

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN FRANKLIN THOMPSON,

Defendant-Appellant.

UNPUBLISHED

December 11, 2003

No. 243049

Midland Circuit Court

LC No. 01-009926-FH

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant John Franklin Thompson appeals as of right his jury conviction of one count of check insufficiency of \$500 or more.¹ Thompson was sentenced as a second habitual offender² to eighteen months' probation and ordered to pay various fines. Because we conclude there was sufficient evidence to support the conviction, we affirm.³

I. Basic Facts And Procedural History

Thompson was the sole proprietor of Beck Auto Sales, a used car lot in Gladwin, which was his only source of income. Thompson maintained a commercial checking account with Comerica Bank, which he also used for personal expenses.

In late January 2001, Thompson sold a truck for \$4,000. Rather than pay Thompson directly, Dow Credit Union, the lien holder of the truck, transferred money to the buyer's account, and the buyer wrote Thompson a personal check for the truck. On January 23, 2001, Thompson deposited the buyer's personal check into his commercial account. Comerica Bank placed a hold on Thompson's deposit until it cleared. On January 24, 2001, Thompson made an unrelated second deposit for \$4,000.

Meanwhile, Dow Credit Union and Comerica Bank each called Thompson and left messages that there was a problem with the January 23 transaction. Thompson later learned that Dow Credit Union inadvertently transferred funds into the buyer's savings account rather than

¹ MCL 750.131(3)(C).

² MCL 769.10.

³ An earlier appeal was dismissed as premature. See *People v Thompson*, unpublished order of the Court of Appeals, entered May 21, 2002 (Docket No. 241070).

the buyer's checking account. Dow Credit Union fixed the problem within a week. Comerica Bank returned the buyer's check for insufficiency of funds and withdrew Thompson's deposit from his commercial account on January 23, 2001. However, Thompson, who assumed that the check was properly credited to his account, wrote checks, several of which were later returned unpaid by Comerica Bank.

On February 22, 2001, Thompson purchased a new door for his home and wrote a check for \$595.81 to Lowe's. Comerica Bank received the check for presentment on February 26, returned the check to Lowe's unpaid, and assessed Thompson a return fee on February 27. Comerica Bank ultimately returned the check twice. Comerica Bank sent Thompson a notice of non-sufficient funds after each rejected presentment as part of its usual course of business. Douglas D. Rosier, Jr., a Comerica Bank fraud investigator, testified that Thompson should have received a banking statement indicating the insufficient funds and general account activity no later than March 5 because Comerica Bank mailed account statements at the end of each month.

Heidi Naessens, the Lowe's Midland credit coordinator, testified that the Lowe's store policy was to send customers a "bad check" notice and then try to recover the insufficient checks by working with the customers, which succeeded 80 to 90 percent of the time without police involvement. In the present case, Lowe's sent three notices to Thompson's business address, which was the address printed on the check. Notices were mailed on April 11, 16, and 26, 2001, but each was returned unclaimed. Thompson testified that he did not check his mail regularly or respond to letters marked "receipt requested."

A Lowe's employee left a message regarding the check on Thompson's answering machine on March 23, but the employee did not speak with Thompson until April 13. Naessens testified that Thompson made arrangements to pay the check on April 13 and April 23, but failed to follow through on either date. Thompson testified that he arranged on May 11 to pay the check on May 14, but Naessens testified that she did not recall the conversation. Thompson paid for the purchase on May 14, 2001.

On May 3, 2001, before Thompson paid Lowe's, Lowe's turned the case over to the Midland Police Department. Detective John Oswald attempted to contact Thompson that day. Unable to reach Thompson, Detective Oswald forwarded the case to the prosecutor's office on May 11. Later that day, Thompson returned Detective Oswald's message and reported that he had already made an arrangement with Lowe's to pay the check on May 14. Lowe's reported to the police that the check had been paid on May 14, and Detective Oswald informed the prosecutor's office that funds had been recovered. Between February and May 2001, Thompson continued to patronize Lowe's without incident.

Thompson acknowledged that he knew checks written around February 22 did not clear the bank, but testified that he was unaware that Lowe's was unpaid for so long because his other checks cleared on second presentment to the bank. Thompson assumed that the check he wrote to Lowe's also cleared. At trial, Thompson testified that after the outstanding check to Lowe's was brought to his attention, he was unable to immediately remedy the situation because he was distracted by personal problems.

Thompson claimed that he had an incredible run of bad luck from January through May that prevented him from paying Lowe's more promptly. For example, Thompson had to begin home-schooling his younger daughter after she was expelled from school for calling in a bomb

threat. Thompson was also building a new home, had an altercation with a tenant to whom he rented property, his accountant died, and his truck, which he claimed his checkbook was in, burned in a fire. Thompson was later arrested for setting the truck on fire. Additionally, the police inspected his car lot in a dragnet for illegal “chop shops,” and they arrested him for assaulting his older daughter. Moreover, Thompson claimed that he was generally a poor manager of his account, stating that he had difficulty determining when funds from recent deposits would be available for withdrawal.

The prosecution countered that Thompson was a more sophisticated businessman than he claimed because he had more than twenty-three years of experience in auto sales. The prosecution pointed out that Thompson was not only bad with a checkbook, he was also reckless in his accounting practices. For example, the prosecution noted that even though Thompson knew of complications with his checking account in January and February, he expected to be made aware of problems as they arose. In fact, during the early part of 2001, Thompson frequently maintained a negative balance and relied on overdraft protection.

The prosecution charged Thompson with one count of check insufficiency over \$500 and tried him before a jury. At the close of Thompson’s case-in-chief, Thompson moved for a directed verdict, claiming that the prosecution failed to prove intent. Thompson also argued that an inference of intent was unconstitutional because the standard in a criminal case was beyond a reasonable doubt. The prosecution argued that it was proper for the jury to deliberate on the element of intent because there was at least a “scintilla” of evidence. The trial court denied the motion.

During deliberation, the jurors sent two notes to the judge. The first note questioned what would happen if they were unable to reach a decision and how long should they deliberate. The judge responded that another jury could hear the case if they failed to reach a verdict but that they should “make [every] reasonable effort to re-examine [their] position and the reasons for these positions.” The second note asked if the jurors could find Thompson guilty if they determined intent after the check was written. The judge responded,

You, the jury, must be satisfied beyond a reasonable doubt that when the Defendant wrote the check, he knew there would not be enough money to pay the check upon presentment. The defendant’s conduct, after the check is presented for payment, in responding to the notice of non-payment as outlined in CJI2d 29.5, may be considered as evidence of the Defendant’s earlier intent at the time he issued the check, if his conduct is not explained.

The jury returned a guilty verdict. At sentencing, the court stated:

I agree a bit reluctantly at least in part because I was at least satisfied that there was a reasonable defense under the circumstances of this case that Mr. Thompson wasn’t necessarily intending to issue the check without sufficient funds.

But upon examination of the transactions in the account at the time, it was at best volatile with fairly significant sums of money being deposited as well as withdrawn.

Nevertheless, two things are clear. The gentleman was taking virtually no safeguards in order to assure himself of the funds that were in the account when he was issuing the checks. And a jury of 12 people found that he issued the check with the understanding that the funds weren't there to cover them. And that conclusion needs to be respected.

Notwithstanding that fact, I'm also in agreement that the recommended terms of probation are appropriate.

Thompson moved for new trial on the basis that the evidence did not support the jury's verdict and that he was not given his constitutional presumption of innocence.⁴ After a hearing, the trial court denied the motion.

II. Sufficiency Of The Evidence

A. Standard Of Review

We review de novo challenges to the sufficiency of the evidence, taking the evidence in the light most favorable to the prosecutor and determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.⁵

B. Intent To Defraud

It is a felony to write an insufficient funds check for \$500 or more.⁶ The elements of a check insufficiency charge are (1) an intent to defraud, (2) drawing a check for payment upon a bank, and (3) knowledge that the bank account had insufficient funds to pay the check.⁷ Here, Thompson contests only the element of intent to defraud. Intent is a question for the trier of fact,⁸ and a jury's determination of the facts should be given deference.⁹ Intent may be inferred from the facts and circumstances.¹⁰

Thompson argued that he did not intend to defraud Lowe's because he believed this check, like several others that had bounced during the same period, would be paid on second

⁴ Thompson does not pursue this argument on appeal.

⁵ *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

⁶ MCL 750.131(3)(C).

⁷ *People v Chappelle*, 114 Mich App 364, 370; 319 NW2d 584 (1982), overruled in part on other grounds by *People v Bearss*, 463 Mich 623, 633 n 9; 625 NW2d 10 (2001).

⁸ *People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991), citing *People v Wirth*, 87 Mich App 41, 46-47; 273 NW2d 104 (1978).

⁹ *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998).

¹⁰ *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999), citing *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

presentment to the bank. In *People v Cimini (On Rehearing)*,¹¹ this Court held that a defendant does not have intent to defraud if he “entertained a reasonable expectation that the check would be paid upon presentation.”¹² Similarly, in *People v Coats*,¹³ this Court stated:

If at the time he negotiated the check the defendant knew that he then had insufficient funds in the bank to pay the check on presentation in the ordinary course of business but he reasonably expected that it would be paid on presentation because of, for example, an arrangement with the drawee bank, for credit or with some third person for funds, then the essential element of fraudulent intent is lacking and the prosecution must fail.^[14]

There was some evidence to suggest that Thompson believed he had more money in his account than he did for a certain period of time because of the error in processing a \$4,000 deposit the previous month, although other evidence indicated that this error had been corrected before Thompson wrote the check at issue. In any event, viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence to establish the intent to defraud based on Thompson’s conduct after the check had bounced. MCL 750.132 provides:

As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, when presented in the usual course of business, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within 5 days after receiving notice that such check, draft or order has not been paid by the drawee.^[15]

Stated another way, under this provision, failure to pay for a bounced check within five days of receiving notice constitutes prima facie evidence of intent to defraud.

In the present case, Thompson received notice of his insufficient funds in a bank statement that he would have received no later than March 5. Bank customers have “an affirmative duty to exercise reasonable care and promptness in examining bank statements,”¹⁶

¹¹ *People v Cimini (On Rehearing)*, 33 Mich App 461; 190 NW2d 323 (1971).

¹² *Id.* at 464.

¹³ *People v Coats*, 16 Mich App 652; 168 NW2d 463 (1969).

¹⁴ *Id.* at 654, quoting 9 ALR3d 719 § 5 pp 720-721.

¹⁵ MCL 750.132

¹⁶ See *Benson v Comerica Bank*, 177 Mich App 517, 520; 442 NW2d 284 (1989), citing MCL 440.4406.

regardless whether they were actually received, as long as they were made reasonably available.¹⁷

Further, Lowe's sent three notices to Thompson's business address, which was the address printed on the check, on April 11, 16, and 26, 2001. Finally, Thompson received a telephone message regarding the check from Lowe's on March 23, and spoke to a Lowe's employee about the check on April 13. Naessens testified that Thompson made arrangements to pay the check on April 13 and April 23, but failed to follow through on either date. Even taking the generous view that Thompson did not receive actual notice that his check had been returned for insufficient funds until April 13, it is undisputed that Thompson did not pay the check until over a month later. Because this well exceeds the five-day period set forth in MCL 750.132, we conclude that a rational trier of fact could have found beyond a reasonable doubt that Thompson acted with intent to defraud.¹⁸

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Pat M. Donofrio

¹⁷ See *Siecinski v First State Bank*, 209 Mich App 459, 563; 531 NW2d 768 (1995).

¹⁸ *Johnson, supra* at 723; 597 NW2d 73 (1999); *Herndon, supra* at 415.