

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES BENJAMIN BRUNK, JR.,

Defendant-Appellant.

UNPUBLISHED

February 12, 2008

No. 273858

Kent Circuit Court

LC No. 05-004496-FH

Before: Davis, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for violation of MCL 752.795, which prohibits a person from intentionally accessing a computer network without authorization or in excess of valid authorization to acquire property or to use the network's services. The prosecution proceeded under an aiding and abetting theory, MCL 767.39. Defendant was acquitted of aiding and abetting another person in intentionally accessing a computer network to execute a scheme with the intent to defraud, MCL 752.794. We reverse because the evidence was insufficient to support the conviction.

This case arises out of defendant's act of accessing a state of Michigan computer network (intranet) to download a software program template from the network's server and then emailing the template to Andrew Felde, a vendor who operated a radio communications company. Felde used the template to program radios for and purchased by the Walkerville Fire Department. The programming of the radios through use of the template allowed the Walkerville Fire Department to use the radios within the Michigan Public Safety Communication System (MPSCS), which is a closed radio system that allows communication solely between MPSCS members involved in providing police, fire, and emergency services (public safety). User or membership agreements between the state and public safety departments or organizations relative to joining the system are utilized in the process, pursuant to which the department or organization is approved for membership and recognized as a member of the MPSCS. The public safety departments or organizations themselves purchase the radios, not yet ready for use in the MPSCS, from various listed manufacturers, and, after a user or membership agreement is executed, the state constructs a specific template tailored for the particular member and makes the template available on the state's computer network to state radio technicians; defendant is a state radio technician. Typically, a template is accessed or downloaded by a radio technician, and then the technician

uses the template to program a department's radios, at which point the radios are ready for use in the MPSCS.

In this case, Walkerville procured a number of radios through Felde, which were rebuilt and of questionable origin, resulting in a discrepancy in serial numbers. When Walkerville's fire chief, Jerry Frick, first contacted the state about joining the MPSCS, the discrepancy between the serial numbers on the radios he had acquired and the numbers that should have been on those radios was brought to Frick's attention. Frick explained that the inconsistency was due to a typographical error. Frick subsequently supplied new serial numbers that were accepted by the state, and a template was constructed.¹ After the template was ready to be accessed, a work order was issued by the state to radio technician Klay Watson, directing him to access or download the template from the state's computer network and to program the radios. Felde, on behalf of Walkerville, brought the radios to Watson, and Watson began programming the radios with the template but then stopped after discovering a problem with the serial numbers. Felde then contacted defendant to program the radios, and defendant accessed and downloaded the template from the computer network and directly provided the template to Felde via an email attachment. Felde, using the template, then programmed the radios himself and provided them to Frick and Walkerville.² There was no work order directed to defendant to program Walkerville's radios. There is no dispute that Walkerville was authorized by the state to be part of the MPSCS and that Felde was working as a vendor on behalf of Walkerville.

Because the evidence was insufficient to support defendant's conviction, it is unnecessary to address the constitutional vagueness argument or defendant's argument concerning the exclusion of evidence related to technician guidelines. We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

MCL 752.795 provides, in pertinent part:

A person shall not intentionally and without authorization or by exceeding valid authorization do any of the following:

¹ Frick testified that he pled guilty to a misdemeanor arising out of his efforts to have the radios programmed for purposes of joining the MPSCS.

² Felde testified that he pled guilty to unauthorized use of a computer system or computer software.

(a) Access or cause access to be made to a computer program, computer, computer system, or computer network to acquire, alter, damage, delete, or destroy property or otherwise use the service of a computer program, computer, computer system, or computer network.

With respect to the elements of the crime, the jury was instructed, consistent with the statute, that the prosecution was required to prove beyond a reasonable doubt that defendant or Felde intentionally accessed a computer network without valid authorization in order to use the services of the network. It would appear that defendant, and not Felde, was the person who actually accessed the state's computer network; however, the prosecution expressly proceeded on the theory that defendant aided and abetted Felde in accessing the network, with Felde being the person who accessed the network without authorization.³ Consistent with the instructions given by the trial court in this case, to convict a defendant under an aiding and abetting theory, the prosecutor must present evidence showing that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time aid and encouragement were provided. *Carines, supra* at 768. In light of the jury instruction giving jurors the choice to find that either defendant *or* Felde accessed the network without authorization, we shall address the evidence under the two alternatives regardless of the prosecution's theory. We first consider whether there was sufficient evidence to show that defendant lacked authority to access the network for purposes of using the services of the network.

Generally speaking, defendant, as a state radio technician, had authority to access the computer network. However, viewing it more narrowly, it must be ascertained whether there was sufficient evidence showing that defendant lacked authority to access the network to retrieve the template for Felde and Walkerville. This, in our opinion, required the prosecution to submit evidence reflecting the existence of a framework within the Radio Programming Unit (RPU) of the Michigan Department of Information Technology (MDIT)⁴ minimally establishing procedures and policies concerning a radio technician's authority and guiding a technician's actions with respect to accessing the computer network to download templates and in regard to programming radios at the time of the alleged crime.

³ We note that, for purposes of the computer crime statutes, the term "access" is defined as meaning "to instruct, communicate with, store data in, retrieve or intercept data from, or otherwise use the resources of a computer program, computer, computer system, or computer network." MCL 752.792(1). Because Felde ultimately used the resources of the computer network, i.e., use of the template to program the radios, it can be contended that he "accessed" the computer network for purposes of MCL 752.795. The jury was not instructed on the definition of "access." Given the manner in which the jury instruction on the crime was crafted, we can only speculate whether the jurors found that defendant or Felde, or both, accessed the computer network.

⁴ Testimony indicated that this department and the radio unit within it handled matters relating to the MPSCS.

An employee of the RPU, Daniel Robinson, testified about the generation of work orders by the state that are sent or assigned to specific radio technicians or radio shops with instructions regarding what radios need to be programmed and what template needs to be used. The evidence, however, did not reveal that, at the time of the alleged crime, only state radio technicians who received work orders were permitted to access the computer network in the process of programming radios for public safety departments or organizations. Robinson did not testify that any policy or procedure was in place that prohibited defendant from accessing the network to download the template for Walkerville absent a work order. He did not testify that defendant lacked authorization to download the Walkerville template.⁵ Robinson also testified as follows:

Q. Are there any written rules that would go to [defendant] or radio technicians working for the [MDIT] that tells them you must do A, B, C, or D when programming a radio?

A. Written rules, there are none.

When asked whether there were any written protocols regarding how radio technicians were to interact with the server that holds the templates, Robinson only stated that passwords were set up to give individual radio shops the ability to access the network or server. He said nothing about a work order requirement. Again, there is no dispute that defendant had the general authority to access the network, and there is no dispute that defendant had the general authority to program radios. Robinson indicated that there are no written rules that specify to which radio shop or technician a particular work order must be sent.

David McKinnon, a defense witness and radio technician employed by the MDIT who worked on the MPSCS, testified that radio technicians were pretty independent as far as organized job responsibilities relative to working on radios within the MPSCS. He further testified:

Q. What was your guidance or instructions or atmosphere regarding customers on the system?

A. We were getting so many customers . . . at such a rate that we were trying to accommodate them as best we could, and the guidance was to accommodate them any way we could.

⁵ We note that MCL 752.797(6) creates a rebuttable presumption, if certain enumerated situations or circumstances did not exist, that a person lacked authorization. One of the situations would appear to apply to defendant's actions in accessing the network, MCL 752.797(6)(c) (access achieved without use of code that bypasses, defrauds, or circumvents preprogrammed access procedures). Regardless, the jury was never instructed on any rebuttable presumptions regarding authorization as to defendant or Felde.

Q. Turning your attention again to that time, keeping it right there, were there instructions about what you had to do, following rules or procedures to get people on to the system?

A. It was verbal, everything was verbal at that point in time.

Q. Was it always consistent?

A. No. It was case by case, different jobs.

Klay Watson testified that, while he never programmed a radio without a work order, which allowed him to do the work, he could not recall being given any written rules or procedures that directed a radio technician to take certain steps in programming radios.

Felde testified that he had been involved in maintaining Walkerville's radio system for several years leading up to the date of the alleged crime, that he and defendant had known each other professionally for quite some time, that Felde contacted defendant, telling defendant that he needed to get the Walkerville radios programmed, and that defendant trusted Felde.

Defendant made a statement to police that he had known Felde for approximately 15 to 20 years. The officer who took the statement indicated his personal knowledge that Felde had a history of working with the state on public safety radio systems. Defendant admitted to police that he did not have a work order. He also stated that a work order was *usually* needed; defendant did not state that a work order was mandatory.⁶

We find that the evidence was insufficient to establish that, because he lacked a work order, defendant did not have authority to access the computer network and download the Walkerville template, and, again, the prosecution did not proceed on that basis or theory. While there may have been a clear and absolute verbal policy, rule, or directive that only radio technicians or radio shops given work orders could access the network and download templates relative to a particular public safety department, and while perhaps defendant did not have authority to do so absent a work order, there was no evidence presented to support these propositions.

The next issue regarding authority concerns defendant's authority to send the template directly to Felde so that Felde could program the radios, instead of defendant himself keeping the template and programming the radios. That issue necessarily encompasses the issue of Felde's authority to accept the template and program the radios himself, which authority the prosecution claimed Felde lacked, thereby forming the basis for the prosecution's aiding and abetting theory. At oral argument, the prosecutor acknowledged that had defendant programmed the radios

⁶ Defendant told police that he did not recall sending an email to Felde with the template attached, but the computer forensic evidence established that such an email was sent to Felde and there was a stipulation to that effect. Defendant also told police that he programmed the radios himself with the template, which clearly was not the case.

instead of giving the template to Felde so that Felde could do the programming, defendant most likely would not have been prosecuted.

Although there very well may have been a clear and absolute verbal policy, rule, or directive that prohibited defendant's and Felde's actions in regard to the programming of the radios at issue in 2003, and that defendant and Felde lacked authority to proceed as they did, there was a failure by the prosecution to submit sufficient supporting evidence.⁷ Felde did not testify or concede that he lacked authority to program the radios or that defendant lacked authority to give him the template. There was no testimony by police that defendant made a statement that he or Felde lacked authority with respect to the handling of the template and the programming of the radios.

Watson testified that he had never given any tools in his possession to another person for programming a radio because "we don't want" others outside the system to hear critical police communications. Robinson explained that computer tools for programming radios were not sent to MPSCS members in order to make sure that radios were permissibly on the system and that the radios were properly programmed. He stated that tools were not widely available to anyone who wanted them because the MPSCS was a closed system and the state needed to maintain control. As indicated above, Robinson also testified that radio technicians programmed the radios with the templates. This brief testimony by Watson and Robinson was all that was presented on the issue now being addressed. Watson's testimony was specific to his own circumstances and thoughts, and Robinson's testimony was, at best, general in nature, lacking any particularity relative to the specific facts, the persons involved here, the crime charged, and the time period when the crime allegedly occurred. The prosecutor did not elicit basic, necessary testimony that, when the alleged crime occurred in 2003, defendant had no authority to give the template to Felde and that Felde lacked any authority to accept the template and program the radios himself.⁸ Again, this may indeed have been the case, but supporting evidence needed to be submitted. There certainly was no evidence of written rules and procedures regarding programming in 2003.

The evidence, in summation, revealed that defendant, a longtime state radio technician generally authorized to access the state's computer network, downloaded a template from the network's server for a person defendant personally knew for quite some time as someone involved in the radio business and as someone who was doing work on behalf of Walkerville to bring them into the MPSCS (Felde), that Walkerville was authorized to be brought into the system pursuant to the membership agreement, that Felde had a history of working on state radio systems, and that, at the time, there were no written rules and policies in place relative to a radio

⁷ We note that we understand and fully appreciate the nature of the state's concern about keeping the templates secure, but a criminal conviction requires sufficient supporting evidence.

⁸ We recognize that Felde testified that he pled guilty to unauthorized use of a computer system or computer software. However, no specifics or details were given regarding the factual basis of the guilty plea that was eventually entered, making it improper for us to consider the plea as it would entail speculation, especially given that Felde was originally charged with five different counts.

technician's involvement in assisting departments to become part of the MPSCS, only inconsistent verbal directives. The evidence was simply insufficient to support defendant's conviction.

Reversed.

/s/ Alton T. Davis

/s/ William B. Murphy

/s/ Helene N. White