

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 11, 2012

v

TABATHA ANN DAWSON,
Defendant-Appellant.

No. 304573
Wayne Circuit Court
LC No. 10-011399-FH

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree retail fraud, MCL 750.356c. She was sentenced as a fourth habitual offender, MCL 769.12, to 58 months to 15 years' imprisonment. Defendant appeals by right. We affirm.

Defendant first argues that her due process right to a jury trial was violated when the jury deliberated for only 16 minutes before returning a guilty verdict. Unpreserved error is reviewed for plain error affecting substantial rights, and this Court should reverse only where the error "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Defendant does not cite a single case supporting her theory that, due to the shortness of deliberations, the jury could not have given careful consideration to the jury instructions and charge at hand. In fact, it has long been held that the amount of time the jury spends deliberating is not relevant. See *Haidy v Szandzik*, 46 Mich App 552, 555-556; 208 NW2d 559 (1973) ("[A] verdict after only 15 minutes of deliberation does not mean the verdict was not the product of considered judgment and due deliberation"); see also *Farnsworth v Fraser*, 137 Mich 296, 303; 100 NW 400 (1904) (A jury deliberation of less than five minutes is not cause for reversal). Accordingly, defendant was not denied due process because of the jury's 16-minute period of deliberation.

Next, defendant alleges that there was insufficient evidence to support her conviction for first-degree retail fraud. A defendant's challenge to the sufficiency of the evidence is reviewed de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). This Court must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.* When viewed in a light most favorable to the prosecution, there was sufficient evidence that defendant aided and abetted a first-degree retail fraud.

The elements of aiding and abetting are: “(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that 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 that [the defendant] gave aid and encouragement.” *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). The elements of first-degree retail fraud are that, while a store is open to the public, a person steals property of the store that is offered for sale at a price of \$1,000 or more. MCL 750.356c(1)(b). Defendant does not contest that first-degree retail fraud was committed. Rather, she denies that she performed acts that assisted the commission of the retail fraud and that she had knowledge that the principal intended the commission of retail fraud. Defendant contends that she was merely present at the store and unaware of her sister’s intentions.

Although the evidence that defendant aided and abetted the first-degree retail fraud was circumstantial, it was sufficient to convict defendant. First, defendant lured the sales clerk away from the young men’s department where the theft occurred to the sportswear department. Even after the sales clerk told defendant that the store did not carry shirts in size XXL, defendant persisted in asking questions about shirts and directed the sales clerk further away from the young men’s department. During this time, store loss prevention associates observed three women in the young men’s department stuffing stacks of expensive jeans into a plastic garbage bag. Defendant was prompted to leave the store when one of the thieves told her that her mother was ill. Defendant left abruptly without asking questions about her mother’s health. She walked quickly out of the store and, once outside, ran to a Durango. Defendant left in the Durango even after store security told the group to stop and that police were on the way.

Loss prevention officers testified that the three shoplifters were observed scanning the store for surveillance cameras and associates. Although there was normally an associate in the young men’s department, she was distracted by defendant into another department. Loss prevention officers testified that it was common for shoplifters to distract a sales associate away from expensive merchandise. When the resolution of the issue involves the credibility of two diametrically opposed versions of events, the test of credibility lies where statute, case law, common law, and the constitution have reposed it, with the trier of fact. *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998). The question of intent presents an issue for resolution by the trier of fact. *People v Whittaker*, 187 Mich App 122, 128; 466 NW2d 364 (1991). “[B]ecause it can be difficult to prove a defendant’s state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant’s state of mind, which can be inferred from all the evidence presented.” *People v Kanaan*, 278 Mich App 594, 622; 752 NW2d 57 (2008). “A factfinder can infer a defendant’s intent from his words or from the act, means, or the manner employed to commit the offense.” *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). In the present case, defendant’s witness, her cousin, testified that defendant was at the store to purchase a shirt and was unaware of the plan to steal. Defendant’s mere presence and innocent intent theory was presented to the jury, and the jury rejected the credibility of this testimony and the theory itself. Therefore,

viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence that defendant aided and abetted first-degree retail fraud.¹

Finally, defendant contends that the trial court erred in sentencing her above the guidelines range. No action is required to preserve a challenge to an upward departure from sentencing guidelines. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). This Court reviews a sentencing court's determination regarding the existence of a particular factor for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). This Court reviews the determination that a factor is objective and verifiable as a matter of law. *Id.* This Court reviews the sentencing court's determination that the objective and verifiable factors present in a case constitute substantial and compelling reasons to depart from the statutory minimum sentence for an abuse of discretion. *Id.*

A sentencing court must impose a minimum sentence within the sentencing guidelines unless the sentencing court has a substantial and compelling reason for that departure and states on the record the reasons for the departure. MCL 769.34(2), (3). The reasons relied upon must be objective and verifiable. *Smith*, 482 Mich 299. The sentencing court must also explain how the substantial and compelling reason justifies the amount of the departure. *Babcock*, 469 Mich at 272.

The trial court gave two reasons for the departure. First, the trial judge noted that defendant had a twenty-five year criminal history and described her as: "just a hopeless case. You're a serial offender, serial felon, a serial thief and a serial assailant." The trial court also cited, as a reason for the departure, the involvement of two children in the crime. The trial court was entitled to conclude that the guidelines did not adequately take into account defendant's lengthy prior criminal history. MCL 769.34(3)(b); see also *People v Abramski*, 257 Mich App 71, 75; 665 NW2d 501 (2003). Additionally, the trial judge stated that the two children, who were with defendant when she aided and abetted first-degree retail fraud by distracting the sales associate, were also victims of the crime. Defendant argued that she was not aware of the intentions of her friends/relatives to steal jeans and that she went to the store to buy a shirt. Clearly, the jury did not believe defendant. Defendant and the children ran into the parking lot while being chased by security staff and being yelled at to stop. Defendant and the children entered her Durango and departed the scene against the orders of security staff and were stopped by police. The trial court did not clearly err in finding that the two children were victims of the crime and in finding that the children's presence was not considered in the guidelines. Although defendant argues that she was not responsible for the children because their mother was also present, the children were with defendant when she distracted the sales associate and when she departed the store. Clearly, she consented to their presence with her and, therefore, she is as

¹ Defendant also alleged that a remand for correction of errors in the presentence investigation report (PSIR) should occur. We remanded this matter to the trial court for the limited purpose of correcting errors in the PSIR. *People v Dawson*, unpublished order of the Court of Appeals issued January 18, 2012 (Docket No. 304573). In light of the trial court's compliance with the remand order, we need not address this issue.

responsible as their mother for their participation. The trial court did not clearly err in finding that the children were present which is objective and verifiable.

Further, the trial court did not abuse its discretion in finding that the children's presence was a substantial and compelling reason to depart from the guidelines. A standard first-degree retail fraud offense does not involve children. That defendant involved two children who were forced to run from security staff, get into a car against security staff orders, and leave, only to be stopped by police minutes away, is a substantial and compelling reason to depart from the guidelines.

Defendant argues that her sentence was not proportionate to the crime because her codefendants received much lighter sentences. However, the rule of proportionality requires only that the sentence be proportionate to defendant's conduct and to her criminal record, *Babcock*, 469 Mich at 262, not to others' sentences. Further, this Court has no information about the codefendants' criminal history with which to make a valid comparison. Here, the sentencing court articulated its reasons for departing in the amount that it did. Under the scoring guidelines, defendant's minimum sentence range as a fourth habitual offender was nine to 46 months. However, the sentencing court determined that, if the children were considered victims in defendant's offense, her Offense Variable (OV) score would be 25 rather than five, and her minimum sentence as a fourth habitual offender would be 14 to 58 months. The trial court therefore sentenced defendant to a minimum incarceration of 58 months. Given the circumstances, the trial court adequately articulated its reason for departure and did not abuse its discretion in the extent of the departure.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray