

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENISE M. MARTIN,

Defendant-Appellant.

UNPUBLISHED

October 30, 1998

No. 200778

Oakland Circuit Court

LC No. 95-143081 FH

Before: Young Jr., P.J., and Wahls and Jansen, JJ.

MEMORANDUM.

Defendant appeals by delayed leave granted her guilty plea based conviction for receiving and concealing stolen property, MCL 750.535; MSA 28.803, habitual offender, fourth offense, MCL 769.12; MSA 28.1084, and failure to display a driver's license, MCL 257.311; MSA 9.2011. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant asserts that the prosecution abused its discretion in charging her with receiving and concealing stolen property, rather than first degree retail fraud, MCL 750.356c; MSA 28.588(3). *People v Beckner*, 92 Mich App 166; 265 NW2d 52 (1979). The argument that defendant was charged under an inapplicable statute is not waived by a guilty plea. *People v Hogan*, 225 Mich App 431, 433; 571 NW2d 737 (1997).

The facts elicited from the defendant support a conviction for receiving and concealing stolen property, and they do not support a first degree retail fraud charge. Defendant admitted that she possessed a clock that she knew was stolen. In other statements, defendant consistently denied stealing the clock herself. Where defendant did not commit the theft, there was no basis for finding her guilty of first degree retail fraud. The prosecution did not abuse its discretion in its charging decision where the alternative charge was not supported by the evidence. *People v Kotesky*, 190 Mich App 330; 475 NW2d 473 (1991).

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Myron H. Wahls

/s/ Kathleen Jansen