

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 31, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See Wis. Stat. § 808.10 and RULE 809.62.

No. 01-0223

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

VILLAGE OF GREENDALE,

PLAINTIFF-RESPONDENT,

V.

STEPHANIE M. KRAMSCHUSTER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
JEAN W. DIMOTTO, Judge. *Affirmed.*

¶1 CURLEY, J.¹ Stephanie Kramschuster appeals from an order assessing a fine and costs against her after a jury found Kramschuster guilty of the Village of Greendale's municipal charge of theft. Kramschuster also appeals from the trial court's order denying her motion to set aside the jury verdict. On appeal,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

Kramschuster argues that the verdict should be set aside because: (1) the circuit court judge failed to divulge that she was a resident of the village of Greendale; (2) her motion seeking to suppress her inculpatory statements should have been granted; (3) the trial court, although granting her motion to sequester witnesses, did not enforce the order; (4) several of the village's witnesses perjured themselves during the trial; and (5) there was insufficient proof submitted by the village to support the accusation that Kramschuster had no authority to mark down the prices on the merchandise the store claimed she reduced and then purchased. This court affirms.

I. BACKGROUND.

¶2 Kramschuster, while employed as a sales associate at the J.C. Penney store in the Southridge Shopping Center, located in Greendale, Wisconsin, was accused of stealing merchandise from the store. Kramschuster was observed buying merchandise in a different department during her break, contrary to store rules. An investigation led to the discovery that Kramschuster was making unauthorized mark-downs of merchandise and then purchasing these items. Kramschuster, a minor at the time, was detained by the store detective when the store closed and told of the store's allegations. Kramschuster admitted that on more than one occasion she had engaged in improperly marking down pieces of merchandise and then purchased the items during her break. Ultimately, the police were called. Kramschuster was advised of her *Miranda*² rights and she admitted to police that she had purchased merchandise at unauthorized reduced

² *Miranda v. Arizona*, 784 U.S. 436 (1966).

prices. Kramschuster was given a municipal citation for theft of items having a value under \$100.00.

¶3 Kramschuster contested the charge. After filing a request for substitution of the Village of Greendale municipal judge, Kramschuster was found guilty in the West Milwaukee municipal court after a court trial. She appealed this finding to the circuit court and sought a jury trial. Prior to trial, both the village and Kramschuster brought several motions. The trial court granted several of the village's motions and denied Kramschuster's motion seeking to suppress her statements, but it granted Kramschuster's motion for sequestration of witnesses. A six-person jury convicted Kramschuster of the municipal ordinance violation by a vote of 5 to 1. Kramschuster brought a post-judgment motion seeking a new trial that was denied.

II. ANALYSIS.

¶4 Kramschuster first argues that she is entitled to a new trial because the trial judge failed to reveal that she was a resident of Greendale and, Kramschuster posits, had she known of this fact she would have exercised her right of judicial substitution. Kramschuster cites WIS. STAT. § 757.19(2)³ as support for her position.⁴ Kramschuster first raised this issue in her post-trial motion. The trial court denied her motion in a reasoned and well-written decision which this court adopts. To summarize the trial court's decision, the trial court

³ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

⁴ Kramschuster argues that the village confused judicial substitution with judicial disqualification. This court disagrees.

determined, after applying both an objective and subjective test pursuant to *State v. Harrell*, 199 Wis. 2d 654, 658, 546 N.W.2d 115 (1996), that it had properly presided over Kramschuster's matter. The trial judge subjectively determined she could preside over Kramschuster's case as she believed she was impartial. *See id.* Examining the matter objectively, the trial judge concluded that her residing in the village prosecuting the municipal charge did not disqualify her from hearing the matter or require her to advise Kramschuster of her residence. *See id.* The trial court commented that the simple fact that the trial court lives in the same community prosecuting the municipal code violation does not raise a question of bias on the part of the trial court. Further, the trial court remarked that if this logic were accepted, then no circuit judges would ever be permitted to hear cases being prosecuted by the local district attorney's office, as judges are required to live in the county in which they are elected. Thus, this court disagrees with Kramschuster's contention that the trial court, as a Greendale resident, was clearly biased towards the village, and, inasmuch as Kramschuster has presented nothing to challenge the trial court's subjective decision that it was fair and impartial, this court concludes that the judge properly presided over the matter.

¶5 Next, Kramschuster challenges the trial court's ruling that she was not entitled to a motion to determine whether her inculpatory statements should be suppressed. The trial court ruled that Kramschuster was not entitled to bring a motion to suppress her statements because her statements were not be used in a criminal trial against her. Curiously, the village does not refute Kramschuster's argument. In fact, the village's only reference to the issue in its brief is located in the section touching on the disqualification of the trial judge. An assertion not refuted is deemed admitted. *Charolais Breeding Ranches, Ltd. v. FPC Secs.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Thus, this court is obligated to

accept Kramschuster's position. Because of the village's failure to address Kramschuster's allegation, this court must find that Kramschuster was entitled to a hearing on her motion to suppress. However, because this court determines that the motion would not have been granted, it is harmless error not to have held a hearing. This court notes that Kramschuster's statements were made when she was not in police custody; thus, she was not entitled to *Miranda* warnings. "Custodial interrogation," within the rule limiting admissibility of statements stemming from such interrogation, means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). This court also observes that the record reflects that Kramschuster was advised of her *Miranda* rights by a police officer for the Village of Greendale. Thus, the failure to hold a suppression hearing was, in the context of this appeal, harmless error.

¶6 Kramschuster next complains that the trial court failed to enforce her motion to sequester the village's witnesses. The record indicates that the trial court granted the motion to sequester before the start of the trial. Kramschuster points to the absence of any reference in the record to the trial court's actually addressing the witnesses and ordering them sequestered, except an entry that states "court ordered witnesses sequestered," as evidence that the witnesses were never personally informed that they had been sequestered. This court is not persuaded.

¶7 The trial court's failure to tell the witnesses on the record that the witnesses were sequestered provides no proof that the witnesses disobeyed the trial court's order. It is likely that the witnesses were present when the order was made or that the village's attorney or the court staff advised the witnesses that they were to leave the courtroom during the rest of the trial and not discuss their

testimony with one another. Further, if the witnesses remained in the courtroom contrary to the trial court's order, Kramschuster had an obligation to alert the court during the trial that a violation of the order was occurring. Kramschuster's failure to raise the issue until after the trial deprives her of the right to complain about its enforcement. Moreover, not every violation of a sequestration order results in a new trial. Unless a violation of the order results in prejudice to Kramschuster, no new trial is required. *See Nyberg v. State*, 75 Wis. 2d 400, 409, 249 N.W.2d 524 (1977), *overruled on other grounds by State v. Ferron*, 219 Wis. 2d 481, 579 N.W.2d 654 (1998). Here, Kramschuster has not only failed to prove that the sequestration was violated, but in the event it did occur, she has also not demonstrated that any prejudice actually occurred.

¶8 Next, Kramschuster maintains that her motion seeking to set aside the jury verdict should have been granted because several of the village's witnesses committed perjury. Contrary to Kramschuster's apparent understanding, the credibility of witnesses and the weight to be given to their testimony are matters left to the trier of fact. *State v. Wilson*, 149 Wis. 2d 878, 893, 440 N.W.2d 534 (1989). Further, this court is obligated to view the evidence in the light most favorable to the verdict and to affirm if there is any credible evidence to support the jury's verdict. *Martz v. Trecker*, 193 Wis. 2d 588, 595, 535 N.W.2d 57 (Ct. App. 1995). Here, there is ample evidence to support the jury's credibility determinations and verdict. A store employee testified that she observed Kramschuster purchase store merchandise during Kramschuster's break contrary to store policy, and that she viewed the bag containing Kramschuster's purchased merchandise and saw that the items had lower prices on them than identical items located on the floor. Another Penney's employee testified that only the manager or the manager's assistant was authorized to use the "ticket gun" used in marking

down prices, and Kramschuster had no one's permission to mark down prices. Although Kramschuster points to minor discrepancies in the witnesses' testimony, these discrepancies do not rise to a level permitting this court to review the jury's determination of the credibility of the witnesses. Consequently, this court must accept the jury's view of the evidence that the village witnesses were telling the truth.

¶9 Finally, Kramschuster submits that the Village also failed to prove that she did not have any authority to mark down the merchandise she purchased on her break. This court disagrees. As noted, a Penney's employee testified that it was against store policy for anyone except a manager or manager's assistant to use the ticket gun and reduce merchandise, and Kramschuster held neither position. Kramschuster was observed buying merchandise on her break, which was contrary to store rules, and upon further investigation, the store learned that this merchandise had not been officially reduced, although the items bore reduced stickers. Thus, there was ample evidence in the record to support the finding that Kramschuster was not legitimately engaged in reducing merchandise in the store which she later bought at the severely reduced prices. *See id.*

¶10 Consequently, this court affirms the trial court's order requiring Kramschuster to pay costs and a fine. Further, the recent motion received from the respondent requesting reconsideration of its earlier request for frivolous attorney fees and costs of this appeal is denied.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

