STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLORIA JEAN MCLAURIN,

Defendant-Appellant

UNPUBLISHED
May 2, 1997

No. 192612
Oakland Circuit Court
LC No. 93-129015-FH

Before: Holbrook, Jr., P.J., and Fitzgerald and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of use of a financial transaction device without consent, MCL 750.157n(1); MSA 28.354(14)(1), and pleaded guilty of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. She was sentenced to serve an enhanced prison term of three to fifteen years. She now appeals as of right. We affirm her convictions, but remand to the trial court for a redetermination of restitution and correction of the presentence investigation report.

Defendant first argues that insufficient evidence was presented that she intended that the crime be committed or that she knew her daughter Carmen intended to commit the crime. We disagree. In reviewing the sufficiency of the evidence, this Court must consider the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have concluded that the elements of the crime were established beyond a reasonable doubt. *People v McCrady*, 213 Mich App 474, 484; 540 NW2d 718 (1995). A trier of fact may make reasonable inferences from the facts, if the inferences are supported by direct or circumstantial evidence. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). Intent may be inferred from all the facts and circumstances of the case. *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991). This Court may not interfere with the jury's role of determining the weight and credibility of the evidence. *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654(1993).

The crime of stealing or retaining a financial transaction device, including a credit card, is a specific intent crime, because knowledge is an essential element of the crime. MCL 750.157n(1); MSA 28.354(14)(1); *People v Ainsworth*, 197 Mich App 321, 325; 495 NW2d 177 (1992). Intent to

defraud in most instances is not provable by direct testimony, but, by its nature, must be inferred from other facts. *People v Kimble*, 60 Mich App 690, 694; 233 NW2d 26 (1975). Here, defendant was charged as an aider and abettor in the offense. To convict a defendant as an aider or abettor, the prosecution must prove that (1) a crime was committed either by the defendant or another, (2) the defendant performed acts or gave encouragement that aided or assisted in the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time she gave the aid or encouragement. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. *Id.* at 569. To sustain an aiding an abetting charge, the guilt of the principal must be shown, but the principal need not be convicted. *Id.*

The jury heard evidence that defendant and Carmen both applied for credit and were declined, and that both applied again with another cashier shortly thereafter. Defendant was present when the cashier told Carmen that she had an existing account and gave her a shopping pass. Defendant selected computer software from the electronics department and asked Carmen to purchase the software with the credit account. When Carmen was informed that the account belonged to Jeffrey Watters, defendant "started ranting and raving" and said that there must have been a computer error, and that Watters was Carmen's "no good boyfriend." Watters testified that he did not know defendant, or Carmen or Patrice McLaurin, and that he never authorized anyone other than his wife to use his credit card. Taken in a light most favorable to the prosecution, a rational trier of fact could infer from this evidence that defendant intended to commit a crime, or knew of Carmen's intent, and that she assisted Carmen in the commission of the crime. Therefore, sufficient evidence was presented to support defendant's conviction.

Defendant next argues that she was denied a fair trial by the prosecutor's remark during closing argument that defendant was like a squid that releases ink in the water to mask its escape. We find no error requiring reversal. The trial court specifically instructed the jury that "it is improper in a criminal trial to refer to a Defendant as some sort of animal or fish." We find that this curative instruction was sufficient to eliminate any potential prejudice because of the prosecutor's ill advised argument. See *People v Compian*, 38 Mich App 289, 297; 196 NW2d 353 (1972). Accordingly, defendant was not denied a fair and impartial trial.

Defendant next argues that she was denied effective assistance of counsel by her trial counsel's failure to call Priscilla White and Carmen McLaurin as res gestae witnesses. We disagree. To prove ineffective assistance of counsel, a defendant must prove that trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that but for counsel's error a reasonable probability existed that the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Trial counsel is presumed competent, and defendant has the burden of proving that the complained of conduct is not within sound trial strategy. *Id.* Ineffective assistance of counsel can take the form of failure to call witnesses only if the failure deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). A defense is substantial if it might have made a difference in the outcome of

the trial. *Id.* at 710-711. On this record, we conclude that counsel's decision not to call Priscilla White and Carmen McLaurin as witnesses was a matter of trial strategy, which this Court will not second guess. Notably, defendant has not indicated the nature of these witnesses' proposed testimony that would have provided defendant with a substantial defense. Accordingly, defendant has not established entitlement to appellate relief on this basis.

Defendant next argues that her sentence is disproportionate. First, contrary to defendant's argument, the sentencing guidelines do not apply to habitual offender sentences. *People v Cervantes*, 448 Mich 620, 625; 532 NW2d 831 (1995); *People v Yeoman*, 218 Mich App 406, 418; 554 NW2d 577 (1996). Second, defendant argues that her sentence is disproportionate to her background and the severity of the offense, because there were no actual losses or damage suffered by anyone, and defendant played a minor role in the offense. We find no abuse of discretion. Given defendant's prior criminal history which consisted of several convictions for fraud-related offenses, and the fact that the trial court did not sentence defendant to the maximum term allowed by MCL 769.12; MSA 28.1084, which was life imprisonment, defendant's enhanced minimum sentence of three years in prison was proportionate to this offender and the seriousness of the offense. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990).

Defendant next argues that she is entitled to remand to the trial court for correction of the presentence investigation report. We agree. When a sentencing court states that it will disregard information in a PSIR challenged as inaccurate, the defendant is entitled to have the information stricken from the report and a corrected copy transmitted to the department of corrections. MCR 6.425(D); *People v Martinez*, 210 Mich App 199, 202; 532 NW2d 863 (1995); *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993). Here, because the sentencing court stated that it would disregard the challenged information, defendant is entitled to have the information stricken from the PSIR.

Defendant next argues that the trial court erred in ordering her to pay $1,284.22 in restitution. The amount was based on $405 in lost wages for "the person whose card was used" and $802.22, which was the cost to the prosecutor's office for flying a witness in to testify. There is no documentation in the PSIR or in the sentencing transcript that indicates how the amounts were calculated.[1] A sentencing court has discretion to order restitution in addition to or in lieu of any other penalty authorized or required by law. MCL 780.766(2); MSA 28.1287(766)(2). In determining whether to order restitution, the court must consider the loss sustained by any victim as a result of the offense, the financial resources and earning ability of the defendant, the financial needs of the defendant and the defendant's dependents, and such other factors as the court considers appropriate. MCL 780.767(1); MSA 28.1287(767)(1). A trial court may require a convicted felon to pay costs only where such requirement is expressly authorized by statute. *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995).

In *People v Jones*, 168 Mich App 191, 196; 423 NW2d 614 (1988), this Court held that MCL 780.766(10); MSA 28.1287(766)(10) did not authorize the sentencing court to order a defendant to pay restitution to reimburse the victim for traveling expenses. Therefore, although the prosecutor's office may be a "victim" within the meaning of the statute, *Slocum*, *supra* at 243, the trial

court abused its discretion in ordering defendant to pay $802 in restitution to reimburse the prosecutor's office for travel expenses for a witness.[2]

Defendant also challenges the trial court's order of restitution to the victim for lost wages. Restitution is not a substitute for civil damages, but encompasses only those losses that are easily ascertained and are a direct result of a defendant's criminal conduct. *People v White*, 212 Mich App 298, 316; 536 NW2d 876 (1995); *People v Orweller*, 197 Mich App 136, 140; 494 NW2d 753 (1992); *People v Tyler*, 188 Mich App 83, 89; 468 NW2d 537 (1991). Where a sentencing court fails to properly apply the procedural requirements of the statute, remand is appropriate. *Orweller, supra* at 141.

There is no indication in the record that the trial court considered the factors required by MCL 780.767(1); MSA 28.1287(767)(1) when determining the amount of restitution. Furthermore, the record does not indicate how the lost wages were caused or whether they were a result of defendant's criminal conduct. It appears that the trial court accepted the prosecution's figures, including its mathematical error, without conducting any analysis of its own. Therefore, we remand to the trial court for a redetermination of restitution based on the appropriate statutory factors.

Finally, the pre-amendment version of MCL 780.766(15); MSA 28.1280(766)(15) provided that where a defendant is placed on probation or parole, "any restitution ordered . . . shall be a condition of that probation or parole." Accordingly, defendant's argument to the contrary is without merit.

Affirmed, but remanded for redetermination of restitution and correction of the PSIR. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski

[1] Although defendant does not raise this point in her brief, we also note that the two amounts specifically requested add up to $1207.22, not $1284.22.

[2] Defendant committed the current offense in October 1993, before the amended version of MCL 780.766(10); MSA 28.1287(766)(10) became effective in January 1994, deleting the "interest of justice" language and creating a presumption of restitution.