

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROSIE MARY GRAY,

Defendant-Appellant.

UNPUBLISHED

December 18, 2001

No. 227068

Oakland Circuit Court

LC No. 99-168354-FH

Before: Holbrook, Jr., P.J., and Cavanagh and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial convictions for forgery of a promissory note, MCL 750.251, false pretenses involving property worth more than \$1,000 but less than \$20,000, MCL 750.218(4), and forgery or alteration of a driver's license, MCL 257.310(7)(a). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to a term of four to twenty years for the forgery of a promissory note conviction, four to fifteen years for the false pretense conviction, and one year for the forgery or alteration of a driver's license conviction. The sentences run concurrently with each other, but consecutive to a current parole violation. We affirm defendant's convictions but remand for resentencing.

Defendant argues on appeal that the trial court erred when it gave the jury an instruction on aiding and abetting. Defendant claims that, since the prosecution's theory in the case was that defendant acted alone, the evidence offered at trial did not support a theory of aiding and abetting. However, defendant has waived the issue before this Court because the trial court specifically asked defense counsel for her opinion on that instruction and defense counsel stated she had no objection to it. When defense counsel expressly accepts a trial court's jury instruction, she effectively waives appellate review of any error based on that accepted instruction. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Consequently, we will not review defendant's jury instruction claim. Further, the objection made by defense counsel after the trial court reinstructed the jury was directed at the manner in which the trial court reread the aiding and abetting instruction rather than the instruction itself. We thus will not reverse defendant's conviction on that basis.

Defendant next asserts that, in passing sentence, the trial court improperly considered the fact that defendant exercised her right to a trial, improperly considered her refusal to admit guilt,

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

and improperly took into account the effect defendant's exercise of her right to trial had on her daughter. We agree in part. A court in passing sentence may not consider factors that violate a defendant's constitutional rights. *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998). A defendant has the constitutional right to a trial. *People v Mosko*, 190 Mich App 204, 211; 475 NW2d 866 (1991); *People v Travis*, 85 Mich App 297, 303; 271 NW2d 208 (1978). Similarly, a defendant has a right to secure witnesses on his own behalf and to present a defense. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v McCumby*, 130 Mich App 710, 715; 344 NW2d 338 (1983). Nor may a sentencing court base its sentence even in part on a defendant's refusal to admit guilt. *People v Wesley*, 428 Mich 708, 711; 411 NW2d 159 (1987); *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977). Since this issue presents a question of constitutional law, our review is de novo. *People v Levandoski*, 237 Mich App 612, 619; 603 NW2d 831 (1999).

The court's comments at sentencing were as follows:

Ms. Gray, I'm going to be very blunt. I'm going to sentence you to the maximum in connection with this. And the reason I'm doing so is simply because, one, I think you're a menace to society from the standpoint of white collar crime and to yourself, but also, as a very practical matter, you, because of your foolish behavior in connection with this, *insisting on going to trial in connection with this* and pursuing this in the manner in which you did, you jeopardized your daughter because subsequently they may write her as a result of it. You forced her to get on this stand and lie. Now that's my opinion of exactly what took place in connection with this matter. Therefore, I have no pity for you, no sympathy. *And you're still denying everything*, even when I read this report. [Emphasis added.]

Even a slight indication that the sentencing court considered the defendant's refusal to plead guilty can be enough to remand for resentencing. In *Travis, supra*, this Court found error in the trial court's comments:

I don't think that any person should have their right to a jury trial chilled. But, on the other hand, occasionally, the Court will reward a person, giving something less than they deserve just because they have [pleaded] guilty, and, consequently, not put the People to the risk of a not guilty verdict. [*Travis, supra* at 303.]

In *Mosko, supra*, this Court found the trial court's comments, "I am very concerned about this case. I'm concerned because it was a case that went to trial," indicated that the court *may have* improperly considered the defendant's exercise of his right to trial. *Mosko, supra* at 210-211. The comment made in the present case is even more indicative of an improper consideration, and nothing in the record or the prosecution's arguments sufficiently counters defendant's assertion.

We likewise find that the trial court's comment, "you're still denying everything," tends to indicate improper consideration of defendant's refusal to admit guilt as a basis for sentencing. A trial court cannot base its sentence, even in part, on a defendant's refusal to admit guilt. *Wesley, supra* at 711; *Yennior, supra* at 892. However, a court may consider a defendant's lack of remorse when imposing the sentence. *Wesley, supra* at 714. In this case, the court's comment that defendant was still denying her guilt does not indicate that the court thought she was failing

to show remorse, but that she continued to insist on her innocence.

Finally, defendant asserts that the sentencing judge erred by taking into account the effect defendant's exercise of her right to trial had on her daughter. Because the reasons above require resentencing, we need not determine whether the court erred in this matter. However, we note that a defendant's right to present a defense includes the right to compel witnesses to testify. *Hayes, supra* at 278. Even if it were proper for the trial court to consider them, the record does not indicate any adverse effects resulting to the daughter, nor is there any indication in the record, contrary to the trial court's statement, that defendant's daughter testified for any reason but her own choice. She was fully advised of her right to remain silent in a pre-testimonial hearing. Any consequences she suffered were those of her own choosing.

Finally, in response to the prosecution's argument that MCL 769.34(10) narrowly circumscribes appellate review of a sentence within the guidelines' range, we do not find defendant's four-year minimum sentence necessarily inappropriate. However, that statute does not take away a defendant's constitutional protection of due process rights, including the right to trial by jury.

Defendant's convictions are affirmed and her sentences vacated. We remand for resentencing; we do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ Mark J. Cavanagh

/s/ Roman S. Gibbs