

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0287

September Term, 2015

EMILY BUTLER

v.

STATE OF MARYLAND

Berger,
Arthur,
Reed,

JJ.

Opinion by Reed, J.

Filed: September 15, 2016

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Emily Butler, was charged in the Circuit Court for Somerset County with: 1) theft over \$1,000; and 2) theft over \$1,000 pursuant to a scheme and continuing course of conduct. A jury found appellant guilty of the theft scheme but failed to reach a unanimous verdict as to the theft charge. The court sentenced appellant to four years in prison. In this appeal, appellant presents the following question for our review:

1. Was the evidence insufficient to sustain the conviction for theft scheme?

Finding no error, we affirm.

FACTS AND PROCEEDINGS

The State called the following witnesses at appellant’s trial: Rebecca Miller, Michael Rayne, and Corporal Jonathan Pruitt of the Maryland State Police. Ms. Miller testified that between July 1, 2014, and October 3, 2014, she shared her home with appellant, who is her daughter. During that time, Ms. Miller kept some personal checks in her wallet and the rest in an unlocked desk drawer in her home office. Ms. Miller noticed “that there were checks missing . . . that had been cashed which I had not done.” Ms. Miller determined from a transaction detail report of her checking account that twenty-two checks had been written without her authorization. The unauthorized checks totaled \$2,365 and were made payable to appellant and Michael Rayne, someone Ms. Miller “had never heard of.” Ms. Miller’s account was debited for the unauthorized checks, but she believes that her account was ultimately credited for those amounts by the bank.

Mr. Rayne testified that he met appellant three months prior to trial, and that appellant introduced herself to him as Rebecca Miller. Appellant provided Mr. Rayne with

checks that he deposited in his bank account. Once the checks cleared, he would give appellant the amount of the deposited checks in cash. Mr. Rayne deposited “at least 15 checks” he received from appellant.

Corporal Jonathan Pruitt of the Maryland State Police testified that he investigated the unauthorized checks from Ms. Miller’s checking account and determined that approximately 19 checks were written to Mr. Rayne in the amount of \$2,085 and three checks were made payable to “Emily Butler” in the amount of \$280. Corporal Pruitt testified that he showed a photograph of appellant to Mr. Rayne, who, upon seeing the photograph, identified appellant as the individual who represented herself to be Rebecca Miller.

At the close of the State’s evidence, defense counsel moved for judgment of acquittal, arguing that while the indictment identified the stolen property as “money,” “there is no evidence that money was taken in this case.” Defense counsel further argued that the indictment incorrectly identified Ms. Miller as the victim when the true victim was the bank that reimbursed her.

The trial court denied the motion for judgment of acquittal, finding that “money in its ordinary and more popular sense could mean currency obviously, but also banknotes or other circulating medium in general use and representative of the value in the case of checks.” The trial court also found that the charging document was sufficient and that proof of loss is not required as an essential element of the crime of theft.

STANDARD OF REVIEW

The standard of review of the sufficiency of the evidence is “whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Neal v. State*, 191 Md. App. 297, 314, *cert. denied*, 415 Md. 42 (2010) (citation omitted). “We give due regard to the fact finder's finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.” *Moye v. State*, 369 Md. 2, 12 (2002) (citations and quotation marks omitted).

DISCUSSION

Appellant contends that the evidence was insufficient to sustain her conviction for theft scheme for three reasons. First, appellant argues that the State failed to prove that appellant stole “money” from Ms. Miller because checks are not the equivalent of money. Second, even if the State proved theft of property of at least \$1,000, the victim was the bank, not Ms. Miller. Third, appellant contends that the checks were not worth at least \$1,000 at the time they were stolen.

The State responds that the alleged variances between the particular property stolen and the identity of the victim are immaterial. Moreover, the State contends that appellant’s claims fail on the merits, both because the evidence was sufficient to demonstrate that appellant had engaged in a theft scheme to steal “money,” and because Ms. Miller was indeed the victim of the theft scheme. Finally, the State submits that appellant’s argument that the checks were not worth at least \$1,000 at the time they were stolen was not raised

in the motion for acquittal, and therefore, appellant's argument regarding the value of the checks is unpreserved.

It is a general rule that "matters essential to the charge must be proved as alleged in the indictment." *Love v. State*, 6 Md. App. 639, 642 (1969) (citations omitted). "It is, of course, well settled that the evidence in a criminal case must not vary from those allegations in the indictment which are essential and material to the offense charged." *Green v. State*, 23 Md. App. 680, 685 (1974) (citation and quotation marks omitted).

The Second Count of the Indictment (theft scheme with a value of \$1,000 to under \$10,000) states:

The Grand Jurors for the County of Somerset and the State of Maryland inform and charge Emily Butler, between the 1st day of July and the 3rd day of October, in the year two thousand and fourteen at 11130 Steward Neck Road, Princess Anne, Somerset County, Maryland, did, pursuant to one scheme and continuing course of conduct, steal money of Rebecca Miller having a value of at least \$1,000 but less than \$10,000, in violation of CR, Section 7-104 of the Annotated Code of Maryland, contrary to the form of the Act of Assembly in such case made and provided and against the peace, government and dignity of the State.

Md. Code (2002, 2012 Repl. Vol.), Crim. Law ("CL") § 7-104(a) defines the crime of theft as follows:

A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:

- (1) intends to deprive the owner of the property;
- (2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

In addition, theft by scheme is defined as theft committed “under one scheme or continuing course of conduct.” CL § 7-103(f).

With respect to the definition of “property” as used in the theft statute, CL § 7-101 provides, in relevant part:

(i) Property.—

(1) “Property” means anything of value.

(2) “Property” includes:

(i) real estate;

(ii) money;

(iii) a commercial instrument;

(iv) an admission or transportation ticket;

(v) a written instrument representing or embodying rights concerning anything of value, or services, or anything otherwise of value to the owner.

(Emphasis added).

“Money,” though specifically enumerated as a type of property under the statute, does not have its own separate definition. We note that checks are not delineated as one of the categories within the definition of “property” set forth in CL § 7-101. This is reasonable because the check itself is not the property or the thing of value. The money within the

bank account is the thing of value. The check is the medium through which the money is transferred from the bank account to the payee.

However, Black's Law Dictionary defines “money” as:

1. The medium of exchange authorized or adopted by a government as part of its currency; esp., domestic currency . . .
2. **Assets that can be easily converted to cash** . . .
3. Capital that is invested or traded as a commodity <the money market>
4. (*pl.*) Funds; sums of money . . .

Black's Law Dictionary (10th ed. 2014) (emphasis added).

Thus, as the above definition makes clear, assets which can easily be converted to cash are “money” as well. In our view, the definition of “money” under the statute is not so limited as to apply only to currency. The term “money,” by definition, applies to more than mere currency.

Appellant fails to cite any case law in support of her argument that checks are not included within the definition of money. We consider the case of *Uricolo v. State*, 19 Md. App. 123, *rev'd on other grounds*, 272 Md. 607 (1974), to be informative on the subject. Uricolo alleged that there was a “fatal variance between the indictment allegation of embezzlement of currency of the total value of \$7500.00 and the alleged proof of that embezzlement by check for \$1788.53.” *Id.* at 137. In rejecting Uricolo’s argument, this Court determined that, “the check was the device through which the money of [the victim] was appropriated to the [defendant’s] use.” *Id.* at 138. Accordingly, this Court found no meaningful variance between the allegation in the indictment and evidence at trial. *Id.* at 137. Although *Uricolo* was an embezzlement case, the analysis is relevant to this case. Here, as in *Uricolo*, the check was the medium through which the crime was executed. We

perceive no variance here between the allegation in the indictment that the appellant stole money and the evidence at trial.

Appellant next argues that there was a fatal variance between the allegation in the indictment that Ms. Miller was the victim of the theft and the evidence at trial. We disagree. An “owner” of property for purposes of theft is defined as: “a person, other than the offender: (1) who has an interest in or possession of property . . . ; and (2) without whose consent the offender has no authority to exert control over the property.” CL § 7-101 (h). Ms. Miller certainly had an “interest in or possession of” the money in her bank account when appellant, who had “no authority to exert control” over the funds in the account, negotiated checks to obtain money from the account “without [her] consent.” Ms. Miller was the “owner” of the money and she did, in fact, lose money from her account when the stolen checks were deposited. Once the money was debited from her account, it became unavailable to her. The fact that she was later reimbursed by the bank after she discovered the theft and reported it to the bank does not negate the fact that she suffered a loss at the time of the theft. Accordingly, under the definitions set forth above, Ms. Miller was the “owner” of the money pursuant to the theft statutes. As the trial court correctly pointed out, proof of loss is not an essential element of the crime of theft.

Finally, we agree with the State that appellant failed to raise the argument that the stolen checks were not worth at least \$1,000 in the motion for acquittal. Because this argument was not raised in appellant’s motion for judgment of acquittal, it is not preserved for appeal and we decline to address it. *See* Md. Rule 4-324(a) (in moving for judgment of acquittal, “[t]he defendant shall state with particularity all reasons why the motion should

be granted.”); *State v. Lyles*, 308 Md. 129, 135-36 (1986) (holding that criminal defendant is not entitled to appellate review of reasons not raised in a motion for judgment of acquittal but stated for the first time on appeal); *Graham v. State*, 325 Md. 398, 417 (1992) (Court declined to review defendant’s argument on appeal that the State had failed to prove the value of the stolen items when defense counsel moved for acquittal solely on the ground that the State had failed to prove that the owner of the items was a Maryland corporation).

**JUDGMENT OF THE CIRCUIT COURT
FOR SOMERSET COUNTY AFFIRMED.
COSTS TO BE PAID BY THE
APPELLANT.**