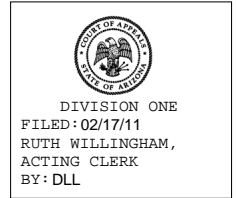


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 10-0074
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
DESIREE NICOLE HARDGE,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-134754-001 SE

The Honorable Lisa Ann Vandenberg, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Terry J. Reid, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Desiree Nicole Hardge timely appeals from her conviction and sentence for theft of \$3000 or more but less than \$25,000, a class three felony. After searching the record on appeal and finding no arguable question of law that was not

frivolous, Hardge's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asking this court to search the record for fundamental error. This court granted counsel's motion to allow Hardge to file a supplemental brief *in propria persona*, but she chose not to do so. After reviewing the entire record, we find no fundamental error and, therefore, affirm Hardge's conviction and sentence.

FACTS AND PROCEDURAL BACKGROUND¹

¶2 Johnson Bank's Pinnacle Peak branch hired Hardge in late December 2005 as a temporary employee. In late January 2006, the bank made her a permanent employee. Between January 2006 and April 2006, a number of unexplained losses from the branch's ATM occurred, resulting in a total loss of \$65,620.² As a result of these losses, a Johnson Bank corporate security officer began an investigation.

¹We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Hardge. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

²The branch suffered total losses from the ATM of \$65,720 during the period, but a \$100 loss on March 2, 2006, may not have been due to theft and thus the State did not seek a conviction for that loss.

¶13 The security officer testified she reviewed ATM records, other bank records, time sheets, and surveillance videos, and concluded Hardge was the only employee who was working when every loss occurred. The security officer interviewed every employee who worked significant hours at the branch during the period. The security officer testified that, during an interview, Hardge admitted to taking money from the bank and signed a written statement admitting she had done so. After the security officer asked Hardge to write in the amount she had taken, Hardge wrote "(6-8)." The security officer testified Hardge verbally stated she had taken \$6000 to \$7000, and in writing "(6-8)" it was understood "thousands of dollars . . . were being discussed." Hardge testified, however, that she took \$6 to \$8 for lunch money and paid it back later. Hardge testified the security officer continually asserted Hardge had taken \$6000 to \$8000 despite her insistence she had taken \$6 or \$8.

¶14 The security officer brought the investigation to the Scottsdale Police Department's fraud unit. Two fraud-unit detectives interviewed Hardge and two other branch employees. The detectives testified Hardge admitted during the interview to taking \$6000 to \$8000 from the bank, although Hardge testified she told the detectives she took \$6 to \$8.

¶15 A grand jury indicted Hardge on one count of theft of \$25,000 or more but less than \$100,000, a class two felony. After a trial, a jury found Hardge guilty of theft of \$3000 or more but less than \$25,000, a class three felony.

¶16 The superior court suspended imposition of sentence and placed Hardge on four years of supervised probation with seven days' incarceration in jail as one of the conditions of probation.

DISCUSSION

¶17 Through counsel on appeal, Hardge asserts the State presented insufficient evidence to convict her. We disagree. We review the sufficiency of the evidence to determine if substantial evidence supported the verdict. *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005). Substantial evidence is evidence "reasonable persons could accept as sufficient" to find a defendant guilty beyond a reasonable doubt. *Id.* at 411-12, ¶ 6, 103 P.3d at 913-14 (quoting *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997)).

¶18 Despite the complicated paper trail, the State presented sufficient evidence for the jury to find Hardge guilty beyond a reasonable doubt. The State presented testimony and bank records detailing Hardge's presence when all losses occurred; surveillance photos that showed Hardge was not at her desk or was walking to and from the ATM room around the times

when the ATM's money drawers were opened without a proper banking reason; and testimony of four witnesses who said Hardge admitted to thefts from the bank totaling thousands of dollars. Taken together, the State presented sufficient evidence for the jury to find Hardge guilty beyond a reasonable doubt.

¶19 We have reviewed the entire record for reversible error and find none.³ See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Hardge received a fair trial. She was represented by counsel at all stages of the proceedings and was present at all critical stages.

³While we find no reversible error, a few oddities occurred during and after the trial. Twice during the trial, the superior court judge was forced to admonish the jury not to communicate with witnesses after jurors had improperly done so. The first occurred when jurors apparently communicated nonverbally with a witness on the stand about the comfort -- or lack thereof -- of the witness's chair. The second occurred outside the courtroom when a juror told a witness she "looked like Darma."

A few days after the verdict, a juror wrote a letter to the superior court judge requesting leniency in the sentencing of Hardge. The letter stated that the "jury unanimously felt that the evidence showed that there were multiple bank employees involved in the theft" and that how much money Hardge took was "virtually impossible to accurately ascertain." The letter also listed what the juror felt were mitigating circumstances, such as the fact Hardge wrote only "(6-8)" when she was asked how much money she took, that interviews were not recorded, and that close examination of the bank records showed that "there were some out-of-balance/possible-theft instances that [Hardge] could not possibly have been involved in." The court reviewed the letter and found nothing in it "would require or qualify the court to set aside the jury verdict." We agree.

The superior court properly handled these oddities, and they did not deprive Hardge of a fair trial.

¶10 The evidence presented at trial, as summarized above, was substantial and supports the verdict. The jury was properly comprised of eight members, and the court properly instructed the jury on the elements of the charge, Hardge's presumption of innocence, the State's burden of proof, and the necessity of a unanimous verdict. The superior court received and considered a presentence report, Hardge was given an opportunity to speak at sentencing, and the court imposed a period of probation authorized by statute.

CONCLUSION

¶11 We decline to order briefing and affirm Hardge's conviction and sentence.

¶12 After the filing of this decision, defense counsel's obligations pertaining to Hardge's representation in this appeal have ended. Defense counsel need do no more than inform Hardge of the outcome of this appeal and her future options, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

¶13 Hardge has 30 days from the date of this decision to proceed, if she wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Hardge 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.

/s/

PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Judge

/s/

PATRICIA A. OROZCO, Judge