

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DANE WEINKOWITZ,	§	
	§	No. 503, 2007
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	Cr. I.D. No.
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: March 26, 2008

Decided: March 27, 2008

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 27th day of March 2008, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Dane Weinkowitz (“Weinkowitz”), the appellant, appeals from the Superior Court’s denial of his motion for judgment of acquittal. Weinkowitz was indicted for, and found guilty of, forgery in the second degree, unlawful use of a credit card, and misdemeanor theft. On appeal, Weinkowitz contends that the Superior Court erred in denying his motion for judgment of acquittal because (he argues) there was insufficient evidence to find him guilty beyond a reasonable doubt. Because the Superior Court committed no legal error in denying the motion for judgment of acquittal, we affirm.

2. In November and December 2006, several patrons contacted the Crab Trap Restaurant in Newark, Delaware to report unauthorized charges from the restaurant on their credit cards. An internal investigation was conducted and police were contacted. Kimberly Speed (“Speed”), the restaurant bookkeeper and office manager, identified fraudulent transactions involving several customers who later testified at trial that the particular charges to their credit cards were unauthorized.

3. At trial, Speed described the computer system used by the restaurant. At the beginning of a shift, individual employees, including servers, log in the computer system using their ID number. The ID number—provided to each employee by the manager and unique to each employee—tracks all of the employee’s transactions: the tables served by the employee, the meal and beverage orders, the cost of the meal, and whether cash or a credit card voucher was received in payment. All this information is recorded in the computer system under the employee’s ID number. At the end of the shift, the system generates a report that tracks the day’s information for that particular employee. The employee is then responsible for determining whether the restaurant owes the employee money—for tips paid by credit card—or if the employee owes money to the restaurant—for the cash payments received. After making that determination, each employee attests the accuracy of the report and reconciliation by signing the report. The report and the shift’s receipts are then turned in to the manager.

4. On cross-examination, Speed indicated that the servers' name and ID number were shown on each check. Therefore, when checks and server reports were turned in to the manager at the end of the shift, the manager could in theory see the ID number for each server. Moreover, managers and other employees who had a key to the office where the paperwork was stored could also in theory learn the ID number of a particular server.¹ Several written documents related to the fraudulent transactions were admitted into evidence: checks and credit card payment vouchers; employee shift reports; and generated print-outs of all credit card activity for the days in question. There was also the trial testimony of the victimized patrons.

5. The first patron, David Pearson, testified that he purchased food and beverages amounting to \$50.15 on November 13, 2006, for which he paid with his VISA card. Upon receiving his credit card bill, Pearson discovered an additional charge of \$46.60 for a separate transaction that he did not authorize. He identified Weinkowitz as the server for the first transaction. Weinkowitz's name and ID number were located on the check, server report, and credit card activity report.

6. A second patron, Steven Silva, testified that he purchased food and beverages amounting to \$55.75 on November 15, 2006, for which he paid with a

¹ Because Speed was at the restaurant only one day per week, other employees who were acting as managers from time to time had access to the office. Moreover, during the time period in question, two of the managers left and were replaced by other persons.

credit card. The patron vividly remembered the meal because it was the first time that he was authorized to use his company credit card for a business lunch. Silva testified that he observed additional charges on his credit card of \$46.85 and \$55.75 on each of the following two days, although he did not go to the restaurant on those days and did not authorize those charges. Silva also testified that the signature on those additional two credit card authorization slips was not his. Weinkowitz's name and ID number were located on the checks, server report, and credit card activity report for the days of the additional two transactions.

7. A third patron, Terrance Haskins, testified that he made two take-out purchases on December 13, 2006, for which he paid with his VISA credit card. Upon receiving his credit card bill, Haskins noticed another charge, of \$23, that he had not authorized. The patron identified Weinkowitz as the server for the legitimate (authorized) transactions. Weinkowitz's name and ID number were located on the credit card slips, server report, and credit card activity report.

8. There were two additional credit card transactions for which the State introduced documentary evidence, but the cardholders did not appear to testify at trial. Weinkowitz's name and ID number were located on the credit card slips, server reports, and credit card activity reports for the days in question: November 10, 2006 (a charge of \$95.80) and November 25, 2006 (a charge of \$32.90).

9. At the conclusion of the State's presentation of the evidence, Weinkowitz moved orally for a judgment of acquittal. Weinkowitz presented two arguments in support of his motion. The first argument, related to the charges of forgery in the second degree, and its rejection, are not at issue here. The second argument was that "more than one person had access to the [ID] number that is ... the alleged link" between Weinkowitz and the crimes. Viewing the evidence in the light most favorable to the State, the trial judge denied the motion, stating:

As to the fact that a number of people had access to the server's user number at the restaurant, unless or until there is an explanation given as to – or some ... evidence presented ... [regarding the] use of his number I don't think that I have a basis to preclude the jury from determining his guilt or liability or lack of liability as to that count.

10. At the end of the one-day jury trial, Weinkowitz was found guilty of second degree forgery (three counts), unlawful use of a credit card (three counts), and misdemeanor theft (five counts). He was later sentenced to 11 years at Level V supervision, suspended for 2 years at Level III and 2 years at Level II probation. This appeal followed.

11. Weinkowitz's sole claim is that the Superior Court erred in denying his motion for judgment of acquittal. He argues that there was insufficient evidence to find him guilty beyond a reasonable doubt, because the only evidence linking him to the alleged crimes was his ID number, which was easily accessible to other people who worked at the restaurant. "We review *de novo* a trial judge's denial of

a motion for a judgment of acquittal to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of a crime.”²

12. Upon carefully reviewing the record, we are satisfied that the prosecution presented substantial evidence showing that Weinkowitz used the credit cards of customers whom he had served to charge them for additional, unauthorized services. Evidence linking Weinkowitz to the crimes included (i) the use of his unique ID number on each fraudulent transaction, (ii) Weinkowitz’s signature on each report on those days (showing that the restaurant owed him money for the days in question), and (iii) the patrons’ identification of Weinkowitz as their server for the legitimate transactions that preceded the fraudulent ones in each case. This combination of direct and circumstantial evidence was sufficient for a reasonable jury to find Weinkowitz guilty of the crimes charged.

13. Weinkowitz’s main argument is that the State did not prove beyond a reasonable doubt an essential element of the charged offenses, namely identity, because “[a]nyone else who wanted to steal but deflect attention from themselves to the [d]efendant ... had ample opportunity to [use] the credit card data from an earlier transaction conducted by the [d]efendant and then manually reente[r] that data on the subsequent fraudulent credit card transaction.” Absent any evidence

² *Flonnory v. State*, 893 A.2d 507, 537 (Del. 2006).

adduced by Weinkowitz that another employee committed the crimes, that argument is pure speculation. The only evidence that remotely supports Weinkowitz's assertion is the fact that other employees *could* have known Weinkowitz's ID number. The State was not required to demonstrate a negative, *i.e.*, that no other employee could have used Weinkowitz's ID number to perpetrate the frauds. Although Weinkowitz claims that circumstantial evidence is insufficient to obtain a conviction, that position finds no support in our case law. We have consistently held that the prosecution may prove a defendant's guilt exclusively through circumstantial evidence.³

14. Weinkowitz waited on each of the customers who later discovered fraudulent activity on their credit cards. He signed each server report at the end of his respective shifts that resulted in the restaurant paying him money from the fraudulent credit card transactions. He had the means to commit the crimes, and was, in fact, the beneficiary of those fraudulent transactions. That evidence, both direct and circumstantial, pointed to him. The jury did not believe that Weinkowitz was the innocent victim of another employee's scheme to steal money. Therefore, viewing the evidence in the light most favorable to the

³ See *Seward v. State*, 723 A.2d 365, 369 (Del. 1999); *Davis v. State*, 706 A.2d 523, 525 (Del. 1998); *Hoey v. State*, 689 A.2d 1177, 1181 (Del. 1997); *Robertson v. State*, 596 A.2d 1345, 1355 (Del. 1991); *Skinner v. State*, 575 A.2d 1108, 1121 (Del. 1990). See also, *e.g.*, *Payne v. State*, 946 So.2d 930, 935 (Ala. Crim. App. 2006); *State v. Askham*, 86 P.3d 1224, 1231 (Wash. Ct. App. 2004) (holding that circumstantial evidence in fraudulent use of credit card provided sufficient evidence to support conviction).

prosecution, a rational jury could have found Weinkowitz guilty beyond a reasonable doubt of all the elements of the crimes charged.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice