# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT PHILIP LARKIN,

Defendant-Appellant.

UNPUBLISHED
October 31, 1997

No. 193600
Saginaw Circuit Court
LC No. 95-011290-FH

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Before: Michael J. Kelly, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

A jury convicted defendant of one count each of forgery, MCL 750.248; MSA 28.445, uttering and publishing a false, forged, altered or counterfeit transactional device without consent, MCL 750.157n(1); MSA 28.354(14)(1), stealing or retaining a financial transaction device without consent, MCL 750.157n(1); MSA 28.354(14)(1), and conspiracy, MCL 750.157; MSA 28.354. Defendant pleaded guilty to being a third-time habitual offender, and was sentenced to enhanced concurrent terms of five to fourteen years' imprisonment on the forgery conviction, two to four years on the uttering and publishing conviction, three to eight years on the stealing or retaining a financial transaction device conviction, and five to fourteen years on the conspiracy conviction. He now appeals as of right. We affirm.

Defendant first argues that the trial court erred in refusing to grant his motion to suppress certain inculpatory statements he made to police while he was in custody in Shiawassee County involving his participation in the instant matter, because they were made involuntarily. Defendant primarily argues that these statements were the product of promises of leniency made by Shiawassee and Saginaw County detectives and an unreasonable delay between his arrest and arraignment. Defendant also claims that the waiver of his *Miranda*[1] rights was "ambiguous," although he does not deny that he waived his *Miranda* rights before speaking with the police.

There is no merit to defendant's first argument. We must note that even if defendant's inculpatory statements were involuntary, they were not introduced at trial as substantive evidence of his

guilt. Indeed, the prosecutor's only mention of defendant's statements came in his opening statement when he made the following comments:

> Well, there was a period of time from October 12 and 13 when the Detective started investigating the case working with Meijer's, until the summer of 1995 before he could get his hands on the Defendant, before he could find him. And when he found him, he did interview him, advised him of his rights, and after having his rights in mind, the Defendant made certain admissions to him, which the Detective will testify to. Some blame the Defendant puts on Christina [Schramm]. But the Defendant admits being involved to the extent of signing Edward Kreager's name. He denied doing some of the things but he admits being involved with signing Mr. Kreager's name at Meijer's to get the items.

To the extent that defendant could argue that the prosecutor engaged in misconduct by making these comments and then failing to produce the inculpatory statements to which he referred in his opening, defendant must show that the prosecutor acted in bad faith. *People v King*, 215 Mich App 301, 307; 544 NW2d 765 (1996). In light of the trial court's ruling that defendant's statements were admissible, we can discern no bad faith on the prosecutor's part by the comments he made during his opening statement. Moreover, we do not believe that defendant was denied a fair trial by the prosecutor's fleeting reference to his inculpatory statements. See *id.* Later, the trial court properly instructed the jury that "[e]vidence includes only the sworn testimony of witnesses and exhibits admitted into evidence" and "[l]awyers' statements and arguments are not evidence." In the absence of indication to the contrary, we will assume that the jury followed these instructions. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994).

Further, we conclude that the trial court did not err in finding that defendant made his admissions voluntarily. In evaluating the admissibility of a statement, we review the totality of the circumstances surrounding the making of the statement to determine whether it was freely and voluntarily made in light of the following factors:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Haywood*, 209 Mich App 217, 226; 530 NW2d 497 (1995) (quoting *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988)).]

Here, there is no evidence to show that defendant made his admissions because he was of low intelligence or because of his age or illness; because he was deprived of physical necessities; or because

he was subjected to bodily abuse or threats thereof. Instead, defendant, a repeat offender who was familiar with the ways of law enforcement, made his confessions after being fully apprised of his *Miranda* rights. Even if defendant had a subjective expectation of leniency as a result of his cooperation with the authorities as to a separate matter under investigation in Shiawassee County, the testimony of the police detectives who interviewed defendant established that they unequivocally told defendant they would merely inform the Saginaw County prosecutor of his cooperation, but that only the prosecutor of that county could make the final decision whether to charge defendant with the instant offenses. Although there was some delay between defendant's arrest and his arraignment on the instant charges, we do not in this case find that the delay caused defendant to make his statements involuntarily. Defendant was initially arrested in Saginaw County, where a warrant had been issued for his participation in the instant offenses, and held in Shiawassee County, where a warrant had been issued for breaking and entering charges, which were later dismissed. Defendant was also wanted for questioning in Shiawassee County concerning an unrelated criminal matter. In addition to all this, defendant was wanted as a parole violator in Saginaw County and stood no chance of posting bond or gaining his freedom until the underlying parole violation had been addressed because he was placed on parole detainer. Defendant could not have believed that it was necessary to confess to crimes that he did not commit as a condition of gaining his freedom. Accordingly, we find that defendant's admissions were voluntarily made.

Lastly, defendant argues that the trial court erred in refusing to instruct the jury that in order to commit the offense of stealing or retaining a financial transaction device (FTD) without consent, MCL 750.157n(1); MSA 28.354(14)(1), he had to intend to defraud or cheat someone. See CJI2d 30.3(4).[2] Defendant argues that without reading such an element into the statute, it is void for vagueness, because the statute does not provide fair notice of the conduct proscribed and confers unfettered discretion on the trier of fact to determine whether an offense has been committed. See *People v Hubbard (After Remand)*, 217 Mich App 459, 484; 552 NW2d 593 (1996). We disagree.

MCL 750.157n(1); MSA 28.354(14)(1) provides:

> (1) A person who steals, knowingly takes, or knowingly removes a financial transaction device from the person or possession of a deviceholder, or who knowingly retains, knowingly possesses, knowingly secretes, or knowingly uses a financial transaction device without the consent of the deviceholder, is guilty of a felony.

This offense is a specific intent crime, because it requires knowledge as an essential element. *People v Ainsworth*, 197 Mich App 321, 325; 497 NW2d 177 (1992).

The trial court instructed the jury only as to nonconsensual use or possession of an FTD. Therefore, we need only address whether the statute is vague with regard to the unauthorized use or possession of an FTD. We find that it is not. Because violation of the statute requires a specific criminal intent, i.e. a particular criminal intent beyond the act done, see *People v Maleski*, 220 Mich App 518, 521-522; 560 NW2d 71 (1996), we do not believe that this statute could be applied to entirely innocent behavior, nor arbitrarily invoked to punish the same. The statute clearly requires that the violator have knowledge of the nonconsensual nature of his possession or use of an FTD.

Moreover, we examine a vagueness challenge in light of the facts at hand, and reject such challenges where the statute is not vague as applied to the defendant's conduct. *People v Cavaiani*, 172 Mich App 706, 714; 432 NW2d 409 (1988). In the instant case, although defendant presents some hypothetical situations in which MCL 750.157n(1); MSA 28.354(14)(1) might possibly be applied to purely innocent behavior, defendant cannot plausibly assert, in light of the evidence presented at trial, that the statute is vague as applied to his conduct. Accordingly, we reject his argument that his conviction for stealing or retaining an FTD must be reversed because the statute is unconstitutionally vague.

Affirmed.

/s/ Michael J. Kelly
/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] Although the Michigan Criminal Jury Instructions relating to the offense of stealing or retaining an FTD suggest that instructing the jury on intent to defraud is desirable, the standardized instructions do not have the force of law. *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996).