

2013 IL App (2d) 120130-U
No. 2-12-0130
Order filed June 28, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellee)	
)	
v.)	No. 09-CF-1138
)	
JOHN W. FRANKO,)	Honorable
)	Blanche H. Fawell,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶1 *Held:* The State proved defendant guilty of theft beyond a reasonable doubt; affirmed. The DNA analysis fee is vacated, and we direct the clerk of the court to amend the mittimus to reflect a credit for each day of presentence incarceration against the mental health court and child advocacy center fines.

¶2 After a bench trial, defendant, John W. Franko, was convicted of theft under section 16-1 of the Criminal Code of 1961 (Code) (720 ILCS 5/16-1(a)(1) (West 2008)), and sentenced to 24 months probation (720 ILCS 5/16-1(b)(4) (West 2008)). On appeal, defendant contends that (1) the State failed to prove he was guilty of theft beyond a reasonable doubt, and (2) the \$200 court fee for deoxyribonucleic acid (DNA) testing should be vacated and he should receive his statutory \$5 per

day credit for time spent in presentence incarceration against his fines. Affirmed in part as modified and vacated in part.

¶ 3

BACKGROUND

¶ 4 The following facts are taken from the record. On May 20, 2008, Jessica Jimenez brought her car to defendant's body shop for repairs. At this time, defendant had her sign an agreement that included express language for a mechanic's lien. Jimenez was later informed that the party who struck her car did not have insurance and that repairs would cost over \$5,000. Jimenez told defendant she did not have the money to pay at that time but would be receiving a tax refund, which she would apply to the cost of the repairs. Jimenez expressed a desire to set up a payment plan to cover the balance of the repair costs. At no time did Jimenez give defendant consent to sell her vehicle, nor did she present him with a title to the vehicle.

¶ 5 On August 31, 2008, defendant faxed paperwork to Larry Stern in order to begin the process of obtaining a lien on Jimenez's vehicle. Defendant routinely hired Stern for assistance in perfecting mechanic's liens. Stern sent a work authorization form to the Secretary of State on September 4, 2008, which was received on September 8, 2008. Stern then completed a title search with the Secretary of State, which revealed Jimenez as the owner of the vehicle and Ford Motor Credit (FMC) as the sole lienholder. Stern sent letters via registered mail notifying both Jimenez and FMC of the impending mechanic's lien sale and placed an advertisement in the Southtown Star newspaper to provide the required 30-day notice of the impending sale. See 770 ILCS 50/3 (West 2008).

¶ 6 Stern received confirmation that FMC had received the notice, but the letter sent to Jimenez was returned to Stern as undeliverable. Due to a spelling error in Jimenez's name in the advertisement, Stern was required to repeat this process, delaying the proposed sale by 30 additional

days. Stern prepared and sent new letters to Jimenez and FMC. Again, FMC confirmed receipt of the letter, but Jimenez's letter was returned as undeliverable. As a result, on May 1, 2009, Stern filed an affidavit with the Du Page County Clerk's office stating that he had unsuccessfully attempted to give notice to Jimenez regarding the impending sale of her vehicle.

¶ 7 Without Jimenez's knowledge or permission, defendant sold Jimenez's car to Leticia Montes on September 16, 2008. Montes put \$2,000 down and provided a trade-in worth \$500. Defendant delivered the vehicle to Montes, but told her that he would not give her title to the vehicle until she had made all the payments. Rudolfo Ramirez, Montes' son and a former employee of defendant, testified that the vehicle was issued with dealer license plates. Montes later replaced the dealer plates with temporary ones. According to testimony from Stern, there was no valid lien in place at the time Montes provided the down payment and received the vehicle from defendant.

¶ 8 In February 2009, Jimenez received her tax refund and contacted defendant to arrange payment. He told her to make the payment in cash, and agreed to discuss a payment plan. Defendant did not inform Jimenez of his attempt to perfect the mechanic's lien against her vehicle, nor did he inform her that he had sold and delivered the vehicle to Montes. When Jimenez failed to show up for the meeting to remit payment for the repairs, defendant claimed he attempted to contact Jimenez but was unsuccessful in reaching her.

¶ 9 Montes testified that she made additional cash payments on the vehicle to defendant's business partner, Marc Busey, and Ramirez admitted that he witnessed one of these transactions. Defendant claimed never to have received any payments beyond the initial \$2,000 down payment and trade allowance of \$500. On February 5, 2009, defendant confronted Montes and Ramirez at Montes' home in an attempt to repossess the vehicle, at which time Montes was forced to call the

police. Despite defendant's insistence that Montes owed him money for the vehicle, after a brief investigation at the scene, the officer determined that defendant's claims were unfounded and no arrest was made.

¶ 10 Several days later, defendant and Montes went to a currency exchange in an attempt to transfer the title of the vehicle to Montes. Defendant submitted a mechanic's lien verification form prepared by Stern, and Montes submitted payment in the amount of \$143. Due to an error on the form, this transfer did not go through. The form was returned to Stern, who was then required to repeat the filing process.

¶ 11 During this time, police in Villa Park became involved in the case following complaints against defendant alleging that he had stolen several vehicles. Officer Dan McCann contacted Ramirez and on February 11, 2009, Montes and Ramirez went to the Villa Park police department to talk to McCann about the vehicle. When Ramirez told defendant he had been approached by the police, defendant told Ramirez not to talk to them, suggesting it would delay his mother's efforts to obtain title on the vehicle.

¶ 12 When contacted directly by McCann, defendant claimed that Montes had not made any additional payments on the car, and that she "owed him money." McCann asked defendant to provide the vehicle identification number (VIN) for the vehicle and proof of the mechanic's lien. Defendant did not provide McCann with the VIN, and although defendant promised to provide paperwork on the mechanic's lien, McCann never received any such documents.

¶ 13 Eventually, McCann discovered through his own investigation that Jimenez, not defendant, held the title to the vehicle, and the only lien was held by FMC. Because Montes did not have valid title, she was forced to surrender the vehicle to the Secretary of State. McCann contacted Jimenez

and informed her of the situation. She was unaware that the car had been sold and was under the impression that it would remain at defendant's shop until she was able to pay.

¶ 14 On May 9, 2009, defendant was arrested for theft and convicted after a bench trial. He filed a motion to vacate the charges, or alternatively to seek a new trial, on the grounds that the prosecution failed to prove his guilt beyond a reasonable doubt. The motion was denied, and defendant was sentenced to 24 months probation on February 1, 2012. Defendant timely appeals.

¶ 15 ANALYSIS

¶ 16 Theft

¶ 17 Defendant contends that the State failed to prove beyond a reasonable doubt that he was guilty of theft. When faced with a challenge to the sufficiency of the evidence, the relevant inquiry for a court of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The finding of guilt will be upheld unless the evidence is so “improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt.” *Id.*

¶ 18 It is the trier of fact's duty to weigh the credibility of the witnesses and to resolve conflicts and inconsistencies in their testimonies. *People v. Carney*, 229 Ill. App. 3d 690, 694-95 (1992). The reviewing court may not substitute its judgment for that of the trier of fact with regard to the weight of the evidence, the credibility of witnesses, or the resolution of conflicting testimony. *People v. Kotlarz*, 193 Ill. 2d 272, 298 (2000). If the trier of fact convicted the defendant based on evidence from testimony it reasonably believed, then the reviewing court will not disturb the verdict. *People v. Weathersby*, 383 Ill. App. 3d 226, 229 (2008).

¶ 19 The offense of theft requires the knowing exercise of unauthorized control over property of the owner with the intent to permanently deprive the owner of its use or benefit. 720 ILCS 5/16-1(a)(1) (West 2008). A person acts knowingly or with knowledge when:

“(a) *** he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists.

(b) *** he is consciously aware that such result is practically certain to be caused by his conduct.” 720 ILCS 5/4-5(a), (b) (West 2008).

¶ 20 Defendant admits that he exerted control over Jimenez’s vehicle. However, he claims that he believed he was entitled to take the car because he had a valid possessory interest in it. Defendant maintains that his lien actually had been perfected before he sold the car to Montes. Defendant’s argument lacks merit.

¶ 21 Defendant maintains that, by statute, it is the mere delivery of the necessary papers and fees to the Secretary of State that perfects a mechanic’s lien against an automobile. See 625 ILCS 5/3-202 (West 2008). Defendant claims it was reasonable to believe that his mechanic’s lien was perfected on August 31, 2008, when he submitted the necessary paperwork to Stern and the paperwork was delivered to the Secretary of State’s office on September 8, 2008, eight days before defendant sold the car to Montes.

¶ 22 Under section 3-202(b) of the Illinois Vehicle Code, a lien is perfected by the delivery to the Secretary of State of the existing certificate of title, if any, an application for a certificate of title containing the name and address of the lienholder and the required fee. “The security interest is perfected as of the time of its creation if the delivery to the Secretary of State is completed within

30 days after the creation of the security interest or receipt by the new lienholder of the existing certificate of title from a prior lienholder or licenced dealer, otherwise as of the time of the delivery.”
625 ILCS 5/3-202(b) (West 2008).

¶ 23 Here, the Secretary of State never received the appropriate paperwork to perfect the lien. In fact, Jimenez retained possession of the original certificate of title to the car, and it was never delivered to the Secretary of State, as required by section 3-202(b).

¶ 24 Moreover, Stern’s testimony that there was no valid lien in place on or before September 30, 2008, directly refutes defendant’s claim. Stern testified that the required documentation to perfect the lien was not sent to the Secretary of State before the car was sold. Additionally, the evidence indicates that defendant was still working with Jimenez on setting up a payment plan for the cost of repairs as late as February 2009, and he did not inform her at this time that the car already had been sold to Montes. Although defendant testified to a different time line and to different facts surrounding the sale of the car, the trial court clearly credited the other witnesses’ testimony over that of defendant’s, and we will not substitute our judgment for the trial court’s on credibility issues.

¶ 25 The fact that defendant did not have a valid lien and did not hold title to the car when he sold it to Montes, together with the other evidence supports the trial court’s verdict. Defendant never tendered title to Montes. Defendant told Montes’ son not to talk to the police. Defendant also refused to give officer McCann the VIN number for the car and failed to send the officer the lien on the car as promised. It is the duty of the trier of fact to judge whether the belief held was actually *bona fide* in nature. See *People v. Reans*, 20 Ill. App. 3d 1005, 1007-08 (1974) (the right to believe or disbelieve testimony as to the state of mind of defendant or the existence of the requisite felonious intent is the prerogative of the trier of fact). In this case, there was sufficient evidence presented to

the trial court to support its apparent conclusion that defendant did not have a *bona fide* belief that he had a valid lien on the car when he sold it. In this case, the question of whether defendant knew his control was unauthorized can be established by and inferred from the surrounding facts. See *People v. Greeson*, 28 Ill. App. 3d 94, 96-97 (1975). The evidence presented to the finder of fact was sufficient to support a judgment of guilty and is neither so improbable nor so unsatisfactory as to raise serious doubt of defendant's guilt.

¶ 26 Fines, Costs, and Fees

¶ 27 Finally, defendant alternatively contends that the \$200 DNA fee must be vacated and that he must be credited \$160 against the mental health court and child advocacy center fines for presentence time in custody.

¶ 28 The State agrees that the \$200 DNA fee must be vacated. Defendant is currently registered in the DNA databank. Therefore, the \$200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2008)) should be vacated because it applies to defendants who are not currently registered in the DNA databank (*People v. Marshall*, 242 Ill. 2d 285, 301-02 (2011)).

¶ 29 The State also agrees that defendant should be credited against the mental health court and child advocacy center fines for time served. Pursuant to section 110-14(a) of the Code (725 ILCS 5/110-14(a) (West 2008)), and *People v. Jones*, 223 Ill. 2d 569, 595, 606 (2006), defendant is entitled to credit in the amount of \$5 per day for each day of presentence incarceration toward the fines that were imposed. This entitled defendant to a credit of \$160 against his fines. Defendant's presentence credit exceeds the \$40 total in fines, and therefore, these fines are satisfied. See also *People v. Chambers*, 391 Ill. App. 3d 467, 469 (2009).

¶ 30 We therefore direct the clerk of the circuit court to amend the mittimus to reflect a \$5 per day credit for each day of presentence incarceration against the mental health court and child advocacy center fines. We further direct the clerk to vacate the \$200 DNA fee. See Illinois Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999).

¶ 31 **CONCLUSION**

¶ 32 For the foregoing reasons, we vacate the DNA analysis fee and direct the clerk of the circuit court to amend the mittimus to reflect a credit for each day of presentence incarceration against the mental health court and child advocacy center fines. We otherwise affirm the judgment of the circuit court of Du Page County.

¶ 33 Affirmed in part as modified and vacated in part.