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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0348

State of Minnesota,
Respondent,

vs.

Thomas Daryl Allen,
Appellant.

Filed November 25, 2013
Affirmed
Cleary, Chief Judge

Mower County District Court
File No. 50-CR-11-2198

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Thomas C. Baudler, Austin City Attorney, Austin, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Stephen L. Smith, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Kirk, Judge; and Smith, Judge.

U N P U B L I S H E D   O P I N I O N

CLEARY, Chief Judge

Appellant challenges his conviction of misdemeanor theft in violation of Minn. Stat. § 609.52, subd. 2(1), (5)(iii) (2010), arguing that the evidence presented during the court trial was insufficient to support his conviction. Because the evidence presented by

the state at trial was sufficient to permit the district court to find appellant guilty of theft, we affirm.

FACTS

Appellant Thomas Daryl Allen was cited for misdemeanor theft following events that occurred during a night in August 2011 after J.W. lost his cell phone. Those events were disputed during a court trial and continue to be disputed by the parties on appeal.

According to J.W. and his fiancée O.H., appellant called O.H. from J.W.'s phone to report that he had found the phone. O.H. testified that appellant told her to meet him at an area where several bars are located to get the phone back. She further testified that "there was no discussion of money over the phone." J.W. and O.H. picked up two friends on their way to meet appellant because they did not want to go to that area alone at night to meet someone whom they did not know.

J.W., O.H., and their friends arrived at the meeting location and found appellant outside of a bar. According to O.H., when she approached appellant, he "said that he wasn't going to give the phone back to us unless we gave him $20 for it." J.W. also testified that appellant "wanted $20 for the phone" and "just didn't want to give the phone up." Appellant took a phone out of his pocket and showed it to them, and J.W. and O.H. recognized it as J.W.'s missing phone. They refused to pay for the return of the phone. More friends of J.W. and O.H., who had been inside of a bar in the area, joined the group. A verbal argument began that involved the use of racial slurs. Some of the friends who were present at the time testified that appellant continued to demand $20 for the return of the phone.

According to O.H., appellant then walked around a corner of a building with the phone, a few of the friends followed him, and O.H. went to her vehicle and called the police. J.W. and O.H. did not see what happened to the phone. O.H. testified that an unidentified man who had been sitting nearby "mentioned that he had thought he [saw appellant] throw the phone over the fence." One of the friends who was present testified that he saw appellant "make a throwing motion" and was "pretty sure [that appellant threw] the phone over in the apartments across the street from the bar."

Appellant's version of the events of that night differs significantly from the version told by the state's witnesses. According to appellant, he found the phone in the middle of a street and, a few minutes later, it began to ring and he answered it. He testified that he spoke to O.H., said that he had found the phone, and agreed to give it back. He further testified that he asked, "Do you mind giving me a reward for it?" and that O.H. agreed to give him a reward of $20 and to meet him outside of a bar. But he testified that he was going to give the phone back regardless of whether he received a reward.

According to appellant, O.H. arrived at the bar with two vehicles full of people, and even more people emerged from the bar. He testified that he was surrounded by people before he could give O.H. the phone and that the situation got "heated" and a fight was about to break out. He stated that the police then arrived on the scene, the circle of people dispersed, and he set the phone on a bench and walked away.

Police officers arrived after receiving a report of a theft. Officer Ryan Jones, one of the officers to respond, testified that several individuals told him that appellant had

"said that he required a finder's fee or requested $20" for the return of the phone. Officer Jones spoke to appellant, who said that he did not have the phone, and did a pat-down search of appellant. The phone was never recovered, and appellant was cited for theft.

Following the court trial, the district court found appellant guilty of misdemeanor theft in violation of Minn. Stat. § 609.52, subd. 2(1), (5)(iii). The court found that appellant committed theft "by demanding a reward for the return of a phone he had found [and] denying possession to the owner/possessor when no reward was paid." The court further found that "the testimony of the victim(s) and witnesses [was] credible in all major respects" and that there was "no credible evidence that [appellant] intended to return the phone without payment." This appeal follows.

D E C I S I O N

Appellant argues that the state failed to present sufficient evidence at trial to prove him guilty of theft in violation of Minn. Stat. § 609.52, subd. 2(1), (5)(iii). When reviewing a challenge to the sufficiency of the evidence following a court trial, the findings of the district court are entitled to the same weight as a jury verdict. *State v. Thompson*, 544 N.W.2d 8, 11 (Minn. 1996). Appellate review of a claim of insufficient evidence involves "a painstaking analysis of the record" to determine whether the evidence, viewed in the light most favorable to the conviction, was sufficient to permit the fact-finder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The appellate court must assume that the fact-finder believed the state's witnesses and disbelieved any evidence to the contrary, *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989), and this is especially true when resolution of the case depends on

conflicting testimony. *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). The verdict should not be disturbed if the fact-finder, "acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [the] defendant was proven guilty of the offense charged." *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

A person commits theft if he or she "intentionally and without claim of right takes, uses, transfers, conceals or retains possession of movable property of another without the other's consent and with intent to deprive the owner permanently of possession of the property." Minn. Stat. § 609.52, subd. 2(1). A person also commits theft if he or she "intentionally commits any of the acts listed in [subdivision 2] but with intent to exercise temporary control only and . . . the actor intends to restore the property only on condition that the owner pay a reward or buy back or make other compensation." *Id.*, subd. 2(5)(iii).

Intentionally takes, uses, transfers, conceals, or retains possession of movable property of another

It is undisputed that appellant found J.W.'s missing cell phone; that a phone conversation occurred between appellant and O.H. during which appellant reported that he had found the phone; and that appellant and O.H. agreed to meet for the return of the phone. According to the testimony of J.W. and O.H., when they met appellant, he took a phone out of his pocket that they recognized as J.W.'s phone. Also according to J.W., O.H., and their friends who testified at trial, appellant refused to return the phone without

receiving a reward. The phone was never returned to J.W. There was sufficient evidence presented at trial that appellant intentionally retained possession of movable property of another.

Without claim of right or the other's consent

It is undisputed that appellant found the phone and that he and O.H. made arrangements to meet for it to be returned. J.W. and O.H. did go to meet with appellant for the return of the phone. There was sufficient evidence presented at trial that appellant was without claim of right or consent to retain possession of the movable property.

With intent to exercise temporary control only and to restore the property only on condition that the owner pay a reward or buy back or make other compensation

O.H. testified that there was no discussion of a reward when she spoke with appellant over the phone. According to J.W., O.H., and their friends who testified at trial, when they met appellant, he repeatedly refused to return the phone unless he was given a $20 reward. Appellant argues that O.H. agreed to pay a $20 reward when he spoke with her over the phone and that she "reneged on this deal" and "refuse[d] to pay the reward she had promised" when the group of friends met him outside of the bar. But this court must assume that the district court believed the state's witnesses and leave the determination of witness credibility to the district court. *See Moore*, 438 N.W.2d at 108. There was sufficient evidence presented at trial that appellant intended to exercise temporary control of movable property and to restore it only on the condition that the owner pay a reward. Thus, the evidence presented by the state at trial was sufficient to

permit the district court to find appellant guilty of theft in violation of Minn. Stat. § 609.52, subd. 2(1), (5)(iii).

Affirmed.