STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED January 8, 2009
v	No. 282041 Wayne Circuit Court
EDWARD WOODRUFF, Defendant-Appellee.	LC No. 07-100034

Before: Zahra, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted from a circuit court order reversing defendant's district court conviction of second-degree retail fraud, MCL 750.356d, and remanding for a new trial. We reverse and remand for reinstatement of defendant's conviction. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant and a friend, Anthony Beverly, went to a Home Depot store where Beverly paid for three ceiling fans and then transferred the receipt to defendant, who used it as proof of purchase for three identical ceiling fans. Defendant and Beverly offered a defense of innocent mistake. The district court, sitting as the trier of fact, disbelieved their explanation and found defendant guilty as charged. On appeal, the circuit court found that the district court made erroneous factual findings and that the evidence was insufficient to support the verdict. Accordingly, it vacated defendant's conviction and remanded for a new trial.[1]

A challenge to the sufficiency of the evidence in a bench trial is reviewed de novo on appeal. *People v Sherman-Huffman,* 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002). The evidence is reviewed in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt. *People v Harmon,* 248 Mich App 522, 524; 640 NW2d 314 (2001). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack,* 462 Mich 392, 400; 614 NW2d 78 (2000).

[1] We note that if the evidence is insufficient to sustain the verdict, the conviction must be reversed and double jeopardy would prevent a retrial on the same charge. *People v Bruno,* 115 Mich App 656, 661; 322 NW2d 176 (1982).

The trial court's factual findings are reviewed for clear error. A finding of fact is considered "clearly erroneous if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). "An appellate court will defer to the trial court's resolution of factual issues, especially where it involves the credibility of witnesses." *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). All determinations made by the trier of fact concerning the weight of evidence and credibility of witnesses should not be disturbed. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

A person is guilty of second-degree retail fraud if, while a store is open to the public, he steals property of the store that is offered for sale at a price of at least $200 but less than $1,000. MCL 750.356d(1)(b). The elements of the offense are that (1) the defendant took property offered for sale at a store, (2) the defendant physically moved the property, although he need not leave the store with it, (3) the defendant intended to steal the property, i.e., take it permanently without the store's consent, (4) the defendant's actions took place inside a store or in the immediate area while the store was open to the public, and (5) the value of the property was between $200 and $1,000. MCL 750.356d(1)(b); CJI2d 23.13. The defendant's intent may be inferred from all the facts and circumstances of a case, *In re People v Jory*, 443 Mich 403, 419; 505 NW2d 228 (1993), and "minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 518; 583 NW2d 199 (1998).

The circuit court found that the district court made errors of fact. The district court did err in stating that Beverly's wife drove to the store from Detroit because she testified that she drove from Redford. However, the salient point made by the district court was that Beverly's wife did not have time to get to the store in "the time frame that was described." The circuit court found error because defendant presented new evidence, not offered at trial, regarding the time frame in question. But a trial court's findings of fact are clearly erroneous only if they are not supported by the evidence presented at trial. When new evidence is at issue, the question is whether it would warrant a new trial under the four-part test set forth in *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). The circuit court did not find that the newly offered evidence warranted a new trial under this test.

The district court found that "there were two transactions that took place seven minutes apart here." This finding is not clearly erroneous because it is supported by Beverly's and defendant's time-stamped sales receipts, which are stamped 11:46 a.m. and 11:53 a.m., respectively. The circuit court misapprehended the district court's finding, believing that it had erroneously found that seven minutes had elapsed "from the time of Mr. Beverly's phone call until [defendant] paid for the extension rod and cleaner." The circuit court also rejected the district court's finding because "there is no evidence that the time [the registers] are set to is accurate to the minute with universal standard time or synchronized with the security video cameras." In this regard, the circuit court plainly substituted its judgment for that of the district court, which apparently did not find the lack of such evidence to be a problem. An appellate court cannot substitute its judgment for that of the trial court. *People v Martin*, 199 Mich App 124, 125; 501 NW2d 198 (1993).

The district court stated that "[f]or reasons that have remained unexplained, the parties split up." The circuit court found clear error because defendant and Beverly both offered an explanation for why they split up. It appears from the context of the district court's statement,

however, that it was making a factual finding that the reason offered for the split was not satisfactory, and that the court disbelieved defendant's and Beverly's explanation. The circuit court should have deferred to that finding.

The evidence showed that defendant and Beverly entered a store open to the public. Defendant had three fans on a flatbed cart and moved them to the self-serve register area. He left them there and went to stand by the tool corral. In the meantime, Beverly paid for three identical fans at the other end of the store. Instead of leaving with his merchandise, however, he returned to the sales floor. He parked his shopping cart and then walked to the area where defendant was loitering and dropped his sales receipt into a cart. He started walking off in one direction and, after defendant picked up the discarded sales receipt, he turned around and walked back in the direction of his own cart. A couple of minutes later, defendant retrieved his cart and took it to a different register, where he presented Beverly's receipt as proof of payment for the fans, then tried to leave with them. The value of the fans was $491. Although the prosecutor did not show what happened with Beverly's fans, the prosecutor was not required to negate every theory consistent with defendant's innocence. *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991). It was sufficient that he prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence defendant might present. *Id.*

Defendant and Beverly presented a defense of an innocent mistake, which, if believed, would negate an intent to steal. It is clear from the district court's findings that it simply did not believe defendant's defense and accepted the prosecutor's proofs. The trial court did not clearly err in so finding because the explanation offered by defendant and Beverly was inconsistent with the store surveillance videos. When the evidence as a whole is considered in a light most favorable to the prosecution, the district court reasonably could have concluded that there was no innocent mistake and, instead, defendant intentionally picked up three extra fans, parked his cart to wait for Beverly to drop off the receipt for the purchase of the first three fans, and took that receipt to try to leave with the three extra fans without paying for them, which was sufficient to establish the requisite intent to steal. The district court was not required to believe Beverly's testimony that he left his fans in the store. *People v Cummings*, 139 Mich App 286, 293-294; 362 NW2d 252 (1984) (the fact-finder "may choose to believe or disbelieve any witness or any evidence presented in reaching a verdict"). The circuit court improperly substituted its judgment for that of the district court. The circuit court found that the evidence was insufficient to prove defendant's guilt "in light of the defendant's plausible explanations for his actions," which indicates only that the circuit court would have believed defendant's testimony had it been sitting as the trier of fact, not that the district court, which was in a superior position to evaluate credibility, clearly erred in disbelieving defendant's testimony and rejecting the defense offered. The evidence was sufficient to sustain the district court's verdict.

Defendant alternatively argues that his postjudgment motion in the district court should have been granted as a matter of law because the prosecutor never filed an answer. We disagree. Unless the court requires the opposing party to file a brief, the filing of a response is permissive. See MCR 2.119(C)(2) and (E)(3). Further, the failure to file a response to a motion does not compel the court to grant the motion. To the contrary, MCR 6.431(B) and (C) state that the court "may" grant a postjudgment motion. The term "may" is permissive and indicative of discretion, *In re Forfeiture of Bail Bond*, 276 Mich App 482, 492; 740 NW2d 734 (2007). Thus, while the district court had discretion to grant the motion, it was not required to do so. Similarly, the

prosecutor's failure to timely respond to defendant's circuit court appeal did not preclude the prosecutor from obtaining relief on appeal. The filing of a brief by an appellee is permissive, not mandatory. MCR 7.101(I)(1).

For these reasons, we reverse the circuit court's decision and remand for reinstatement of defendant's conviction.

Reversed and remanded in accordance with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood