STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KITRINA MARIE SIMS,

Defendant-Appellant.

UNPUBLISHED
May 2, 1997

No. 178461
Jackson Circuit Court
LC No. 94-067819-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY SIMS, JR.,

Defendant-Appellant.

No. 182467
Jackson Circuit Court
LC No. 94-067820-FH

Before: Sawyer, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, both defendants were convicted of first-degree retail fraud, MCL 750.356c; MSA 28.588(3), and defendant Kitrina Sims was also convicted of resisting and obstructing an officer, MCL 750.479; MSA 28.747. Defendant Larry Sims, Jr., thereafter pleaded guilty to habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Defendant Kitrina Sims was sentenced to three years' probation and defendant Larry Sims was sentenced to ten to fifteen years' imprisonment. Defendants filed separate appeals as of right, which were consolidated for our review. We affirm both defendants' convictions and sentences.

Defendants, who are husband and wife, attempted to take four VCRs from a Meijer store in Jackson while only paying for two of them. Defendants entered the store together and then separated.

Kitrina paid cash for two VCRs in the sporting goods section. Larry, having picked up two identical VCRs, took the receipt from Kitrina and went to the cashiers with his two VCRs and some chicken. He used the receipt Kitrina received for her two VCRs to show the clerk that he had already paid for the ones in his cart. Larry left the store and put the two VCRs in his car. He returned to the store, put the receipt in Kitrina's cart, left the store and drove out of the parking lot. Kitrina proceeded to the cashier, bought some mints and showed the receipt to indicate that she had already paid for the VCRs that were in her cart. Kitrina was stopped after she left the cashier line and was taken to the security office. When a police officer was attempting to arrest her, she resisted until she was stopped by two loss prevention officers. Defendants had worked a similar scheme at a Kmart store prior to this incident.

Kitrina argues that her conviction should be reversed because she should have had a separate trial rather than the joint trial with Larry. Kitrina has failed to preserve this issue for appellate review. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). In any event, Kitrina has failed to provide any evidence that she and Larry had antagonistic defenses. *People v Hana*, 447 Mich 325, 349-350; 524 NW2d 682 (1994).

Kitrina has also failed to preserve her argument that she was prejudiced by the trial court's denial of her discovery request for Meijer inventory logs and outdoor video tapes because she has not provided this Court with a copy of the transcript of that motion. MCR 7.210(B)(1)(a); *People v Wilson*, 196 Mich App 604, 615; 493 NW2d 471 (1992). She has also failed to provide any authority in support of her argument that the information should have been quashed because the prosecutor never produced any evidence that four VCRs were actually removed from the store. As a result, that issue is not preserved for review. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). In any event, any insufficiency of the evidence on this point at the preliminary examination was rendered harmless by the presentation of sufficient evidence at trial. *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989).

The trial court did not abuse its discretion in denying Kitrina's motion for a mistrial based on her absence at a photographic lineup. The photographic identification related to the Kmart incident for which Kitrina was not charged. She presented no case law for the proposition that counsel must be present at such a showing or that there had to be a corporeal lineup when no charges were flowing from that photographic showing.

Kitrina argues that the trial court erred in denying her motion to disqualify the jury on the basis that the jury array did not adequately reflect the representation of her race, African-American. The trial court is affirmed. Kitrina failed to demonstrate that representation in the jury array was not fair and reasonable in relation to such persons in the community and also failed to prove that any under-representation was due to systematic exclusion of the group in the jury selection process. *People v Guy*, 121 Mich 592, 599; 329 NW2d 435 (1982). In addition, Kitrina did not provide any evidence that any under-representation was not the result of "benign" random selection. *People v Hubbard (After Remand)*, 217 Mich App 459, 476-481; 552 NW2d 593 (1996).

Kitrina argues that the trial court abused its discretion in denying her motion for mistrial based on the fact that the sequestered witnesses had talked with one another. We disagree. There was no violation of the sequestration order because Kitrina did not ask the trial court to caution them against discussing the evidence. *People v Linzey*, 112 Mich App 374, 379; 315 NW2d 550 (1981). In addition, Kitrina presented no evidence of prejudice as a result of the discussion between the witnesses.

Kitrina contends that the trial court erred in admitting a photograph of her wearing her Department of Corrections uniform. She has not preserved this issue for review because she did not object to the admission of this evidence. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). In any event, any error in the admission of the photograph was harmless in light of the testimony of several witnesses that she was wearing the uniform. She has also failed to preserve an issue regarding the failure of the trial court to excuse a juror because she has cited no authority in support of her position and because the claim is not suggested in the statement of the questions presented. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994); *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990).

Defendants' claim that the prosecutor used a peremptory challenge in a discriminatory manner is not preserved for review. *People v Ricky Vaughn*, 200 Mich App 32, 40; 504 NW2d 2 (1993). However, the trial court *sua sponte* raised the issue and determined that the prosecutor had a neutral explanation for the challenge to that juror. See *People v Barker*, 179 Mich App 702, 706-707; 446 NW2d 549 (1989). The trial court did not err in finding that the prosecutor was properly motivated in the exercise of his peremptory challenge. *Id*.

Defendants raise several instances of alleged prosecutorial misconduct. However, they have failed to preserve these issues because they did not object below. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). After a thorough review of the record, we determine that no miscarriage of justice will arise by our refusal to review these issues.

Defendants argue that their convictions should be reversed because Officer Johnston destroyed his police notes and, as a result, they were unable to obtain them through discovery. Reversal is not required because defendants have not demonstrated that the notes were exculpatory or that they were deliberately destroyed. See *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Larry further argues that this matter should be remanded for a hearing regarding the prosecutor's failure to produce the Meijer videotapes, inventory records, photograph of Larry, floor plans and towing orders. All of these items were in the possession of Meijer and not the prosecutor. Larry has provided no citation to authority for the proposition that the prosecution must take all evidence into its possession or that it must produce evidence not in its custody. More importantly, there is no evidence that the prosecutor suppressed these items in light of the fact that defendant was aware of them prior to trial.

Defendants argue that the trial court abused its discretion in admitting evidence of their activity in Kmart as similar acts evidence. We disagree. The evidence was introduced to show defendants' scheme or plan and not to show that they had a propensity to commit crimes. *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). Larry's reliance on *People v Engelman*, 434 Mich 204; 453 NW2d 656 (1990), is misplaced as that case is factually distinguishable.

Defendants claim error in the trial court's instructions regarding the similar acts evidence. Defendants have not preserved this issue and there is no manifest injustice in our failure to review it. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). In any event, the instructions as a whole fairly presented the issues to be tried and sufficiently protected the rights of defendants. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). Larry further argues that the trial court erred in removing the element of price from the jury's consideration. The record reveals that the trial court first instructed the jury that, if it did not find that the value of the property taken was over one hundred dollars, it should find second-degree retail fraud. However, after conferring with counsel, the trial court instructed that there was no question that the goods had a value of more than one hundred dollars. Although this Court has found reversible error when the trial court instructs that an essential element is established as a matter of law, it has done so when that particular essential element is contested by the parties. See *Gaydosh*, *supra*; *People v Tice*, 220 Mich App 47, 54; 558 NW2d 245 (1996). Because the element of price was not contested by the parties and because the price was clearly established, we find no reversible error.

Defendants argue that there was insufficient evidence to convict them of first-degree retail fraud. We disagree. MCL 750.356c; MSA 28.588(3) requires that the store be open to the public, that the defendant steal property and that that property be over one hundred dollars in value. Defendants do not argue that the store was not open to the public or that the value of the property was not over one hundred dollars. They argue that they did not steal the property because they did not take it without the owner's consent. In view of the fact that the store watched defendants and stopped Kitrina before she could completely exit the store with the unpaid for VCRs, there was sufficient evidence that Meijer did not consent to the taking of those VCRs. The evidence was sufficient to support the convictions. See *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

Larry argues that this Court should remand this matter for an evidentiary hearing on the prosecutor's failure to list as res gestae witnesses a Meijer's security person and a Meijer's inventory taker. We disagree. Any failure on the part of the prosecutor to list the security person is harmless error because defendant knew of the existence of this person prior to trial. *People v Calhoun*, 178 Mich App 517, 523; 444 NW2d 232 (1989). The inventory taker is an unknown witness and the prosecutor is under no burden to discover unknown res gestae witnesses. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

Defendants argue that they were denied ineffective assistance of counsel for failure to bring discovery motions, failure to remove a juror, failure to object to prosecutorial misconduct and failure to move for a new trial or judgment notwithstanding the verdict. A review of the record demonstrates that counsels' performances did not fall below an objective standard of reasonableness and that the representation did not so prejudice defendants as to deprive them of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendants have also failed to show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*. at 314.

Finally, Larry argues he should be resentenced because the trial court relied on his refusal to admit guilt when it sentenced him and further argues that his sentence was disproportionate. We

disagree. There is no indication on the record that the trial court asked defendant to admit his guilt as it related to sentencing. The court merely commented regarding defendant's rehabilitation potential and reflected on his lack of remorse in this context. A defendant's lack of remorse is a legitimate consideration in determining a sentence. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995), reh'g denied 448 Mich 1231 (1995); *People v Steele*, 173 Mich App 502, 506; 434 NW2d 175 (1988). Further, we do not find that the sentence imposed violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Defendant was thirty-five years old, had three prior felony convictions, had spent time in prison without rehabilitation success as evidenced by this conviction, and had failed to keep his promise to the court to appear for the original sentencing date. We find the offense to be appropriate for the offense and the offender.

Defendants' convictions and sentences are affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Mark J. Cavanagh