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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed April 21, 1981

vs.

)

DEBRA CRABTREE,

)

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64585

Defendant-Appellant.

)

Appeal from Buena Vista District Court - Richard W. Cooper, Judge.

Defendant appeals from her conviction for conspiracy to commit a felony (theft) in violation of section 706.1, The Code 1979, asserting 1) that the trial court erred in sustaining a hearsay objection made by the State and in overruling her motions for directed verdict and new trial; 2) that the trial court abused its discretion in sentencing her, and 3) that she was denied effective assistance of trial counsel. AFFIRMED.

Patrick J. Spellman of Spellman, Spellman, Spellman & Spellman, Perry, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Thomas N. Martin, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendant Debra Crabtree appeals from her conviction for conspiracy to commit a felony (theft) in violation of section 706.1, The Code 1979. Defendant asserts that the trial court erred 1) in sustaining the State's hearsay objection to defendant's testimony concerning statements made to her by an unindicted co-conspirator and 2) in overruling her motions for directed verdict and new trial. She further contends that the trial court abused its discretion in sentencing her and that she was denied effective assistance of counsel. We affirm the defendant's conviction.

I.

Defendant was convicted by jury of conspiracy to commit a felony (theft) and sentenced to a term not to exceed five years in prison. At trial, a secretary for the Sac City State Bank testified that on March 28, 1979, a man and woman who identified themselves as Richard and Deborah Miller opened a checking account at the bank over the noon hour. The secretary then identified defendant as the woman who came into the bank that day. After the account was opened, between forty and forty-five checks for an aggregate amount of \$4500 were returned to the bank for insufficient funds. Witnesses for various business establishments testified that on April 7, 1979, they were presented with checks signed by Richard Miller in payment for merchandise and that Miller was accompanied by a woman whom the witnesses identified as the defendant. Some of this merchandise was later discovered at the defendant's home. Defendant testified that she was not at the Sac City State Bank over the noon hour on March 28, 1979, and her statement was supported by three defense witnesses. Defendant admitted that on April 7, 1979, at the direction of her husband, she accompanied a man named Richard Miller on a shopping trip to advise him as to what items he would need to set up housekeeping.

II.

Defendant first contends that the trial court erred in sustaining a hearsay objection to defendant's testimony concerning statements made to her by Richard Miller. The objection was made during direct examination of the defendant when she was asked, "In the conversation did you find out where [Richard Miller] was from?" On appeal, defendant alleges that hearsay was not called for in response to this question because the response, had it been allowed, would have been offered not to prove the truth of the matter asserted, but only to "show that Richard Miller made such

statements to defendant." Although defendant proffered various theories at trial as to why the response called for did not involve hearsay, the particular one she now raises on appeal was not brought to the attention of the trial court and the court therefore has never had the opportunity to consider the theory defendant now relies on. We hold that the defendant has failed to preserve error on this question. State v. Hall, 235 N.W.2d 702, 720 (Iowa 1975), appeal after remand, 249 N.W.2d 843 (Iowa 1977), cert. denied, 434 U.S. 822, 98 S. Ct. 66, 54 L. Ed. 2d 79 (1977).

Defendant further contends that the trial court erred in overruling her motion for directed verdict, which was based essentially on an allegation that there was insufficient evidence to support a guilty verdict. Specifically, defendant's position appears to be that the evidence was insufficient because it was circumstantial; however, for the purpose of determining guilt beyond a reasonable doubt, direct and circumstantial evidence are equally probative. State v. O'Connell, 275 N.W.2d 197, 205 (Iowa 1979). Therefore, because we are asked to review the action taken by the trial court on a motion for directed verdict, we have viewed the evidence in the light most favorable to the verdict, without regard to contradiction or inconsistencies and assisted by all reasonable inferences. State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980) (quoting State v. Jones, 271 N.W.2d 761, 763 (Iowa 1978)). It is our conclusion that there exists substantial evidence in support of the verdict and that therefore the trial court did not err in overruling defendant's motion for directed verdict.

Nor do we find that the trial court erred in overruling defendant's motion for new trial. Trial courts have considerable discretion in ruling on such motions and we will interfere only where an abuse of discretion has been shown. State v. Harrington, 284 N.W.2d 244, 251 (Iowa 1979); State v. Kaufman, 265 N.W.2d 610, 619 (Iowa 1978). Our review of the record reveals no such abuse, and we thus uphold the overruling of defendant's motion for new trial.

III.

Defendant next alleges that the trial court abused its discretion in sentencing her to a prison term not to exceed five years. Defendant contends specifically that the court failed to give proper consideration to a presentence report that recommended probation and that the trial court considered irrelevant factors, such as defendant's continuing association with her husband (whom the court believed to be a bad influence) and the fact that her children are named Jesse James and Cole Younger.

In stating that the defendant has the burden to show an abuse of discretion in sentencing, we mean that the defendant must show that the sentence is

so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.

State v. Warner, 229 N.W.2d 776, 783 (quoting Wendel v. Swanberg, 384 Mich. 468, 472, 185 N.W.2d 348, 351 (1971)). We are not prepared to say that the defendant has met her burden in this case. The fact that the trial court did not accept the recommendation of probation contained in the presentence report does not, as defendant suggests, indicate that the court failed to give the report appropriate consideration. Furthermore, the fact that the trial court considered defendant's association with her husband and made reference to the names of defendant's children does not in and of itself constitute an abuse of discretion, since conceivably such factors could have some bearing on the defendant's attitudes towards law enforcement and her chances for successful probation. Thus finding no abuse of discretion, we affirm the sentence imposed.

IV.

Finally, defendant alleges that she did not receive effective assistance of counsel at trial. Review of defendant's allegations on this question requires that we determine whether, considering all the circumstances, counsel's performance was within the range of normal competency in the profession. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980); State v. Hicks, 277 N.W.2d 889, 896 (Iowa 1979); State v. Killpack, 276 N.W.2d 368, 372 (Iowa 1979); State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978) (quoting State v. Rand, 268 N.W.2d 642, 648 (Iowa 1978)). To make such determination, however, we must be supplied with an adequate record. State v. Kellogg, 263 N.W.2d 539, 544 (Iowa 1978). Since the record before us does not permit an informed resolution of this issue, we conclude that an evidentiary hearing is required on the question of competency. See State v. Smith, 282 N.W.2d 138, 143-44 (Iowa 1979). We therefore affirm the conviction without adjudicating the issue of trial counsel's competency; defendant's right to raise that issue in postconviction proceedings pursuant to chapter 663A, The Code 1979, is preserved. O'Connell, 275 N.W.2d at 206; Kellogg, 263 N.W.2d at 544.

AFFIRMED.

All judges concur, except Oxberger, C.J., who specially concurs.

OXBERGER, C.J.

I concur in the results only.