

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEBRA LEAN COLE,

Defendant-Appellant.

UNPUBLISHED

March 10, 2005

No. 251649

Kent Circuit Court

LC No. 03-003756-FH

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial conviction for first-degree retail fraud, MCL 750.356c. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 46 to 138 months' imprisonment. We reverse and remand for a new trial.

Defendant's arrest and prosecution stem from an incident that occurred on April 12, 2003. Defendant was charged with having shoplifted several items from a retail store. The manager of the store identified the items taken and valued them at \$232. Defendant was not apprehended at the scene, but rather, she was taken into custody at a second retail store. When the police searched the vehicle in which defendant had been either riding or sitting, they recovered the items from the first store.

Defendant contends that she was denied a fair trial when the trial court read CJI2d 23.13(7), which instructed the jury that it could consider defendant's conduct within a twelve-month period to determine if the prosecution proved its case beyond a reasonable doubt. We agree. Defendant properly preserved this issue before the trial court by objecting to the instruction. However, a preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant was charged with first-degree retail fraud based on the allegation that she stole more than \$200 but less than \$1,000 of property after having already been convicted of a previous offense under the same section, section 218, 356, 356d(1), or 360. MCL 750.356c(2). The information against defendant stated that the crime for which she was charged occurred on April 12, 2003. Thus, to properly convict defendant, the prosecutor needed to prove beyond a reasonable doubt that defendant stole more than \$200 worth of property on April 12, 2003.

During deliberations, the jury asked the court if it had “to be satisfied that all items were stolen at the same time on the same day?” In response, the court read CJI2d 23.13(7), which states that the jury may “add together the prices of property taken in separate incidents if part of a scheme or course of conduct within a 12-month period when deciding whether the prosecutor has proved the amount required beyond a reasonable doubt.” It is well established that a defendant has a constitutional right to be informed of the nature of the charges pending against him. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). See also Const 1963, art 1, § 20. In reading CJI2d 23.13(7), the trial court broadened the scope of the charges to include possible offenses for which defendant had not been given notice and for which defendant had not prepared a defense.

A trial court cannot broaden the scope of the information against the defendant by way of a jury instruction. *People v Morey*, 230 Mich App 152, 161-162; 583 NW2d 907 (1998), citing *People v Springs*, 101 Mich App 118, 127-128; 300 NW2d 315 (1980). In *Morey*, the defendant was charged under Michigan’s pandering statute, which punishes anyone “‘who shall induce, persuade, encourage, inveigle or entice a female person to become a prostitute. . .’” *Id.* at 161, quoting MCL 750.455. However, the information against the defendant in *Morey* did not contain the word “encourage,” as was found in the statute. *Id.* Despite the fact that the information did not contain this word, the trial court read the jury instruction with the word “encourage.” *Id.* The *Morey* court concluded that this was an impermissible broadening of the scope of the information against the defendant, and, even though the information could have been amended to reflect the statutory language, reversed the pandering charge. *Id.* at 162, 165.

As in *Morey*, the jury instruction in this case impermissibly broadened the scope of the information against defendant even though the statute permitted the prosecutor to so charge defendant. See MCL 750.356c(3) (allowing the aggregation described by CJI2d 23.13(7)). Because of this erroneous jury instruction, it is possible that the jury convicted defendant by aggregating the value of items that it believed defendant stole on days and at places other than for which defendant was charged. Consequently, we cannot conclude that the error was harmless. Because this is error warranting reversal, we need not address defendant’s other claims of error.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Jessica R. Cooper