

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUBY MARIE KERNS,

Defendant-Appellant.

UNPUBLISHED

March 13, 2008

No. 275657

Wayne Circuit Court

LC No. 06-008359-01

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from her bench trial conviction of unlawful use of a financial transaction device, MCL 750.157q. Defendant was sentenced to two years' probation. We affirm.

Defendant argues that the trial court improperly shifted the burden of proof, and consequently violated her right to be presumed innocent, when it questioned her regarding her alibi. We disagree. Defendant failed to object to the trial court's questions at trial; therefore, we review this unpreserved issue for plain error. See *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In a criminal case, the accused is entitled to constitutional protection against compelled self-incrimination and may rely on a presumption of innocence. US Const, Am V; Const 1963, art 1, § 15. Pursuant to this right, neither reference nor comment may be made with respect to a criminal defendant's decision not to testify. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995). Also consistent with the principle of presumed innocence is the corollary that the prosecution may not shift the burden of proof. See *id.* at 111 n 21.

However, if a criminal defendant does elect to testify, he or she makes the decision not to rely upon the presumption of innocence that would otherwise protect the absence of the defendant's testimony. *Id.* at 109. As a general rule, if a defendant "takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness" *Id.* at 110, quoting *Brown v United States*, 356 US 148, 154; 78 S Ct 622; 2 L Ed 2d 589 (1958). Moreover, "[a]lthough a defendant has no burden to produce any evidence,

once the defendant advances evidence or a theory, argument on the inferences does not shift the burden of proof.” *Fields, supra* at 115.

Here, defendant chose to advance a theory that would exonerate her if true, and she attempted to support her theory by offering evidence, including her own testimony, at trial. In making her decision to testify, defendant evidently determined that the importance of telling her version of events and advancing her credibility as a witness outweighed the benefit of relying upon the presumption of innocence that would have attended her decision not to testify.

The trial court did not shift the burden of proof, and consequently impinge upon the presumption of defendant’s innocence, in testing defendant’s credibility by questioning her about her work attendance. The trial court’s interrogation regarding her time record and other details of her alibi did not require defendant to either prove her innocence or disprove any element of the charged crime. Instead, a review of the record reveals that the trial court examined defendant for the purpose of considering whether it, as fact-finder, should accord more weight to the prosecution’s version of events or hers. Moreover, MRE 614(b) specifically permits a trial court to interrogate witnesses, and defendant has not shown that the questions the trial court posed to her were otherwise improper.

In arriving at the verdict, the trial court explained that it “had the opportunity to look at the defendant in court, to examine her testimony, and demeanor on the stand.” It assessed her credibility and found it lacking. Rather than requiring defendant to prove anything, the trial court decided to disbelieve defendant’s testimony and instead accord weight to compelling evidence – such as photographs of defendant taken during the illegal transaction at the automatic teller machine (ATM), and the accountholder’s testimony – and conclude that the evidence supported every element of the charged crime.

Defendant has not shown that the trial court’s questions amounted to plain error that affected her substantial rights, and reversal is unwarranted.

Defendant next argues that there was insufficient evidence to sustain her conviction. Again, we disagree. This court reviews the record de novo when presented with a claim of insufficient evidence. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Reviewing the evidence in the light most favorable to the prosecution, this Court determines whether a rational trier of fact could have found that the elements of the crime were proven beyond a reasonable doubt. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). This Court will not interfere with the fact-finder’s role in weighing the evidence and judging the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to determine the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Conflicts in the evidence are resolved in the prosecution’s favor. *People v Fletcher*, 260 Mich App 531, 561-562; 679 NW2d 127 (2004).

MCL 750.157q states:

A person who delivers, circulates, or sells a financial transaction device which was obtained or held by that person under circumstances proscribed under section 157n, 157p, or 157v, or uses, permits, causes, or procures the financial

transaction device to be used, delivered, circulated, or sold, knowing the device to have been obtained or held under circumstances proscribed under section 157n, 157p, or 157v is guilty of a felony.

MCL 750.157n states:

(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.

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

MCL 750.157p states:

A person who has in his or her possession, or under his or her control, or who receives from another person a financial transaction device with the intent to use, deliver, circulate, or sell the financial transaction device, or to permit, cause, or procure the financial transaction device to be used, delivered, circulated, or sold, knowing the possession, control, receipt, use, delivery, circulation, or sale to be without the consent of the deviceholder, is guilty of a felony.

Here, the accountholder testified that her debit card was stolen and that she did not make a transaction, nor did she authorize anyone to use her stolen debit card, on the night of May 14, 2006, the time of the \$20 withdrawal. Further, the bank statement was evidence that the transaction was attempted and completed on May 14, 2006, at the ATM located at 27511 Telegraph Road, in the city of Flatrock. Photographs taken by an automated camera mounted on the ATM demonstrate that a person, later identified from the photographs as defendant, used the device by withdrawing \$20 from the account. From this evidence, a rational trier of fact could conclude that defendant, without the accountholder's authorization, unlawfully withdrew \$20 from the checking account using the accountholder's stolen debit card.

A rational trier of fact could infer from the circumstances that defendant knowingly possessed the debit card she used to make the unlawful transaction and that she intended to defraud the accountholder. Minimal circumstantial evidence is sufficient to prove the element of intent because of the difficulty of proving an actor's state of mind. *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005). Contrary to defendant's argument, the prosecution was not obligated to prove how defendant obtained the accountholder's Personal Identification Number to access the account because this is not an element of the charged offense.

Viewing the evidence in a light most favorable to the prosecution, resolving all conflicts in the evidence in the prosecution's favor, and deferring to the trial court's role as fact-finder, there was sufficient evidence to convict defendant of unlawful use of a financial transaction device.

Affirmed.

/s/ Patrick M. Meter

/s/ David H. Sawyer

/s/ Kurtis T. Wilder