STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2004
v	No. 246719 Wayne Circuit Court
JAMES FRANCIS ALTER, Defendant-Appellant.	LC No. 02-004183

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for using a credit card without the cardholder's consent, in violation of MCL 750.157n(1). Defendant was sentenced to three years' probation; however, the trial court retained discretion to have defendant serve the last six months of his probationary term in jail if defendant failed to meet the conditions of his probation, i.e., obtaining employment to pay restitution to the victim. We note that although the information and judgment of sentence indicate that defendant was charged with and convicted of MCL 750.157n(2), possessing a fraudulent or altered credit card, the record reveals that defendant was actually tried and convicted on the charge of MCL 750.157n(1). Therefore, we affirm, but remand to the trial court for entry of a corrected judgment of sentence to reflect the crime defendant was actually tried and convicted of, MCL 750.157n(1), and for entry of a final order of restitution.

Defendant first argues that the trial court erred in denying his motion for a directed verdict, and that there was insufficient evidence to sustain his conviction. Specifically, defendant argues that the trial court should have granted his motion for a directed verdict and held that there was insufficient evidence to sustain a conviction for MCL 750.157n(2), because the prosecution did not prove the elements of that crime beyond a reasonable doubt. However, defendant fails to mention that defense counsel moved for a directed verdict speaking in terms of MCL 750.157n(1), and the trial court denied the motion in terms of MCL 750.157n(1). Although the information and judgment of sentence indicate that defendant was charged with and convicted of MCL 750.157n(2), defense counsel's comments and arguments at trial and the trial court's comments and opinion clearly establish that the prosecution tried its case under MCL 750.157n(1), and proved the elements of that crime beyond a reasonable doubt, which the judgment of sentence should now reflect with the appropriate statutory citations. *People v Herndon*, 246 Mich App 371, 393; 633 NW2d 376 (2001). We find that the trial court was aware of the issues in this case and correctly applied the law, pursuant to MCR 2.517(A). See

People v Smith, 211 Mich App 233, 235; 535 NW2d 248 (1995). Therefore, we remand for entry of a corrected judgment of sentence to reflect the crime defendant was actually tried and convicted of, MCL 750.157n(1), pursuant to MCR 6.435(A), MCR 6.435(D), and MCR 7.208(A)(1).

When reviewing a trial court's decision on a motion for a directed verdict, and in determining whether the prosecution presented sufficient evidence to sustain a conviction in a bench trial, we review the record de novo and consider the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001); *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988); *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999).

MCL 750.157n provides in pertinent part:

> (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.
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> (2) A person who knowingly possesses a fraudulent or altered financial transaction device is guilty of a felony.

To prove that defendant committed the offense of using a credit card without the cardholder's consent, the prosecution was required to prove, beyond a reasonable doubt, that: (1) the defendant obtained possession of or used the credit card, (2) the defendant did this knowingly, (3) the defendant did this without the cardholder's consent, and (4) the defendant intended to defraud or cheat someone. MCL 750.157n(1); CJI2d 30.3.

At trial, complainant Gloria Rothe, a sixty-six year-old woman, testified that in 2000, she met and became friends with defendant; approximately one year later, he moved into her home, which she rented out as shared housing. Six months after defendant moved in, Rothe received a check in the mail in the amount of $4,135 from Fleet Credit Card Company. Defendant told Rothe that if she signed the check over to him, he would invest it in his company, and that with the return on the investment, she would be able to move out of shared housing. Rothe later received a credit card from Fleet, signed it, and gave it to defendant with permission to charge $100 per month for six months, with the understanding that defendant would pay the credit card bills when they came due. After receiving numerous phone calls from Fleet, Rothe discovered that defendant had charged substantially higher amounts on the credit card than the $100 per month for six months that she had authorized. Rothe reported defendant to the police, who testified that defendant admitted that he frequently used Rothe's credit card and had charged over $3,000 on it. Additionally, defendant relinquished possession of Rothe's credit card to the police.

The trial court, sitting as the trier of fact, resolved the matter in favor of the complainant, and we decline to disturb that decision on appeal. Viewing the evidence in the light most favorable to the prosecution, sufficient evidence was presented to justify the trial court's

conclusion that defendant was not entitled to a directed verdict on the crime of MCL 750.157n(1), and was guilty beyond a reasonable doubt of using Gloria Rothe's credit card beyond the scope of her consent.

Defendant next argues that the trial court erred in holding a restitution hearing on the amount due Rothe. Defendant asserts that because the parties agreed that there were no corrections, deletions, or modifications to the presentence investigation report at the sentencing hearing, there was no actual dispute as to the alleged $4,135 restitution amount determined by the probation department, and that the trial court's scheduling a restitution hearing therefore amounted to error. Defendant maintains that because there was no dispute as to the amount of restitution set forth in the presentence investigation report, the trial court should have relied on that amount, and should not have scheduled a restitution hearing. See *People v Grant*, 455 Mich 221, 235; 565 NW2d 389 (1997). However, defendant mischaracterizes the events of the sentencing hearing. While it is true that the parties agreed that they had no objections to the presentence investigation report, the parties also stipulated to have a restitution hearing at a later date. Thus, while defense counsel asked the trial court to follow the recommendation of the probation department, he did not intend that the trial court follow the recommendation as to the appropriate amount of restitution. The record reveals that all parties were in agreement that the amount of restitution would be determined at a separate hearing, and defendant's argument that the trial court erred in scheduling a restitution hearing is without merit.

Defendant next argues that the trial court's interim restitution order in the amount of $8.806.60, less the $289.93 that defendant paid, was erroneous.[1] Specifically, defendant argues that the amount was not established by the prosecution by a preponderance of the evidence, in contravention of MCL 780.767(4), which provides that "any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence," and that "the burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney." While defendant correctly states that no evidence was presented at the restitution hearing to support any amount of restitution, defendant's reference is to the initial restitution hearing, wherein the parties apparently agreed that the proper restitution amount was $25,500, but the trial court stated that it needed evidence to verify that amount, pursuant to MCL 780.767(4).

At a subsequent hearing, defense counsel and the trial court discussed the restitution amount and indicated that the amount was at least $8,000. At the following hearing, defense counsel acknowledged the $25,500 restitution amount discussed at the earlier hearing, but indicated that only the amount of approximately $8,000 that was charged on the victim's credit card could be proven to be part of defendant's course of conduct that gave rise to his conviction, pursuant to MCL 780.767(4). At a later hearing, the trial court indicated that it would enter a

[1] We note that defendant had no appeal as of right from the trial court's November 11, 2002 interim order of restitution, because it did not constitute a final order pursuant to MCR 7.203(A)(1). However, because it would serve no purpose to deny jurisdiction at this stage of the appeal, we will address the issue in any event. *People v Sattler*, 20 Mich App 665, 669; 174 NW2d 605 (1969).

temporary order granting restitution in the amount of $8,860.60, equal to the amount that had been charged on the victim's credit card, which was supported by documentation including credit card statements, less $289.93 paid by defendant which he earned from working since the last hearing. Therefore, defendant's claim that the interim restitution order was not supported by the evidence is without merit.

Defendant next argues that the trial court erred in failing to consider his ability to pay restitution. However, in support of his claim, defendant relies on an earlier version of MCL 780.767(1), which provided that "in determining the amount of restitution to order . . . the court shall consider the amount of 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." The 1996 amendment to MCL 780.767(1) deleted the language considering defendant's ability to pay restitution, and the amended version of the statute was in effect at the time the trial court ordered restitution in the instant case. Therefore, defendant's argument is without merit. Further, the record reveals that the trial court did in fact consider defendant's ability to pay restitution. The trial court indicated that it did not intend to have defendant's entire paycheck paid in restitution, but wanted to ensure that the victim was receiving approximately $300 biweekly, or $600 per month, so that the credit card debt would be paid off in a relatively short amount of time. Therefore, defendant's argument that the trial court improperly ordered him to surrender his entire paycheck for restitution is also without merit. The trial court noted that defendant was receiving social security payments, and that if he obtained employment with increased income, his restitution payments would remain the same, thereby allowing him to retain a greater portion of his income. Additionally, MCL 780.766(18) provides that "in each case in which payment of restitution is ordered as a condition of probation, the court may order any employed defendant to execute a wage assignment to pay the restitution."

Defendant next argues, and we agree, that he is entitled to a final order of restitution. It is unclear why a final order of restitution was not entered in the instant case. Therefore, we remand for entry of a final order of restitution, taking into consideration up to date information including the amount of restitution already paid by defendant. MCR 7.216(A)(7).

Defendant next argues that his right to due process was denied when the trial court had him arrested and placed in jail at the restitution hearing, upon learning that he had violated probation by not obtaining employment since the sentencing hearing. Defendant argues that he was entitled to a written copy of the charges constituting the claim that he violated probation, as well as a probation violation hearing. However, at the restitution hearing, the trial court issued a bench warrant and directed the prosecutor to bring a formal complaint and warrant for the probation violation. A formal probation revocation hearing was held three days later, where the trial court released defendant with instructions to obtain employment.

MCL 771.4 provides that "the granting of probation is a matter of grace conferring no vested right to its continuance," and that "all probation orders are revocable in any manner the court that imposed probation considers applicable . . . for a violation . . . of a probation condition . . . or for any other type of . . . action on the probationer's part for which the court determines that revocation is proper in the public interest." Additionally, "in its probation order or by general rule, the court may provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition." Further, "the method of hearing and

presentation of charges are within the court's discretion, except that the probationer is entitled to a written copy of the charges constituting the claim that he . . . violated probation and to a probation revocation hearing."

At the restitution hearing, the trial court learned that defendant had not complied with the terms of probation, i.e., that he had not obtained employment since the sentencing hearing. The trial court issued a bench warrant and served it on defendant, which provided notice of the charges against him. The record reveals that the trial court also advised defendant of his right to a probation violation hearing. Additionally, defendant was represented by counsel at the hearing. Under the totality of the circumstances, we are satisfied that defendant's procedural due process rights were adequately safeguarded within the requirements set out in MCL 771.4, which specifically provides that "the court may provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition." See *People v Darrell*, 72 Mich App 710, 713-714; 250 NW2d 751 (1976); *People v Pratto*, 99 Mich App 521, 523-524; 298 NW2d 21 (1980). Therefore, defendant is not entitled to relief on this basis.

We affirm and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper