

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
February 23, 2012

v

FREDDY LEE WILSON,

Defendant-Appellee.

No. 302748
Ingham Circuit Court
LC No. 07-001132-FH

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

The prosecution appeals as of right the dismissal of defendant's case following a directed verdict in favor of defendant. Because we find that the trial court granted the directed verdict based on an impermissible credibility determination, we reverse and remand.

On November 4, 2006, an open bottle of Vicodin containing about 198 pills was stolen from a CVS pharmacy located in Lansing. Amanda Stuber, an employee of the CVS, identified defendant as the perpetrator of the crime. Defendant was charged with larceny in a building, MCL 750.360. A jury trial was held in November 2010.

Stuber testified during the trial that she and the store manager, Tamara Rahl, were the only employees working the night of the larceny. Stuber worked as a cashier and as a pharmacy technician. Stuber was familiar with defendant because he was a regular customer, and she knew his name because he used a CVS card with his purchases and she often filled his prescriptions. On the night of the larceny, Stuber saw defendant enter the store at about 7:15 p.m.; there were only two other customers inside the store at that time, and they were both using the photograph processing machine. Defendant went to the back of the store where the pharmacy is located; shortly thereafter, the pharmacy alarms sounded. The pharmacy closed and was locked at 6:00 p.m. After hearing the alarm, Stuber stepped out from behind the counter and looked at the pharmacy area. Stuber did not see anyone in the pharmacy, but she observed defendant in the nearby greeting card aisle. Defendant selected a greeting card and proceeded to the front register. The other two customers in the store were still standing at the photograph processing machine when the pharmacy alarm sounded. Rahl testified that she went to the pharmacy area as soon as the alarm went off, and that she did not see anyone in the pharmacy but she observed an African-American man wearing a cream-colored jacket, hat, and sweatpants in the greeting card aisle.

Stuber testified that she had no doubt that defendant was the person in the store that night. Stuber testified that defendant seemed to be in a hurry, and that the alarm was still going off as he approached the check-out counter with a greeting card. After ringing up the card, Stuber asked defendant if he had a CVS card. Defendant replied that it was in his car, and left the store, purportedly to retrieve his CVS card; however, he did not return to the store. At trial, the prosecution introduced security camera footage taken at the time of the larceny. The footage showed an individual reaching behind the pharmacy counter repeatedly and eventually entering the pharmacy area. Stuber testified that the individual depicted in the video was defendant. The individual in the security footage was an African-American man wearing a white or tan jacket.

Rahl contacted the police and the CVS district manager when the pharmacy alarm went off. An audit of the store pharmacy revealed that an open bottle of Vicodin pills was missing. Officer Matthew Kreft responded to the incident, and took statements from both Stuber and Rahl on the night of the larceny. Kreft testified that Stuber identified defendant as the perpetrator without hesitation. On November 22, 2006, Stuber identified defendant from a photograph lineup.

At the close of the prosecution's proofs, defendant moved for a directed verdict, and after argument from both attorneys, the trial court directed the verdict in favor of defendant and dismissed the case. The trial court explained that "it's not really up to me to determine credibility, but I can certainly determine whether or not this witness, the only eyewitness in terms of identification, is credible on the point of identification." The trial court concluded by explaining that the prosecution failed to show that Stuber's testimony was credible, in light of the fact that defendant was a frequent store customer who always paid in the past. The trial court concluded by stating that "[t]his is not credible testimony. This does not rise to the dignity of a sufficient case from an evidentiary standpoint. The People have not, in my view, made out a prima facie case. I'm going to grant the motion to dismiss the case."

On appeal, the prosecution argues that the trial court erred when it directed verdict in favor of defendant, and that double jeopardy does not preclude retrial of defendant because the trial court based its decision exclusively on its determination that Stuber's testimony was not credible.

"We review de novo a trial court's decision on a motion for directed verdict to determine whether the prosecutor's evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proven beyond a reasonable doubt." *People v Martin*, 271 Mich App 280, 319-320; 721 NW2d 815 (2006). Whether retrial is precluded by the double jeopardy clause is a question of law that we also review de novo. *People v Szalma*, 487 Mich 708, 715; 790 NW2d 662 (2010).

Under the parallel double jeopardy clauses of the Michigan and United States Constitutions, a defendant cannot be prosecuted twice for the same offense. Const 1963, art 1, § 15; US Const, Am V. Consequently, where a defendant successfully brings a motion for directed verdict, it "bars any further proceedings relative to the charges brought against defendant." *People v Nix*, 453 Mich 619, 626-627; 556 NW2d 866 (1996). Thus, "[a] defendant may not be retried after an acquittal that is granted on the basis of insufficient evidence." *People v Mehall*, 454 Mich 1, 5; 557 NW2d 110 (1997); *Nix*, 453 Mich at 626.

It “is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for a directed verdict of acquittal, no matter how inconsistent or vague that testimony might be.” *Mehall*, 454 Mich at 6. Whether the trial court’s judgment is an acquittal for purposes of double jeopardy “is not to be controlled by the form of the judge’s action.” *Szalma*, 487 Mich at 721 (citation and quotation omitted). “Rather, an appellate court must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.” *Id.* (citation and quotation omitted).

Considering the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt in this case. The store manager testified that when alarms started going off, she quickly went to the pharmacy area to investigate. While there, she saw an African-American male standing in the greeting card aisle wearing a cream or white-colored jacket, hat, and sweatpants. The store security footage showed an African-American male wearing a cream or white jacket reaching into and eventually entering the pharmacy area near the back of the store. Stuber, who was working in the front of the store at the time and knew defendant by name from his regular visits to the store, identified him as the only African-American male in the store at the time of the larceny, and unequivocally testified that he was the individual in the security footage seen reaching behind the pharmacy counter repeatedly and eventually entering the pharmacy area. Accordingly, we conclude that a directed verdict was not appropriate in this case.

In making its decision directing the verdict in defendant’s favor, the trial court explicitly recognized that its role was not to determine credibility; however, the trial court also specifically stated that it could determine whether Stuber was “credible on the point of identification.” The trial court proceeded to explain that the prosecution failed to show “that the testimony is credible” and that it concluded that Stuber’s testimony identifying defendant was “not credible testimony.” Accordingly, the trial court stated that the proofs did not “rise to the dignity of a sufficient case from an evidentiary standpoint.” The trial court accordingly directed the verdict and dismissed the case.

We conclude that the trial court focused completely on witness credibility, and granted a directed verdict in favor of defendant because it did not believe that Stuber’s testimony identifying defendant as the perpetrator was credible. A trial court fails to rule on the sufficiency of the prosecution’s proofs when it concentrates on the testimony of a witness and disregards that testimony as unbelievable. *Mehall*, 454 Mich at 6-7. Accordingly, the trial court failed to view the evidence in the light most favorable to the prosecution in order to make a determination regarding the sufficiency of the evidence; therefore, retrial is not prohibited by the double jeopardy clauses. *Nix*, 453 Mich at 626.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello