# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 20, 2000 |
| v | No. 215283<br>Wayne Circuit Court |
| DEWAYNE A. PITTS,<br><br>Defendant-Appellant. | LC No. 98-001172 |

Before: Neff, P.J., and Talbot and J. B. Sullivan,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of one count of aiding and abetting false pretenses over $100, MCL 750.218; MSA 28.415, one count of aiding and abetting attempted false pretenses over $100, MCL 750.92; MSA 28.287, and two counts of stealing or retaining a financial transaction device, MCL 750.157n(1); MSA 28.354(14). Defendant received sentences of two to ten years' imprisonment for false pretenses; two to five years' imprisonment for attempted false pretenses, and two to four years' imprisonment for each count of stealing or retaining a financial transaction device. Defendant appeals as of right. We affirm in part and reverse in part.

I

This case arises out of the fraudulent use of credit cards at two retail stores in Redford. Defendant first argues that there was insufficient evidence to support his convictions. In reviewing the sufficiency of the evidence in an appeal from a bench trial, we must determine whether, when viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Lewis,* 178 Mich App 464, 467; 444 NW2d 194 (1989).

Defendant and his brother, Malcolm Pitts, were apprehended following a vehicle pursuit by the police. Officer Wilkinson of the Redford Township Police and Special Agent Skipworth of the United States Secret Service testified that, after reviewing the police video recording of the pursuit, they determined that pieces of paper were thrown from the passenger door of the vehicle during the pursuit. Officers Wilkinson and Foldi and Special Agent Skipworth testified that defendant was the only

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

passenger in the vehicle. On the basis of the evidence presented at trial, a

rational trier of fact could have found that defendant tore up and threw the pieces of paper from the suspect vehicle during the pursuit by authorities on October 28, 1997.

However, the finding that defendant threw the torn pieces of paper from the vehicle on October 28, 1997, is insufficient to support defendant's conviction of aiding and abetting false pretenses. Defendant was charged with committing false pretenses over $100 by aiding and abetting in the fraudulent purchases of T-shirts from a retail store in Redford called Learning By Designs between September 10 and 25, 1997. One who "procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he committed the offense directly." *People v Bigelow*, 225 Mich App 806, 808; 571 NW2d 520 (1997), op reinstated in part 229 Mich App 218, 221; 581 NW2d 744 (1998). To prove aiding and abetting, the prosecution must show:

> (1) [T]he crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted 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 he gave aid and encouragement." [*People v Mass*, 238 Mich App 333, 340; 605 NW2d 322 (1999), lv gtd on other grds 462 Mich 877 (2000), quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).]

A

There was sufficient evidence presented at trial to support the finding that Malcolm Pitts committed the crime of false pretenses against Learning by Designs. However, there was insufficient evidence presented at trial to support the finding that defendant performed acts or gave encouragement that assisted the commission of the crime of false pretenses against Learning By Designs. The credit card numbers given by Malcolm Pitts to purchase merchandise from Learning By Design were not similar to the credit card numbers recovered from the torn pieces of paper that were thrown onto the expressway by defendant. Furthermore, the writing on the recovered paper did not relate to the fraudulent purchases made from Learning By Designs. Therefore, because the prosecution presented no evidence from which it could be reasonably inferred that defendant assisted or gave encouragement in the commission of the fraud against Learning By Designs, defendant's conviction for false pretenses is reversed.

B

Defendant was convicted of aiding and abetting in the attempt to commit false pretenses over one hundred dollars against Advertising Accents. A rational trier of fact could have concluded that Malcolm Pitts attempted to commit the crime of false pretenses against Advertising Accents. However, with regard to the second element of the crime of aiding and abetting, there was insufficient evidence for a rational trier of fact to find that defendant performed acts or gave encouragement that assisted the commission of the crime against Advertising Accents. The evidence shows that defendant was seen riding with his brother approximately one quarter-mile from Advertising Accents on October 28, 1997, the day that the T-shirts were to be picked up by a third man.

As previously noted, the evidence also supports the finding that defendant attempted to destroy incriminating information relating to the commission of the crime against Advertising Accents while he and Malcolm were being pursued by the police on October 28, 1997. This evidence does not relate to the commission of the crime of attempted false pretenses against Advertising Accents. While this evidence might have supported a conviction for the crimes of obstruction of justice or acting as an accessory after the fact, defendant was not charged with those crimes. There is no evidence associating defendant with the representations that were made to the employees of Advertising Accents by Malcolm Pitts regarding the validity of the credit card numbers. There is no evidence associating defendant with the third man, who was hired to pick up the T-shirts from Advertising Accents. Therefore, we find that there was insufficient evidence to support defendant's conviction for aiding and abetting attempted false pretenses, and the conviction is therefore reversed.

C

Defendant was convicted as a principal of stealing or retaining Lisa Jacobson's Teachers Credit Union Visa, #4604 4300 0004 6814. MCL 750.157n(1); MSA 28.354(14) provides:

> 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.

There was sufficient evidence presented at trial to support defendant's conviction for this crime. Special Agent Skipworth testified that the following credit card number was written on People's Exhibit 6, which is the pieced-together paper that defendant attempted to destroy and threw from the suspect vehicle: 04 4300 0004 6813. Skipworth testified that the first two numbers in the series were unreadable. However, Jacobson examined the exhibit and testified that only the first number in the relevant series was unreadable, and that other numbers were 604 4300 0004 6814. After examining People's Exhibit 6, we find that Skipworth misread the document, and that the last number in the series is not a "3," but a "4."

Jacobson also testified that the expiration date written on People's Exhibit 6 was the same as the expiration date of her Teacher's Credit Union Visa. It is reasonable to infer that the first two numbers in the relevant series are "46" because there is evidence that Jacobson's Visa number was used to purchase T-shirts from Advertising Accents by an individual calling himself Albert Foster, whom the evidence shows was actually Malcolm Pitts. Therefore, there was sufficient evidence presented at trial for a rational trier of fact to conclude that defendant possessed Jacobson's Visa number without her consent. Also, the fact that defendant attempted to destroy the paper on which the credit card number was written is sufficient evidence to support the finding that defendant was aware that neither he nor his brother was authorized to have that credit card number in his possession. Thus, defendant's conviction for retaining Jacobson's credit card without consent is affirmed.

D

Defendant was also convicted of stealing or retaining Patrick Uhteg's Sears National Bank Mastercard, #5472 0000 1501 4853. This credit card number was apparently used in the attempted purchase of shirts from Advertising Accents on October 24, 1997. We find that there was insufficient evidence presented at trial to support defendant's conviction for this crime, either as an aider and abettor, or as a principal. As explained above, there was no evidence presented at trial from which it could be reasonably inferred that defendant either retained, possessed or used any credit card numbers other than those written on the piece of paper that he attempted to destroy. Uhteg's credit card number is not similar to any credit card number written on the paper. Therefore, there was insufficient evidence to convict defendant as a principal for stealing or retaining Uhteg's credit card.

With regard to the theory of aiding and abetting, as previously noted, there was sufficient evidence presented at trial for a rational trier of fact to find that Malcolm Pitts committed the crime of attempted false pretenses against Advertising Accents, and that he used the name Alvin or Albert Foster during the commission of the crime. Thus, a rational trier of fact could have found that Malcolm committed the crime of stealing or retaining Uhteg's credit card. However, there is insufficient evidence to show that defendant performed acts or gave encouragement that assisted the commission of the crime. The only evidence against defendant was the information on pieces of paper and because Uhteg's credit card number was not similar to any numbers on the paper that defendant attempted to destroy, there is no evidence in the record to support defendant's conviction for stealing or retaining Uhteg's credit card, even under an aiding and abetting theory. Accordingly, defendant's conviction is reversed.

II

Defendant next argues that the trial judge had an affirmative duty to disqualify himself because of bias and prejudice. Because defendant failed to move for disqualification of the trial judge pursuant to MCR 2.003(C)(1), this issue is not properly preserved. *People v Mixon*, 170 Mich App 508, 514; 429 NW2d 197, mod 433 Mich 852 (1988). We decline to address this unpreserved issue.

In *People v Cocuzza*, 413 Mich 78, 83; 318 NW2d 465 (1982), the defendant raised the issue of disqualification for the first time on appeal. The trial judge in that case had presided over a pretrial hearing at which the defendant began to plead guilty to the charges against him, but then changed his mind. *Id.* at 79-80. On appeal, the defendant argued that because of the trial judge's involvement in the plea hearing, he had an obligation to disqualify himself as trier of fact at the trial. *Id.* at 83. Our Supreme Court stated:

> With full knowledge of the trial judge's involvement in this matter, defendant, who was represented by counsel, elected to proceed with a bench trial before that judge. We will not reward the failure to move for disqualification, with assertion of the basis reserved for appellate purposes, by sanctioning a reversal of the defendant's conviction. [*Id.* at 83-84.]

In the present case, defendant, who was represented by counsel, proceeded with the bench trial before Judge Edwards with full knowledge of his involvement in the pretrial evidentiary hearing, at which Lieutenant Anderson testified that defendant and Malcolm Pitts had been suspects in a similar credit card fraud scheme in approximately 1995. Therefore, pursuant to the holding in *Cocuzza*, we will not address this issue.

Affirmed in part and reversed in part.

/s/ Janet T. Neff
/s/ Michael J. Talbot
/s/ Joseph B. Sullivan