

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANA LOIS SMITH,

Defendant-Appellant.

UNPUBLISHED

December 13, 2002

No. 237197

Oakland Circuit Court

LC No. 01-178467-FH

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction of embezzlement, MCL 750.174(4)(a). She was sentenced to one-year probation. We affirm.

I. Facts and Procedural History

On November 2, 2000, defendant worked at the Southfield Art Van Furniture Store as a customer representative, which involved handling money transactions, including sales and refunds. On that date, defendant was assigned a cash drawer and given the only key for that particular drawer, leaving defendant with sole access to the drawer. At the end of her shift, defendant prepared a balance report for her drawer and returned the drawer key. The balance report for defendant's drawer indicated that a cash refund was posted to Constance Thompson's lay away account in the amount of \$1,180. Further, the employee number used for tracking transactions indicated that the cash refund came out of defendant's drawer. However, the refund paperwork typically prepared by a sales manager or sales associate for every refund transaction was not submitted for that particular refund transaction. Upon further investigation, it was determined that \$1,180 cash was missing from defendant's drawer. Moreover, Thompson did not request or receive a refund in the amount of \$1,180 from the store.

As a result, defendant was charged with embezzlement of \$1,000 or more but less than \$20,000, MCL 750.174(4)(a). Following a jury trial, defendant was convicted as charged.

II. Prosecutorial Misconduct

On appeal, defendant argues that she was denied a fair trial due to prosecutorial misconduct. We disagree. Because defendant failed to preserve this issue with an objection at trial, our review is limited to plain error affecting defendant's substantial rights, which generally

requires a showing of prejudice. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant argues that the prosecution improperly argued facts not in evidence and placed the authority of the police department behind defendant's guilt by remarking "is it just a coincidence that the supplemental investigation by the police got us to this point." We find that the prosecution's comment was not misconduct but a proper remark based on the evidence presented. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (a prosecutor is free to argue the evidence and any reasonable inferences that may arise from it). The store managers at Art Van Furniture testified that they reported the suspected embezzlement to the police. As a result, the instant charge was brought against defendant. The prosecution did not place the authority of the police department behind the charge, nor was defendant prejudiced. Thus, we find no merit to defendant's claim.

III. Ineffective Assistance of Counsel Claims

Defendant also argues that she was denied the effective assistance of counsel based on several errors. However, because there was no *Ginther*¹ hearing, our review of this issue is limited to errors apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that her counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* Furthermore, the defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, because this Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 445.

A.

Defendant first claims she was denied the effective assistance of counsel when her trial counsel failed to object to the prosecutor's improper remark that a "supplemental investigation by the police got us to this point," thereby leaving the jury to infer that the police investigated the matter and found that defendant was guilty. However, because we previously concluded that this remark was not improper, trial counsel was not ineffective in failing to object.

B.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Next, defendant claims that counsel was ineffective in failing to call witnesses on her behalf, including an expert on computer records. Defendant asserts that this error provided no basis to oppose the elements of the charge. We disagree. “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Failure to call witnesses constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). We conclude that counsel’s failure to call witnesses, including an expert, to testify did not deprive defendant of a substantial defense. Defendant’s trial counsel elicited testimony on cross-examination of the prosecution’s witnesses that other employees had access to the computers and money. Trial counsel maintained that someone other than defendant had posted the transaction and that the prosecution had failed to meet its burden of proving defendant’s guilt beyond a reasonable doubt. Thus, trial counsel introduced evidence to oppose the elements of the charge and defendant was not deprived of a substantial defense. *Id.* Similarly, defendant’s argument that she was denied the effective assistance of counsel by her trial counsel’s advice not to testify must also fail. The record clearly reflects that plaintiff’s choice not to testify was knowingly made, and was a matter of trial strategy with her counsel.

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Christopher M. Murray