Maben and Nelson Gaines, another Kohl's employee, followed Lalone outside. They approached her in the parking lot, identified themselves as store security, and requested that she return to the store. Lalone ignored them and continued walking toward her car. Maben attempted to block Lalone's path, but she pushed around him with her elbow and forearms. When Lalone opened her car door and sat down inside, Maben positioned himself just inside the door. Maben recounted at the trial that Lalone started the car, put it in reverse, and "hit the accelerator." The moving vehicle pinned Maben's knee between the open driver-side car door

and a neighboring vehicle. Gaines reached into the vehicle and turned off the ignition. Lalone then agreed to return to the store.

The prosecutor established that, while in custody at the Westland police station, Lalone signed a statement admitting to the clothing theft. In the statement, she maintained that in the parking lot, "men approached, scared me," and that she had attempted to push them away. Lalone elected not to testify.

Lalone's counsel argued to the jury that this was a "simple case" of larceny, and not a robbery:

> Ms. Lalone took stuff that didn't belong to her from Kohl's, okay. She passed all the registers. She went outside where she is approached by civilian employees of Kohls Department Store. She's initially uncooperative but eventually becomes cooperative, that's all fair. No problem. The problem is that Ms. Lalone is charged with robbery, robbery. And if you look at the facts of this case, is there any evidence that she snatched items from any person? No. She took them off a rack. She took them off a display counter.
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> When she's outside and Mr. Maben and Mr. Gaines come up, I mean she does, again, these are people, these are civilian employees. She tries to get away. Alright, that doesn't elevate it to a robbery. She wants to get away. Did she intentionally injure anybody? No, she didn't . . . .
>
> The People have charged her with robbery. And I'm not sure how many times or how many ways I can say this without resorting to basically cheap platitudes. But look, over and over I've tried to emphasize in this brief trial the level they must reach for a robbery as opposed to anything else, a robbery. And when I look at this, no matter how I cut it, it seems to me that they are trying to put a square peg into a round hole . . . . They haven't met the criteria . . . . This case does not arise to a robbery . . . .

The trial court instructed the jury concerning the elements of unarmed robbery. Lalone's counsel did not request instruction concerning attempted unarmed robbery or larceny. After deliberating for approximately 24 minutes, the jury convicted Lalone as charged.

Substitute counsel appeared for Lalone at her sentencing. The substitute attorney urged for "mercy," representing that Lalone "wanted the court to take into consideration her problems with drugs[.]" He also mentioned that Lalone had not intended to hurt anyone, and "some mental issues . . . were going on" at the time Lalone committed her crime. The trial court asked Lalone if she wished to speak before being sentenced, and she declined. The trial court sentenced Lalone as a fourth habitual offender to a minimum term of 48 months' imprisonment, a term falling at the lower end of the 43- to 86-month guidelines range.

II. INEFFECTIVE ASSISTANCE OF COUNSEL: JURY INSTRUCTIONS

Lalone characterizes as ineffective assistance her attorney's neglect to seek jury instructions with respect to attempted unarmed robbery and larceny. Lalone preserved her

ineffective assistance arguments in a motion for new trial, which the trial court denied. Because the trial court did not hold a *Ginther*[1] hearing, we limit our review to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense." The first component of this test requires a defendant to demonstrate that her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). A reviewing court "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance" and that counsel's challenged actions represented sound trial strategy. *Strickland*, 466 US at 689. A defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "'We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence.'" *Payne*, 285 Mich App at 190, quoting *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

In this case, trial counsel employed a legitimate "all or nothing" tactic which we decline to find unreasonable. A theft accomplished without force is a larceny. *People v Perkins*, 262 Mich App 267, 272; 686 NW2d 237 (2004). The unarmed robbery statute, MCL 750.530, specifically proscribes the use of "force or violence against any person who is present" during a larceny, or assaulting or putting a victim in fear while "in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." Given Lalone's admissions and the eyewitness accounts of her crime, her counsel faced limited options in defending against the unarmed robbery charge. By her own admission, Lalone stole the clothing and tried to push the security personnel out of her way. Lalone's lawyer attempted to skirt around those facts by arguing that because Lalone harbored no intent to harm Maben or Gaines, her offense really amounted to a simple larceny. If a jury bought this argument, Lalone would have been entirely exonerated. Consequently, defense counsel had no reason to request instructions on lesser offenses, and we have no reason to second-guess this strategy. Counsel had precious little to work with and opted for an outright acquittal. Though unsuccessful, this approach fell within an objectively reasonable standard of advocacy. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

III. INEFFECTIVE ASSISTANCE OF COUNSEL: SENTENCING

Lalone presents two ineffective assistance arguments arising from her sentencing. She first challenges the appearance of substitute counsel, contending that she did not consent to the substitution and, in an unrelated criminal matter, had filed a grievance against that lawyer. In a closely related argument, Lalone contends that substitute counsel inaccurately attributed her

[1] *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

actions at Kohl's to her use of drugs, and neglected to mention that she suffered from bipolar disorder that caused her to impulsively overreact when confronted by security personnel.

Lalone voiced no objection to the appearance of substitute counsel and failed to advise the trial court that she had filed a grievance against the attorney. Moreover, substitute counsel demonstrated familiarity with the facts of the case and expressed Lalone's remorse. His mention to the court of Lalone's drug usage finds substantiation in the record. Letters from family members and a friend submitted to the trial court before Lalone's sentencing describe in detail her mental illness, history of substance abuse, and difficulties in adjusting to prescribed medications. We perceive no legal or factual basis for concluding that substitute counsel misrepresented any aspect of Lalone's background, or that his advocacy fell short of constitutional standards.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly
/s/ Mark T. Boonstra