STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 16, 2001
v	No. 219819 Wayne Circuit Court
JACKIE E. ELLIOTT, Defendant-Appellant.	LC No. 98-014236

Before: Bandstra, C.J., and Griffin and Collins, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of larceny in excess of $100, MCL 750.356; MSA 28.588. The trial court sentenced defendant to two years' probation and payment of restitution. We affirm.

Defendant, a store manager, was accused of stealing approximately $12,000 from the store after making what was supposed to be a $20,000 deposit in a bank. The bank's deposit record showed that only $8,000 had been deposited. Defendant contends he deposited the amount an assistant manager gave him without verifying the amount with the store's computer or the bank's record before or after the deposit, and that he did not steal any of the funds.

Defendant first argues the prosecutor was unable to establish there was an actual or constructive taking of goods or property because the evidence was insufficient to establish that there was more than one deposit bag given to defendant for deposit. We disagree.

To sustain defendant's conviction, the prosecutor must have provided proof beyond a reasonable doubt of the basic elements of larceny, which are: (1) an actual or constructive taking of goods or property, (2) an asportation of the same, (3) with an intent to permanently deprive the owner, (4) of property that does not belong to the defendant, (5) against the will and without the consent of the owner. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999); *People v Edwards*, 171 Mich App 613, 617; 431 NW2d 83 (1988). To satisfy the constitutional requirements of due process, the prosecutor must provide sufficient evidence to prove each fact necessary to constitute the crime for which a defendant is charged beyond a reasonable doubt. *In Re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

Here, because defendant's challenge is to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999); *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Moreover, determinations of credibility and intent are the province of the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). The element of intent may be inferred from all the facts and circumstances. *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987). A prosecutor need not negate every reasonable theory of innocence but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A review of the record, viewed in the light most favorable to the prosecutor, allows this Court to conclude that although there were discrepancies in the testimony, a reasonable conclusion was that at least two deposit bags were given to defendant and only one was received by the bank.

In bench trials, the judge, who sits as the factfinder, is obliged to articulate the reason for his decisions in findings of fact to reveal the law applied. *People v Jackson*, 390 Mich 621, 627; 212 NW2d 918 (1973).

> Even in a case where there is no issue of credibility and no showing of interest on the part of the witnesses, the question does not become one of law and still is to be decided by the trier of fact where the evidence relied on is contradicted "by any testimony given in the case . . . or by any facts or circumstances in the case," or where the evidence relied on is "in any way improbable or discredited" or any legitimate inferences may be drawn inconsistent with a finding or verdict directed as a matter of law. [*Id.* at 625, n 2, quoting *Boudeman v Arnold*, 200 Mich 162, 164; 166 NW 985 (1918).]

Here, the judge found that deposits totaling over $20,000 were placed in three night deposit bags and then placed in defendant's custody. The trial court determined that a loss had occurred and inferred, from the evidence of loss in addition to the fact defendant was entrusted with the bags, that defendant was responsible for their disappearance. This Court gives deference to the trial court's opportunity to hear the witnesses and its consequent unique qualification to assess credibility. *In re Leone Estate*, 168 Mich App 321, 324; 423 NW2d 652 (1988). Moreover, a trial court's findings of fact will not be overturned on appeal absent clear error. *Featherston v Steinhoff*, 226 Mich App 584, 587; 575 NW2d 6 (1997). A finding is clearly erroneous when, although evidence supports it, this Court is left with a firm conviction that the trial court made a mistake. *Id.* Here, although there were discrepancies regarding the number of bags sent for deposit, the applicable standard for findings of clear error and the admonition that

"conflicts in the evidence are to be resolved in favor of the prosecutor," *Terry, supra* at 452, lead us to conclude that the findings of the trial court were not clearly erroneous.

Defendant next argues the prosecution also failed to establish that defendant had the opportunity to commit larceny because while he was in possession of the deposit bags he was accompanied by a fellow employee. As defendant argues, *People v Strawther*, 47 Mich App 504, 509; 209 NW2d 737 (1973), established that mere possession is not prima facie evidence of larceny. In *Strawther*, the Court reversed the defendant's conviction, concluding there was insufficient evidence to support the conviction. The Court stated that "[t]he prosecutor would have us infer possession from defendant's presence near the goods and then infer that he had stolen the goods, from the fact of possession. We cannot, as a matter of law, make an inference upon an inference from a single fact." *Id*. at 509. In criminal cases, this pyramiding of inferences deprives defendant of the right to require proof of his guilt beyond a reasonable doubt. *People v Clay*, 95 Mich App 152, 159; 289 NW2d 888 (1980). However, the rule against pyramiding inferences does not prevent the factfinder from making more than one inference in reaching its decision if each inference is independently supported by established fact. *People v McWilson*, 104 Mich App 550, 555; 305 NW2d 536 (1981).

In light of the standard of review applicable to sufficiency of the evidence cases, the availability of circumstantial evidence, and the reasonable inferences derived thereof, this Court is bound to conclude that the evidence, when viewed in the light most favorable to the prosecutor, was sufficient to allow a factfinder to conclude that all the elements of the crime were proven beyond a reasonable doubt.

Defendant's final argument is that he was denied effective assistance of counsel because counsel convinced him to waive trial by jury on the day that trial was scheduled to start, waived opening arguments, and failed to prepare, investigate, and present all substantial defenses on defendant's behalf.

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard or reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Effective assistance of counsel is presumed and a defendant must overcome the strong presumption that assistance of counsel was effective. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Counsel's performance must be measured against an objective standard of reasonableness and without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Rockey, supra* at 76. Failure to request an evidentiary hearing limits review to the facts on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

Defendant argues the decision to waive trial by jury was ill advised in circumstances where the evidence was so weak, because had a jury been seated and presented with the evidence they might have found the evidence insufficient and decided the case differently. We find this argument to be speculative at best.

Generally, a criminal defendant has a right to waive a trial by jury and elect a bench trial. MCL 763.3; MSA 28.856; *People v Kirby*, 440 Mich 485, 492; 487 NW2d 404 (1992). A defendant's waiver of his constitutional right to trial by jury must be made voluntarily, intelligently, and knowingly. *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998); *People v Reddick*, 187 Mich App 547, 549; 468 NW2d 278 (1991). Here, the record indicates the waiver was made by defendant after discussion with counsel. We must assume defense counsel had a legitimate reason for waiving trial by jury and defendant agreed with the position because, in the final analysis, the decision to waive trial by jury ultimately rests with the defendant. MCR 6.402(B) Consequently, the reasonable conclusion is that the decision to waive trial by jury was trial strategy reached after consultations between defendant and counsel. In these circumstances, this Court will neither substitute its judgment for that of counsel regarding matters of trial strategy nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The fact that a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant's participation in the waiver of trial by jury allows us to conclude he was not denied the effective assistance of counsel.

Defendant also argues that counsel's failure to present opening arguments was ineffective assistance of counsel because the waiver prevented the court from being apprised of defendant's theory of the case. We note that the prosecutor also waived opening arguments and defense counsel could have reasonably concluded that some tactical advantage could be achieved by proceeding directly to testimony. *People v Johnson (On Remand)*, 208 Mich App 137, 142-143; 526 NW2d 617 (1994).

Citing *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999), defendant also contends that counsel's alleged failure to prepare, investigate, and present all substantial defenses constitutes ineffective assistance of counsel. To successfully present this challenge, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. *Id*. A substantial defense is one that might have made a difference in the outcome of the trial. *Id*. However, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997), habeas corpus gtd sub nom *Mitchell v Mason*, 60 F Supp 2d 655 (ED Mich, 1999); *Rockey*, *supra* at 76.

Here, defendant claims he was denied a substantial defense by counsel's failure to note the discrepancy between the amount the store's computers indicated should have been deposited and the actual amount of the deposit. This, defendant argues, denied him of the defenses that (1) someone else took the money, (2) the deposit totals were incorrect, and (3) there was a computer error in listing the amounts to be deposited as higher than they actually were. The burden is on defendant to prove this claim and to the extent that the claim depends on facts not of record, "he must make a testimonial record at the trial level which evidentially supports his claim and excludes hypotheses consistent with the view that his trial lawyer represented him adequately." *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). Because no such evidentiary hearing was held, review is limited to the record. *Hedelsky*, *supra* at 387. The record reveals

that these defenses were actually raised by defense counsel and considered by the court. The court acknowledged these defenses when it stated that

> the fact that people can make mistakes is of course not to be disputed. Of course that can happen. But there hasn't been any evidence, except the argument made by Defense Counsel that there was an error made at the store on the computer, or that the bank misplaced the bags. There hasn't been any evidence of that, whatsoever.

Consequently, defendant was not denied a substantial defense.

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Jeffrey G. Collins