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Defendant Theodore Whight discovered that the automated teller machine (ATM) card connected to his defunct checking account could still be used to obtain cash at four local Safeway stores. For several weeks he availed himself freely of this happenstance to obtain thousands of dollars. This led to his conviction by a jury of four counts of fraudulent use of an access card or "ATM" theft (Pen. Code, § 484g; undesignated references are to this code) and four counts of grand theft by false pretenses (§§ 484, subd. (a), 487, 532). In a bench trial, the court found true the allegation that defendant had served a prior prison term. (§ 667.5, subd. (b).) Defendant was sentenced to state prison for a total unstayed term of six years. The court also imposed a \$500 restitution fine and ordered \$19,460 in restitution to be paid to Safeway pursuant to Government Code section 13967, former subdivision (c).

We consider two questions in the published portion of this opinion. The first is whether Safeway relied upon defendant's misrepresentations within the meaning of the crime of grand theft by false pretenses. Defendant was able to obtain large amounts of cash from the Safeway stores because the computer verification system was not working properly. Defendant contends that the only misrepresentation he made was that his ATM was valid and Safeway did not rely on this but rather upon the computer authorization. For the reasons which follow, we reject the claim.

The second relates to the ATM convictions. Defendant contends his convictions for ATM theft are fatally flawed because the evidence is insufficient to establish that the bank gave written notice of the revocation of his ATM card. We agree and therefore reverse the convictions for ATM theft.

In the unpublished portion of the opinion, we consider and reject defendant's claim that only one crime of grand theft by false pretenses was committed because there was only one victim. Thus, we will affirm the four convictions for grand theft by false pretenses. In that unpublished portion we also hold that the \$500 restitution fine was improperly imposed but reject defendant's remaining sentencing contentions.

THE CRIMES

Defendant opened a regular checking account at Tri Counties Bank (the bank) in Chico in January 1991. He was issued an ATM card which bore no expiration date. This card did not offer any overdraft protection and could be used only with the checking account. Thereafter, monthly statements for his checking account were sent to defendant by the bank at his post office box. Defendant originally deposited \$3,750.99 into his checking

account. By June 1991, defendant's account was overdrawn by \$6.17. In accordance with the bank's normal practice, defendant was mailed a letter stating that his account was overdrawn, that his bank statement and canceled checks would be held at the bank and if no deposits were made to cover the shortage, the account would be closed. As a bank employee explained it, the letter advised defendant that "if a deposit is not made the account will be closed before the next statement date. Please contact customer service, and it lists a phone number. We enclosed with this same, this letter, letting the customer know that the account will be closed if a deposit is not made to bring the account either to a zero balance to close it or to a positive balance to keep it open." On July 10, 1991, no deposit having been made, the bank closed the account because of the negative balance. From the bank's viewpoint, when defendant's checking account was closed, his ATM card was simultaneously canceled and revoked.

Despite the cancellation by the bank, defendant continued to use his ATM card, mainly at local Safeway markets. Safeway allows customers to make purchases and receive cash back by using ATM cards. Safeway's practice was to verify the cards through the use of a computer system operated by Wells Fargo Bank (Wells Fargo). Wells Fargo would report a code to Safeway which approved or disapproved of the proposed transaction. In some cases Wells Fargo would not be able to link up with the customer's bank or otherwise verify the card. If this lasted for more than about thirty seconds, Wells Fargo would report a "stand in" code to Safeway. Upon receipt of this code, Safeway would approve the transaction.

It appears that there was an error in the Wells Fargo computer, which repeatedly failed to notify Safeway that defendant's ATM card was invalid. In March and April 1992, defendant was able to use his ATM card at four different Safeway markets in Butte County. He would purchase a small item, then use his ATM card to pay for the item and to receive cash back, usually \$200 at a time, often more than once a day. He received a total of over \$19,000. During that time his ATM card was rejected at two other (non-Safeway) markets.

Typically, defendant went to the Safeway stores at differing hours and when he used his card he did so quickly and attempted to conceal it from the view of the store employees. At the time of his arrest, defendant admitted knowing his checking account was closed. A search of his residence revealed Safeway receipts detailing the ATM transactions, a checkbook which did not contain any recent notations and over \$5,000 in cash.

Defendant did not testify, but after his arrest he told an interrogating officer he had an open account with Tri Counties Bank and that in January 1992, he deposited \$50,000 in the account, but could not say where he obtained those funds. He believed a computer "hacker" employed by Safeway had altered his account balance. Not surprisingly, the jury rejected this secondhand explanation and convicted defendant of all the charges.

DISCUSSION

I. ATM Thefts

Defendant first contends the evidence is insufficient to establish that he received adequate notice that his ATM had been revoked. We agree.

The second amended information charged defendant with four counts of violating section 484g, commonly referred to as "ATM theft." It alleged that defendant "with intent to defraud use[d] an access card which [he] knew was forged, expired and revoked for the purpose of obtaining money, goods, services and anything else of value." Despite this catch-all pleading, defendant's card was neither expired (see § 484d, subd. (3)), nor forged. Instead, the People's sole theory at trial was that defendant's ATM card had been "revoked" and the jury was instructed only on this component of the crime.

The statute contains a special, technical definition of the term "revoked." "Revoked access card means an access card which is no longer authorized for use by the issuer, that authorization having been suspended or terminated *and written notice thereof having been given to the cardholder.*" (§ 484d, subd. (7), emphasis added.) The emphasized portion of the statute requires that the issuer give written notice to the cardholder that authorization to use the card has been suspended or terminated.

Here the uncontradicted evidence established that the bank sent only a warning letter threatening to close the account. The bank later closed the account and canceled the card. But no evidence was adduced showing that the bank ever gave written notice to defendant that either his card had been suspended or terminated or that his checking account had been closed. Struggling with the issue, the Attorney General suggests that it is "a reasonable inference that [defendant] was sent the closing statement, like all previous account statements, by Tri Counties Bank in the regular course of business." But there was no evidence that the bank, in the regular course of its business, sent statements to depositors after their accounts had been closed. Even more damaging to the prosecution, there is no evidence that a monthly checking account statement would say anything about the ATM card, much less that its use had been suspended or terminated.

It order to prove the type of ATM theft charged in this case, the prosecution was required to prove that defendant used the card knowing it had been revoked. For purpose of this crime, a card is revoked if, and only if, the issuer has (1) suspended or terminated its use, and (2) "written notice thereof [has] been given to the cardholder." (§ 484d, subd. (7).) Because there is no evidence that the bank gave written notice to defendant that the ATM card had been suspended or terminated, the convictions for violation of section 484g cannot stand. ✓