

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PORTIA PATRICEERICKA LAMB,

Defendant-Appellant.

UNPUBLISHED

October 9, 2008

No. 280705

Oakland Circuit Court

LC No. 2006-210504-FH

2006-210505-FH

Before: O'Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

In LC No. 2006-210504-FH, defendant pleaded no contest to three counts of identity theft, MCL 445.65, and the trial court sentenced her as a second habitual offender, MCL 769.10, to a prison term of 2 to 7 ½ years, plus restitution of \$25,975.51. In LC No. 2006-210505-FH, defendant pleaded no contest to one count of stealing or retaining a financial transaction device, MCL 750.157n, for which the trial court sentenced her as a second habitual offender to a prison term of two to six years. She appeals by delayed leave granted. Because we conclude that there were no errors warranting relief, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At sentencing, the trial court reserved the issue of restitution, which was to be determined at a subsequent evidentiary hearing. At the hearing, the parties stipulated that defendant had charged \$2,132.86 against credit cards obtained in the name of Kelly Merritt. Merritt testified that she suddenly stopped receiving bills from her creditors. Upon investigation, she learned that the post office had received a change of address request that rerouted her mail to an address on Plainview in Detroit. She then contacted her creditors and obtained duplicate bills. She discovered that \$8,308.04 was owed to American Express for charges she had not authorized. She also learned that American Express had opened two new accounts in her name without her consent and \$916.75 had been charged against them. Those charges included \$382.14, which was part of the stipulated amount of \$2,132.86. One of those bills showed defendant's address as that of the cardholder.

Merritt testified that she earned between \$40 and \$50 an hour at work. During the 68 weeks from December 2005 through March 2007, Merritt missed an estimated 10 to 15 hours from work per week trying to investigate the identity theft, to resolve problems with her creditors, and to repair the damage to her credit reports. At the low end, that represented \$27,200 in lost income.

Defendant admitted that she was responsible for the charges in the stipulated amount of \$2,132.86, plus a charge of \$37.97 for gasoline. She denied responsibility for any other charges to any other cards and stated that she had never lived on Plainview, did not know anyone who lived there, and had never been there.

The court ordered defendant to pay \$25,975.51 in restitution, representing \$10,975.51 in unauthorized credit card charges and \$15,000 in lost wages.

Defendant argues that the amount of restitution ordered by the trial court was not supported by the evidence.¹ The trial court's order of restitution is reviewed for an abuse of discretion. *People v Bell*, 276 Mich App 342, 345; 741 NW2d 57 (2007). An abuse of discretion occurs if the trial court's decision is outside the range of principled outcomes. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006). To the extent the determination of restitution involves statutory interpretation, the issue is reviewed de novo. *Bell, supra*.

When a court imposes a sentence, it shall order "that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate." MCL 769.1a(2); MCL 780.766(2). The phrase "course of conduct" is defined broadly to require the defendant to "compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction." *People v Gahan*, 456 Mich 264, 272; 571 NW2d 503 (1997). It is not necessary that the defendant have personally benefited from the full extent of the loss, "only that his criminal acts caused that amount of loss." *People v Lueth*, 253 Mich App 670, 692; 660 NW2d 322 (2002). "Restitution should only compensate for 'losses that are (1) easily ascertained and measured and (2) a direct result of the defendant's criminal acts.'" *People v Byard*, 265 Mich App 510, 513; 696 NW2d 783 (2005), quoting *People v White*, 212 Mich App 298; 316; 536 NW2d 876 (1995). Where the defendant disputes the amount of restitution, the prosecutor must prove the amount of the victim's loss by a preponderance of the evidence, MCL 780.767(4); *Gahan, supra* at 276, and the restitution amount ordered by the court should be based upon the evidence. *People v Guajardo*, 213 Mich App 198, 200; 539 NW2d 570 (1995).

The prosecutor showed that \$10,975.51 had been charged against credit cards issued in Merritt's name. Defendant agreed that she was responsible for \$2,170.83 of the debt owed to American Express. Those charges were made on Merritt's original account number ending in 36000 and on a new account ending in 24007; the billing statement for the third card was actually sent to defendant's address. Thus, the evidence showed that defendant gained access to those accounts as part of her theft of Merritt's identity. Therefore, the trial court did not abuse its discretion in holding defendant liable for those charges as part of her restitution.

¹ To the extent defendant asserts that it was improper for the trial court to order and conduct a separate evidentiary hearing to determine restitution after having entered a judgment of sentence, this issue is not properly before the Court because defendant failed to include it in her statement of questions presented on appeal and we therefore decline to consider it. *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008).

The trial court also held defendant liable for \$15,000 in lost income. Lost income is a recognized component of restitution, but it is after-tax income, rather than gross income, that is compensable. See MCL 769.1a(4)(c); MCL 780.766(4)(c). Merritt testified that, between December 2005 and March 2007, she missed an estimated 10 to 15 hours of work per week trying to investigate the identity theft, to resolve problems with her creditors, and to repair the damage to her credit reports. She estimated that, *at the low end*, this amounted to more than \$27,000 in lost income. She claimed to have records available to support appointments that she had to cancel from July 2006 onward, but did not produce any records to show the amount of time actually missed from work. Although Merritt's testimony concerned gross income losses, we nevertheless conclude that this testimony was sufficient to support the trial court's determination that Merritt's lost after-tax income was \$15,000.

Defendant lastly argues that she is entitled to resentencing because the trial court improperly based its guidelines scoring decision on facts not found by a jury or admitted by defendant at the plea proceeding, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). It is well-settled that Michigan's indeterminate sentencing scheme does not violate the rule stated in *Blakely*. *People v McCuller*, 479 Mich 672, 677; 739 NW2d 563 (2007).

There were no errors warranting relief.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher