Circuit Court for Somerset County
Case No. C-19-CR-21-000032

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 1391

September Term, 2022

CYNTHIA MARIE VAN FOSSEN

v.

STATE OF MARYLAND

Friedman,
Shaw,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 5, 2023

*This is a per curiam opinion. Consistent with Rule 1-104, the opinion is not precedent within the rule of stare decisis nor may it be cited as persuasive authority.

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Convicted by a jury in the Circuit Court for Somerset County of theft of property with a value of at least $1,500 but less than $25,000, Cynthia Marie Van Fossen, appellant, presents for our review two issues: whether there is "sufficient evidence that [she] intended to permanently deprive the owner of the property," and whether the court erred in "impos[ing] restitution as a condition of probation." For the reasons that follow, we shall affirm the judgment of the circuit court.

At trial, the State presented evidence that in July-August 2020, Ms. Van Fossen was the manager of a liquor store located in Pocomoke and operated by the Liquor Control Board of Somerset County. One of Ms. Van Fossen's responsibilities was "making deposits of checks and cash received" into the store's account in the Bank of Hebron. In August 2020, the members of the Board went to the Pocomoke store because "quite a few daily deposits . . . had not been made." When the Board members asked Ms. Van Fossen "why the deposits hadn't been made," she initially stated that her fiancée, Vernon Davis, had made the deposits "that morning." When the Bank of Hebron reported to the Board members that there had been "no deposits," Ms. Van Fossen stated that Mr. Davis "must not have made [them] yet" and that "he had [the deposits] in [his] vehicle." After additional discussion, Ms. Van Fossen stated that the deposits were at "[h]er house." Ms. Van Fossen left the store and returned "approximately an hour" later with "cash and deposit tickets paper-clipped in numerous different bags." When the Board members asked for "the rest of" the deposits, Ms. Van Fossen stated: "I don't know[,] maybe there's some still at the house." The Board members followed Ms. Van Fossen to her house, after which "she came out and said she didn't have it." A Maryland State Trooper subsequently searched the

residence and seized numerous "bank bags," deposit slips, cash register receipts, a cashed check, $122.60 in cash, and a "daily report" of the "printouts from the registers for the daily totals of the liquor store." The total "amount of cash that had not been deposited from cash sales from the Pocomoke store to the" bank was later determined to be $17,675.

Following the close of the State's case, defense counsel moved for judgment of acquittal, arguing:

> I think at best what the State is showing is it is a negligence. I don't know if they've shown, other than sloppy handling of receipts, necessarily to show, you got people (indiscernible). Her testimony's been, deposit[s] were not made in time and then when they were made, they were made in amounts consistent with what needed to be done.
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> So I mean, if they could prove we're . . . here on a single count for negligence, I think the State would be (indiscernible).

The court denied the motion, and the jury convicted Ms. Van Fossen of the offense. The court subsequently sentenced Ms. Van Fossen to a term of imprisonment of five years, all but one year suspended, and a subsequent term of probation of five years. As a "special condition of probation," the court ordered Ms. Van Fossen to "make restitution to the Somerset County Liquor Board in the sum of $17,675.12."

Ms. Van Fossen first contends that "there was insufficient evidence to support her conviction," because for numerous reasons, "there was insufficient evidence that [she] intended to permanently deprive the owner of the property." *See Price v. State*, 111 Md. App. 487, 503 (1996) (theft "requires proof of circumstances that would indicate the offender's intent permanently to deprive the owner of his or her property"). The State counters that Ms. Van Fossen "did not preserve her claim," because "[a]t no time did [she]

argue that the evidence was legally insufficient as to the element of intent to permanently deprive." Alternatively, the State contends that "the evidence was legally sufficient to convict."

We agree with the State that Ms. Van Fossen's contention is not preserved, as defense counsel did not particularly argue that the evidence of intent to permanently deprive the Board of its property was insufficient. *See* Rule 4-324(a) ("[t]he defendant shall state with particularity all reasons why [a motion for judgment of acquittal] should be granted"). But, even if the contention was preserved, we would reject the contention. When initially questioned as to the location of the missing checks and cash, Ms. Van Fossen falsely stated that they had been deposited in the Board's bank, then falsely stated that they were located in Mr. Davis's car. When Ms. Van Fossen stated that the missing checks and cash were in her house and went to retrieve them, she returned with only a portion of the missing property. Finally, when the Board members accompanied Ms. Van Fossen to her house to search for the remainder of the missing property, she admitted that "she didn't have it." This evidence supports a rational inference that Ms. Van Fossen intended to permanently deprive the Board of its property, and hence, the evidence is sufficient to sustain the conviction.

Ms. Van Fossen next contends that the court "should not have imposed restitution as a condition of probation without conducting an inquiry into [her] ability to pay." Conceding that "restitution is mandatory in theft cases," and that Md. Code (2002, 2012 Repl.Vol., 2019 Supp.), § 7-104 of the Criminal Law Article ("CL"), "does not include an explicit requirement that restitution only be ordered when the defendant possesses the

ability to pay," Ms. Van Fossen contends that "[i]t may well be unconstitutional to impose restitution without first conducting an inquiry into a defendant's ability to pay," and "to avoid potential conflict with the Constitution, [CL] § 7-104 should be interpreted to require such an inquiry." The State counters that Ms. Van Fossen's contention "is not properly before this Court." Alternatively, the State contends that the contention "fails on its merits."

We agree with the State that Ms. Van Fossen's contention is not preserved, as the Supreme Court of Maryland (formerly known as the Court of Appeals of Maryland)[1] has long held that the failure of a defendant "to make a timely objection" to the court's failure "to conduct an inquiry into the defendant's ability" to pay restitution "constitutes a waiver of that particular issue[.]" *Brecker v. State*, 304 Md. 36, 41-42 (1985). But, even if the contention was preserved, we would reject the contention. Ms. Van Fossen does not cite any authority that supports her contention that "[i]t may well be unconstitutional to impose restitution without first conducting an inquiry into a defendant's ability to pay." On the contrary, the Supreme Court of Maryland has stated that "[a]s a matter of both constitutional due process and Maryland criminal procedure, restitution orders may be entered if: (1) the defendant is given reasonable notice that restitution is being sought and

[1]At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022. *See also* Rule 1-101.1(a) ("[f]rom and after December 14, 2022, any reference in these Rules or, in any proceedings before any court of the Maryland Judiciary, any reference in any statute, ordinance, or regulation applicable in Maryland to the Court of Appeals of Maryland shall be deemed to refer to the Supreme Court of Maryland").

the amount that is being requested, (2) the defendant is given a fair opportunity to defend against the request, and (3) there is sufficient admissible evidence to support the request – evidence of the amount of a loss or expense incurred for which restitution is allowed and evidence that such loss or expense was a direct result of the defendant's criminal behavior." *Ingram v. State*, 461 Md. 650, 669 (2018) (internal citation and indentation omitted). Ms. Van Fossen does not dispute that these requirements were met, and hence, the court did not err in imposing restitution as a condition of probation.

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