

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MATTHEW NELSON,

Defendant-Appellee.

---

UNPUBLISHED

February 23, 1999

No. 208365

Oakland Circuit Court

LC No. 97-153884 FH

Before: Murphy, P.J., and MacKenzie and Talbot, JJ.

PER CURIAM.

The people appeal by right an order of the trial court granting defendant's motion to quash the information charging stealing/retaining a financial transaction device without consent or possessing a fraudulent financial transaction device, MCL 750.157n; MSA 28.354(14), on the ground that there was insufficient evidence to support bindover. We reverse and remand for reinstatement of the charges. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

A reviewing court may not substitute its judgment for that of the examining magistrate but may reverse the magistrate's determination of the sufficiency of the evidence to establish probable cause only if an abuse of discretion is apparent on the record. This Court reviews the trial court's decision de novo to determine whether there has been an abuse of the magistrate's discretion. E.g., *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

Here, there was no abuse of discretion by the magistrate. Although the magistrate found incredible most of the testimony from the storekeeper who reported the stolen credit card to the police, i.e., Mr. Mikha, the magistrate nevertheless found credible Mr. Mikha's testimony that he *did* identify the person who presented the false credit card to the police officers when they arrested defendant at the store. Although Mr. Mikha testified somewhat inconsistently in this regard, the inconsistencies in his testimony do not render this portion of his testimony incompetent to support the magistrate's bindover decision, the credibility of a witness being a question for the factfinder to resolve at trial, not for the trial court reviewing the magistrate's decision. *People v Northey*, 231 Mich App 568; \_\_\_ NW2d \_\_\_ (1998).

The magistrate also correctly noted that the police officer's testimony regarding Mr. Mikha's statements and gestures identifying the person they arrested at that time (the defendant) as the person who had presented the credit card is competent, nonhearsay testimony because Mr. Mikha was present and subject to cross-examination. MRE 801(D)(1)(c); *People v Malone*, 445 Mich 369, 384; 518 NW2d 418 (1994).

The trial court made much of the fact that the officer's testimony regarding Mr. Mikha's identifying "nod" was only offered and admitted to establish the officer's reasons for arresting defendant, not to prove the truth of the matter asserted. However, as the magistrate later correctly recognized, that testimony is in fact admissible to prove the truth of the matter asserted. *Malone, supra*. We need not decide whether the magistrate was bound by the prosecuting attorney's statement, in response to a hearsay objection, that the officer's testimony about the "nod" was not offered to prove the matter asserted. Even without the officer's testimony regarding Mr. Mikha's "nod," the officer's testimony that Mr. Mikha later verbally identified defendant as the person with the credit card provides sufficient support for the magistrate's bindover decision.

Reversed and remanded for reinstatement of the charges. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie

/s/ William B. Murphy

/s/ Michael J. Talbot