# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWIGHT N. THOMAS,

Defendant-Appellant.

UNPUBLISHED
January 17, 1997

No. 180626
LC No. 93-128813-FH

Before: Taylor, P.J., and Markey and N.O. Holowka,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of stealing or retaining a financial transaction device, MCL 750.157n(1); MSA 28.354(14)(1), fleeing or eluding a police officer, MCL 257.602(1); MSA 9.2302(1), and reckless driving, MCL 257.626; MSA 9.2326. Defendant was sentenced to two to four years' imprisonment on the stealing or retaining a financial transaction device conviction, one year's imprisonment for the fleeing or eluding a police officer conviction, and ninety days' imprisonment for the reckless driving conviction. Thereafter, defendant pleaded guilty to being an habitual offender, fourth offense. MCL 769.12; MSA 28.1084. As a result, his sentence for the stealing or retaining a financial transaction device conviction was vacated and a sentence of five to fifteen years' imprisonment was imposed. Defendant now appeals as of right. We affirm.

On October 1, 1993, at approximately 12:30 p.m., the police were dispatched to the area of Manistee and Albany to investigate a possible burglary. A police officer attempted to stop two men in a vehicle matching a description that had been provided to the police. The men disregarded the police officer's signal to stop, eventually lost control of the vehicle, and hit a tree. Both men were apprehended. One of the men, later identified as defendant, was taken to the police station. In the process of removing defendant's personal effects, the police recovered two Mastercards and one Michigan Bell card. All of these cards belonged to defendant's cousin Rosamund Davis. Because Davis indicated to the police that defendant's possession of the credit cards was unauthorized and defendant himself also told the police that Davis did not know he had the credit cards, defendant was charged with two counts of stealing or retaining a financial transaction device. Defendant was ultimately

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

convicted by a jury of one count of stealing or retaining a financial transaction device. MCL 750.157n(1); MSA 28.354(14)(1).

Defendant first contends that the trial court abused its discretion in binding over defendant for trial because hearsay testimony was elicited to prove the elements of the charged offense and no evidence was presented to show that defendant's use of the credit cards was unauthorized. We disagree.

We review a trial court's decision to bind defendant over for an abuse of discretion. See *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991). We will sustain a conviction of stealing or retaining a financial transaction device where the prosecutor proves beyond a reasonable doubt that the defendant stole, knowingly took, or knowingly removed a financial transaction device from the person or possession of a deviceholder, or who knowingly retained, knowingly possessed, knowingly secreted, or knowingly used a financial transaction device without the consent of the deviceholder. MCL 750.157n(1); MSA 28.354(14)(1); *People v Ainsworth*, 197 Mich App 321, 325; 495 NW2d 177 (1992).[1] Here, Officer Jankowski testified at the preliminary examination and at trial that Rosamund Davis, the owner of the credit cards, said she was unaware that defendant possessed her credit cards. According to Officer Jankowski, defendant also told him that Rosamund Davis did not know that defendant possessed her credit cards. We find no error because Officer Jankowski's recounting of Davis' statement to him qualifies as extrinsic evidence of a witness's prior inconsistent statement, MRE 613(b). Further, defendant's statement to Officer Jankowski is not hearsay. Pursuant to MRE 801(d)(2), it is an admission by a party-opponent.

Moreover, defendant argues that he was improperly bound over on the charges of stealing or retaining a financial transaction device because there was no testimony indicating that defendant's use of the credit cards was unauthorized. Finding no abuse of discretion, we disagree. *People v Honeyman*, 215 Mich App 687, 691; 546 NW2d 719 (1996). Under MCL 750.157n; MSA 28.354(14), there is no requirement that defendant use the credit card without the owner's consent. Instead, at the preliminary examination, the prosecution must and did provide evidence that defendant's possession or retention of the credit card was unauthorized. *Ainsworth, supra*.

Next, defendant argues that because he was improperly bound over on the charges of breaking and entering, possession of burglar's tools, and two counts of stealing or retaining a financial transaction device, the jury reached a compromise verdict by convicting him of one count of stealing or retaining a financial transaction device. As noted above, we review the trial court's decision to bind over a defendant for an abuse of discretion. *Thomas, supra*. Because defendant was properly bound over on all of the other charges, the jury correctly considered all of the charges. Moreover, there is no indication of a compromise verdict; consequently, defendant's claim has no merit. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995).

Defendant further contends that the jury instructions given by the trial court were erroneous. Defendant failed, however, to object to the instructions at trial, so appellate review will only be granted

where necessary to avoid manifest injustice to defendant. *People v Vaughn*, 447 Mich 217, 228; 524 NW2d 217 (1994); *People v Collins*, 158 Mich App 508, 512; 405 NW2d 182 (1987). We find no manifest injustice will result from the denial of appellate review. Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* at 232. Our review of the challenged instructions leaves us with the belief that they fairly presented the issues and sufficiently protected defendant's rights. Therefore, no manifest injustice can be demonstrated.

Next, defendant claims that the jury convicted him based upon his mere possession of the credit cards. We disagree. The jury was instructed regarding the elements of stealing or retaining a financial transaction device and was aware that the prosecutor must prove defendant had knowing possession of the Mastercard without Davis' consent and that defendant intended to defraud someone. CJI2d 30.3; MCL 750.157n(1); MSA 28.354(14)(1). Read as a whole, the jury instructions were proper. *Vaughn*, *supra* at 232.

Defendant further argues that his stealing or retaining a financial transaction device conviction should be reversed because the prosecution failed to present sufficient evidence that he "knowingly removed a financial transaction device from Davis' possession or that he knowingly retained or secreted the cards." We again disagree.

In reviewing such a claim, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). Contrary to defendant's argument, the prosecutor must prove that defendant knew he possessed Davis' financial transaction device without her consent. See *Ainsworth, supra*. Defendant's argument that the prosecutor must prove that he knowingly removed a financial transaction device from the owner's possession or that he knowingly retained or secreted the cards ignores the express language of MCL 750.157n; MSA 28.354(14) that provides alternative grounds for finding someone guilty of a felony based upon a person's stealing, knowingly taking, retaining, or secreting a credit card without the cardholder's consent. For this reason, we find defendant's argument without merit.

Defendant also claims that the jury's verdict was against the great weight of the evidence because Davis testified that defendant had her permission to use her credit card. Because defendant failed to timely request a new trial, pursuant to MCR 7.208(B), as it existed before its amendment in May 1996, and failed to provide this Court with a transcript of any hearing held with respect to defendant's untimely motion for a new trial, pursuant to MCR 7.210, we find that this argument is unpreserved for appellate review. *Brown v Swartz Creek Memorial Post 3720—VFW Inc*, 214 Mich App 15, 27; 542 NW2d 588 (1995).

Finally, defendant argues that his sentence of five to fifteen years' imprisonment was disproportionate in light of the seriousness of the offense. We review defendant's sentence for an abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). A sentence constitutes an

abuse of discretion if it is disproportionate to the seriousness of the offense and the offender. *Id.* To support his assertion that his sentence was disproportionate to the seriousness of the offense, defendant claims that the sentencing guidelines were improperly scored because he should not have been assessed ten points under OV 9 for a leadership role in a multiple offender situation. We disagree.

First, defendant did not object at sentencing to the scoring of the guidelines. Failure to object to guidelines scoring at sentencing or to move for remand to consider incorrect scoring precludes consideration of the issue on appeal. *People v Eaves*, 203 Mich App 356, 358; 512 NW2d 1 (1994). Moreover, because defendant pleaded guilty to being an habitual offender, fourth offense, the sentencing guidelines are inapplicable to the case at hand. *People v Gatewood*, 216 Mich App 559, 560; 550 NW2d 265 (1996), citing *People v Cervantes*, 448 Mich 620, 627, 630; 532 NW2d 831 (1995). Accordingly, this Court should only determine whether the trial court abused its discretion in imposing the sentence and whether the sentence is proportionate to the offense and the offender. *Gatewood, supra*. We find no such abuse. *Id.*

Furthermore, we find that defendant's sentence was proportionate in light of the seriousness of the crime committed and defendant's background. Defendant had been convicted of at least three prior felonies and had been released from Jackson prison approximately one year before the commission of the instant offense. In light of defendant's prior record and his failure to rehabilitate himself, the trial court did not abuse its discretion in sentencing defendant to serve five to fifteen years' imprisonment. *Id.* Defendant also contends that his sentence is disproportionate because the trial court disregarded his plea for a county jail sentence. Although defendant desired a county jail sentence, we find no authority that permits defendant's choice for the situs of incarceration to be considered when determining whether a sentence is proportionate. Moreover, because a jail sentence cannot exceed one year and the trial court properly determined that defendant deserved a minimum sentence of more than one year, defendant's argument is without merit as he could not have served his sentence in the county jail.

Affirmed.

/s/ Clifford W. Taylor
/s/ Jane E. Markey
/s/ Nick O. Holowka

[1] See also CJI2d 30.3, which also requires that the prosecution prove beyond a reasonable doubt "that the defendant intended to defraud or cheat someone."