STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2002
v	No. 227630 Oakland Circuit Court
CARA JEAN GASTON, Defendant-Appellant.	LC Nos. 99-166472-FH 99-166473-FH 99-166474-FH 99-166475-FH 99-166476-FH

Before: Whitbeck, C.J., and Wilder and Zahra, JJ.

PER CURIAM.

A jury convicted defendant Cara Gaston of five counts of larceny over $100.[1] The trial court sentenced her as a fourth habitual offender[2] to five concurrent terms of 2-1/2 to 15 years' imprisonment, and ordered her to pay restitution in the amount of $18,743.78. She appeals as of right. We affirm.

I. Basic Facts And Procedural History

In a series of related offenses, Gaston allegedly subverted over $18,400 from accounts held by her previous employer, Trinity Solutions, into her own credit card account with Capital One for her personal use. According to the prosecution's theory of the case, Gaston took the money after she was fired from her job as an accountant for Trinity. She used one of Trinity's account numbers with Michigan National Bank and had Capital One write electronic checks to use this money to credit her account. According to the prosecution witnesses, Trinity did not notice that Gaston was obtaining money this way for approximately four months. Over the course of these months, Gaston repeated the transactions numerous times, eventually obtaining over $18,400. Although her credit limit on the Capital One account was $300, Gaston was able to withdraw the additional funds or exceed her credit limit once the additional monies were deposited into the account.

[1] MCL 750.356.

[2] MCL 769.12.

Amy Davis, a fraud investigator for Capital One, explained the nature of Gaston's account with the company and recited how the account limit could be exceeded if additional money was deposited into the account. She also stated that, in October 1998, payments in the amount of $4,098 were made to Gaston's account at the request of someone purporting to be Gaston. Several cash advances were also made from the account. These withdrawals seemed unusual to Davis. According to Davis, Gaston's account also showed this unusual activity for the months of November and December 1998, and January 1999.

Anthony Madison, a former financial sales manager at Michigan National Bank, testified that he was contacted by either Mike Downing or Fred Fletcher from Trinity in response to a complaint that there was a problem with Trinity's business account. According to Madison, after speaking with this person, he called the loss prevention investigation department and, acting pursuant to advice from that department, closed the account for Trinity and later opened a new account for Trinity. After receiving photocopies of the transactions, Madison called Gaston, whose name and number were on the checks. Madison testified that he told Gaston that he had an item drawn from Trinity's account and asked her to explain. Gaston, who according to Madison acted "nervous," stated, "'well, there's a story behind that' and then she said 'I've got to go pick up my daughter from school and I'll call you back.'" Gaston did contact Madison again, but he then referred her to loss prevention. Madison also testified that the person using this electronically generated checking process did not have to sign the checks themselves. He did not know whether additional checks were drawn in Gaston's name on the new Trinity account.

Carolyn Bunn, a fraud investigator for Michigan National Bank, testified that she was contacted by a Trinity representative about unauthorized checks drawn against Trinity's account. The prosecution also presented electronic checks drawn from Trinity's account, which were paid to Capital One and other services, such as Ameritech, Dayton-Hudson's Progressive Insurance, some with Gaston as the drawer (the person who signs the check) and some with Trinity as the drawer. Bunn also stated that Gaston did not contact her.

Fred Fletcher, Trinity's former[3] president and CEO, testified that in January 1999 Trinity's comptroller, Michael Downing, informed him that there was less money in Trinity's accounts than there should have been and that numerous unauthorized checks had been written on the account. Fletcher stated that Gaston, who had been fired from her job as an accountant in September 1998 for excessive absenteeism, was not authorized to sign checks on behalf of Trinity. He also stated that Gaston called him in January 1999 and left a voice mail message telling him that there were extenuating circumstances and that she was willing to make full restitution. The tape-recording of the conversation was played for the jury.

On cross-examination, the defense questioned Fletcher about his seventeen-year-old daughter and whether she had had an affair with Gaston, a matter made relevant by Gaston's theory that Fletcher's daughter actually placed the money into her account. Fletcher stated that his seventeen-year-old daughter, his other two daughters, and his wife all worked at Trinity. His

[3] Trinity ceased doing business in March 1999.

seventeen-year-old daughter stayed at Trinity until August 1998, when she moved to Idaho; she was currently married and was five or six months pregnant. He stated that the idea that Gaston and his daughter were romantically involved was "absurd."

Gaston testified on her own behalf and maintained that she did not transfer the money into her Capital One account. She stated that, although she was married and had a daughter, she had been having a relationship with another woman and had confided that fact to Fletcher's seventeen-year-old daughter. According to Gaston, she and Fletcher's daughter then became intimately involved in June 1998, an entanglement the younger woman allegedly initiated. Gaston said that the relationship ended when the daughter left for school in August 1998. Gaston claimed not to have known of the payments to her Capitol One account until October 1998. She said that she had asked Fletcher's daughter to make a payment on her account, apparently in return for money that Gaston had loaned her previously. Gaston said that she did not anticipate that the payment would be so large, nor did she question its origin. According to Gaston, after she received her statement, she called Fletcher's daughter, who told her that she had made the payment. Gaston said that she knew of the subsequent payments to the account, but did not suspect that they were fraudulent. When Gaston spoke with Fletcher's daughter throughout the period, the young woman was in Idaho and the young woman told her that she was making the payments. She maintained that she only became aware that the money was taken from Trinity when Madison contacted her, but when she tried to return his call, he would not discuss anything with her. She also attempted to contact Downing, but he did not return her call. She admitted to contacting Fletcher but stated that she did not talk to him personally. She also spoke to Southfield Police Detective John Rogatski about her involvement in the financial transactions.

On cross-examination, Gaston was questioned about payments made to other sources, such as her insurance accounts and her Hudson's account. She did not dispute that someone, who must have had her account numbers, made the payments. In response to another question concerning her phone conversations with Fletcher's daughter, she admitted that she did not bring phone records of these conversations. Additionally, she admitted that, before her arrest, she never told Detective Rogatski that she was uninvolved in the theft of the money.

On redirect, Gaston stated that, before Fletcher's daughter received permission from Fletcher to go to Idaho, Gaston gave her a large sum of money to get a car and an apartment. Additionally, she responded affirmatively to defense counsel's questions that she did not provide details to the police before the appointment of counsel because she did not feel that it was in her best interest and had not spoken afterward on the advice of counsel. Gaston admitted that she did not tell Fletcher's daughter that she would be testifying about their relationship and stated that she had not spoken to the young woman since her marriage. On recross-examination, the prosecutor questioned Gaston about her convictions in 1993 or 1994 for forgery in Indianapolis, and in 1990 and 1991 for presenting checks drawn on a non-existent account. On redirect, Gaston stated that she pleaded guilty to those offenses, but was innocent of the charges in this matter.

On rebuttal, the prosecutor presented the testimony of Detective Rogatski, who stated that Gaston was contacted by letter on February 9, 1999. According to Detective Rogatski, Gaston set up an appointment to see him but later changed the appointment because of a death in the

family. Detective Rogatski also stated that, during the two phone conversations he had with Gaston, she did not claim to be innocent of committing the crimes

II. Impeachment

A. Standard Of Review

Gaston argues that trial court erred in allowing the prosecutor to impeach her with her previous convictions of forgery and presenting a check drawn on a non-existent account. A trial court's decision to allow the admission of evidence is reviewed for an abuse of discretion.[4] In contrast, a preliminary issue of law regarding admissibility based upon the construction of a court rule or statute is subject to de novo review.[5]

B. MRE 609

MRE 609 provides in relevant part:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and
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> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
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> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.
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> (b) Determining Probative Value and Prejudicial Effect. For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

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[4] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[5] *Id.*

Because each of the previous crimes of which Gaston was convicted involved an element of theft or dishonesty,[6] they were admissible under MRE 609(a)(1). Further, the trial court properly determined that these convictions were sufficiently more probative than prejudicial to permit their admission.[7] Thus, the trial court did not abuse its discretion in allowing the prosecutor to impeach Gaston with these convictions.

C. Recross-Examination

Gaston also argues that, because the prosecutor did not elicit the evidence of her previous convictions on cross-examination, it was improper to do so subsequently, during recross-examination. Nothing in the language of MRE 609 prohibits evidence of previous convictions from being elicited during recross examination. Moreover, a trial court has discretion to "permit open redirect examination."[8] In this case, the prosecutor's decision to impeach Gaston during recross was responsive to defense counsel's tactic of inquiring further into Gaston's alleged innocence during redirect. We see no error in the timing of this otherwise admissible evidence.

III. Ineffective Assistance Of Counsel

Gaston argues that she was denied the effective assistance of counsel because her trial counsel's decision to continue questioning her on redirect examination allowed the prosecutor to impeach her with her previous convictions during recross-examination. De novo review would be appropriate for this issue because it presents a constitutional question[9] and does not require us to defer to the trial court in any respect.[10] However, the trial court informed Gaston before she testified that the prosecutor intended to impeach her with her previous convictions. She affirmatively responded that she understood this and, nevertheless, wished to testify. Consequently, Gaston waived this issue, "extinguishing" any error that might have existed and making appellate review unnecessary.[11] Even if she did not waive this issue for appeal, Gaston has still failed to overcome the strong presumption that her attorney's decision to emphasize her innocence to the jury was sound strategy.[12]

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[6] See, generally, *People v Reynolds*, 122 Mich App 238, 240; 332 NW2d 451 (1982) (trial court found MCL 750.131a involved elements of theft, dishonesty, and false statement; Court of Appeals reversed for other reasons); *People v Worden*, 91 Mich App 666, 683; 284 NW2d 159 (1979) (fraud is inherent in forgery, suggesting dishonesty and theft).

[7] *People v Allen*, 429 Mich 558, 593-594; 420 NW2d 499 (1988).

[8] See *People v Stevens*, 230 Mich App 502, 507; 584 NW2d 369 (1998).

[9] See *Houstina*, *supra* at 73.

[10] See, generally, *People v Toma*, 462 Mich 281, 303-305; 613 NW2d 694 (2000) (Supreme Court directly examined the evidence on the record).

[11] See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

[12] See *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

IV. Burden Of Proof

A. Standard Of Review

Lastly, Gaston claims that the trial court improperly shifted the burden of proof to her when it instructed the jury in accordance with CJI2d 23.2, which directs the jury with respect to the inferences it *may* draw from evidence that the defendant possessed newly stolen property. Gaston claims that the prosecutor also improperly shifted the burden of proof to her by having Detective Rogatski testify that Gaston did not deny stealing Trinity's money and by arguing to the jury that Gaston could have presentence corroborating evidence. Because Gaston failed to preserve this issue for appeal by objecting in any of these instances, our review is limited to determining whether there was plain error affecting her substantial rights.[13]

B. Plain Error

Gaston has failed to show plain error in the trial court's decision to instruct the jury in accordance with CJI2d 23.2. This instruction is proper in a larceny case because "the possession of recently-stolen property permits an inference that the possessor committed the theft."[14]

Nor was it plainly erroneous for the prosecutor to elicit from the investigating officer the fact that Gaston did not mention that she had not committed the charged crimes during phone conversations prior to her arrest. Under the circumstances of this case, Gaston's pre-arrest silence was admissible for impeachment purposes.[15]

Finally, the prosecutor did not shift the burden of proof to Gaston by commenting on her failure to provide corroborative evidence. "[I]t is well settled that a prosecutor is permitted to comment on a defendant's failure to produce 'corroborating' witnesses whenever the defendant takes the stand and testifies on his own behalf."[16] This rule applies to corroborating evidence as well.[17]

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

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[13] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[14] *People v Miller*, 141 Mich App 637, 641; 367 NW2d 892 (1985).

[15] See *People v Hackett*, 460 Mich 202, 213-214; 596 NW2d 107 (1999); *People v Cetlinski (After Remand)*, 435 Mich 742, 757-760; 460 NW2d 534 (1990).

[16] *People v Jackson*, 108 Mich App 346, 351-352; 310 NW2d 238 (1981).

[17] See *People v Fields*, 450 Mich 94, 105-112, 115; 538 NW2d 356 (1995).