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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kendall County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-324
)	
RUSSELL PULFER,)	Honorable
)	Timothy J. McCann,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The State proved beyond a reasonable doubt that defendant committed theft by deception.

¶ 2 Richard Konow gave defendant, Russell E. Pulfer, several guns and watches to sell on consignment in defendant's shop. Defendant was convicted of theft by deception after he failed to return or offer payment for the property, despite repeated requests by Konow. On appeal, defendant argues that the State failed to prove beyond a reasonable doubt that he knowingly obtained, by deception, the property with the intent to permanently deprive Konow of the use or benefit of the property. See 720 ILCS 5/16-1(a)(2)(A) (West 2010). We affirm.

¶ 3

I. BACKGROUND

¶ 4 On December 2, 2010, defendant was charged by indictment with theft, alleging that, on July 23, 2008, he knowingly obtained, by deception, control over Konow's property, which was various guns and pocket watches worth more than \$300. See 720 ILCS 5/16-1(a)(2)(A) (West 2010). On July 24, 2012, defendant was charged in a second indictment with committing the same offense between November 23, 2007, and August 24, 2010. Each charge alleged that defendant intended to deprive Konow permanently of the use and benefit of the property in that he obtained the property under a promise to sell it but without presenting payment or returning the property.

¶ 5 At the trial on February 27, 2013, Konow testified that he had been friends with defendant for 15 to 20 years and had bought and sold items at defendant's gun shop in the past. On November 23, 2007, Konow gave defendant approximately 30 guns, 17 barrels, and 2 Thompson frames to sell on consignment. Konow estimated the value of the property to be \$6,000 to \$10,000. Konow also gave defendant several watches of which defendant sold 10. The value of the watches that were sold was approximately \$605. When Konow brought in the items to be sold, he expected defendant would forward payment or return any unsold items within six months to a year. However, defendant never forwarded any money.

¶ 6 Between November 23, 2007, and August 3, 2010, Konow called defendant about three times to check on defendant's progress and inquire about payment. Upon learning that defendant had sold some of the property without forwarding payment, Konow called defendant two or three times and demanded that his property be returned. On July 12, 2009, defendant responded by sending Konow a list of 31 guns, each with an approximate value and a notation of whether it had been sold. Defendant returned the unsold watches but did not forward any payment for the

items he had sold, and he did not return any other unsold property.

¶ 7 On August 3, 2010, Konow sent defendant a letter requesting payment for the items he sold. The letter, which was admitted into evidence, states as follows:

“In November of 2007, I brought into your shop guns & watch’s [sic] for you to sell for me. You sold (19) guns, (2) Thompson Frame’s [sic], (17) Barrels, & (10) Pocket Watches[;] as of August 3, 2010, I still have not received any monies for said item’s [sic]. I think I have been extremely patient with waiting for your response’s [sic] or payment. I now need payment for all property sold within 14 days or further action will have to be taken.”

¶ 8 Over the next week, Konow called defendant several times and left voicemail messages. Defendant did not answer or return the calls.

¶ 9 On August 15, 2010, defendant sent a written response, stating as follows:

“Thanks for being so patient, I have been in and out of the Hospital along with the wife over the past year (11 mo) with some serious problems (Michael) despite what rumors everyone has heard I will be back in the shop around the 22nd (give or take a day or two) I will call you then and we will get together and settle up with the remaining guns and money. Again. Thanks.”

¶ 10 On cross-examination, Konow admitted that he delivered his property to defendant voluntarily and that they did not agree on a time frame for selling or returning the property. Although Konow spoke to defendant a few times to check the status of the sales, the first time Konow demanded the property or the proceeds was August 3, 2010. Konow acknowledged that, when he learned that defendant had sold some of his guns, he did not demand payment but only asked for the return of the unsold items.

¶ 11 On redirect examination, Konow testified that, after the parties' correspondence in August 2010, he made several attempts to meet defendant, but defendant repeatedly gave excuses for his unavailability. Defendant never sent Konow any form of payment. Defendant was arrested on October 29, 2010, which was about three months after Konow sent his letter demanding payment.

¶ 12 Defendant testified that he has owned Pulfer Guns in Newark, Illinois since 1984. He is licensed by the Bureau of Alcohol, Firearms, Tobacco, and Explosives (ATF) as a firearms dealer. Defendant recalled that, in November 2007, Konow brought watches and guns into his shop to sell on consignment. Konow said he preferred cash, but the parties did not agree on when the property would be sold or when payment would be made. The parties left the agreement "open-ended." At the time, defendant believed that he was obligated to pay Konow only after everything was sold. From November 2007 to August 2010, Konow periodically came into the store, and the parties talked about hunting and how the sales of guns were going, but Konow did not ask for any money or unsold property.

¶ 13 Defendant testified that, in July 2010, he returned some of the watches to Konow. At the time, defendant believed that Konow still wanted him to sell the remaining items. After receiving Konow's letter demanding payment for all the property, defendant called Konow several times and left messages but received no response. Defendant sent the August 15, 2010, letter because he could not reach Konow by telephone. Defendant insisted in his letter that they meet at his shop because Konow wanted to be paid in cash, which defendant did not want to send in the mail. Defendant testified that his shop operated during its usual business hours around the time Konow demanded payment. Defendant did not recall receiving any telephone messages from Konow after Konow sent his letter. Defendant admitted on cross-examination that he

received \$605 for the 10 watches he sold but that he never forwarded any of the proceeds.

¶ 14 The trial court found defendant guilty of theft by deception, sentenced him to 24 months' conditional discharge, and ordered him to pay \$6,560 in restitution. The court stated that "Well, having considered the evidence that was presented, having considered the credibility of the witnesses as they testified, I believe the State has met its burden of proof. I don't find the defendant's testimony that his theory -- or his theory of the case -- that since we didn't specify a specific date or time for the items to be returned, therefore I essentially don't have to return them at any time until everything is sold. I don't find that testimony on his part to be believable. I believe that the evidence here is that he did deceive Mr. Konow and I'm going to enter a finding of guilty."

¶ 15 On March 15, 2013, defense counsel moved for a new trial and for reconsideration of the guilty finding, and those motions were denied on May 6, 2013. Referring to the testimony at trial, the court reiterated that "Mr. Konow was credible and the defendant was not and so I'm going to deny both motions." On May 7, 2013, defendant filed a timely notice of appeal.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant argues that the State failed to prove him guilty beyond a reasonable doubt of theft by deception and therefore, he is entitled to a reversal of his conviction. Defendant contends that the evidence was insufficient to find that he knowingly obtained, by deception, property with the intent to permanently deprive Konow of the use or benefit of the property when Konow gave defendant the guns and watches to sell at his shop.

¶ 18 We note that count I charged defendant with committing the offense on July 23, 2008, and count II alleged that he committed the offense between November 23, 2007, and August 24, 2010. The trial court did not specify the charge under which defendant was found guilty, but for

purposes of our analysis, we conclude that defendant was convicted under count II. Count I was subsumed by count II because the date alleged in the former was included in the time period alleged in the latter. Moreover, the undisputed evidence showed that Konow gave defendant all of the property at issue on November 23, 2007, which was alleged only in count II.

¶ 19 When a criminal conviction is challenged based on the sufficiency of the evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, will determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004) (quoting *Jackson v. Virginia*, 443 U.S. 307,319, (1979)). A reviewing court will not retry the defendant when considering a challenge based on the sufficiency of the evidence. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 20 A person commits theft when he or she knowingly obtains by deception control over property of the owner; or intends to deprive the owner permanently of the use or benefit of the property. 720 ILCS 5/16-1(a)(2)(A) (West 2010). To convict a defendant of theft by deception, the State must prove that (1) the victim was induced to part with his property; (2) the transfer was based on the deception; (3) the defendant intended to permanently deprive the victim of the property; and (4) the defendant acted with specific intent to defraud the victim. *People v. Kotlarz*, 193 Ill. 2d 272, 299 (2000).

¶ 21 Whether the defendant acts with specific intent to defraud is a question of fact and may be proven by circumstantial evidence because direct evidence is rarely available. *People v. Lighthall*, 175 Ill. App. 3d 700, 706 (1988). Thus, intent to defraud may be inferred from the

facts and circumstances surrounding the transaction. *Lighthall*, 175 Ill. App. 3d at 706. Questions of fact regarding specific intent to defraud and inferences to be made from the evidence are for the finder of fact and will not be set aside unless the evidence is so unsatisfactory that it raises a reasonable doubt of the defendant's guilt. *Lighthall*, 175 Ill. App. 3d at 706.

¶ 22 The State introduced evidence supporting an inference that defendant induced Konow to part with his guns and watches because he had a previous business relationship with defendant, who told Konow that he would sell the property for him. Konow was friends with defendant for 15 to 20 years, and during that time, Konow had bought and sold items at defendant's gun shop. The transfer was based on deception because the evidence supports the inference that defendant falsely told Konow that he would sell the guns and watches on consignment and forward the proceeds.

¶ 23 The State also introduced evidence supporting the inference that defendant intended to permanently deprive Konow of his property because defendant did not return any of the unsold guns or forward payment for any of the property for more than three years. Defendant argues that the State failed to prove his intent to permanently deprive Konow of the property because it is undisputed that defendant, in fact, sold some of the watches and guns. However, defendant never forwarded the proceeds from those sales. From November 23, 2007, to August 3, 2010, Konow called at least three times to check on defendant's progress and inquire about payment. After Konow learned in July 2009 that defendant had sold some of the property without forwarding the proceeds, he called defendant and demanded that the remaining property be returned. Defendant did not return Konow's phone calls at that time. Furthermore, on August 3, 2010, Konow sent a letter requesting payment and followed up with telephone calls and voice

messages that were not acknowledged. Defendant responded with a letter promising to settle up with Konow, but defendant did not follow through by providing Konow with any property or compensation.

¶ 24 The trial court was in the best position to assess the witnesses' credibility and found Konow to be credible and defendant to be not credible. The court rejected defendant's testimony that he did not intend to permanently deprive Konow of his property. The court rejected defendant's position that, because the parties had not agreed on a specific date or time for the items to be returned, defendant could retain possession of the unsold items and the sale proceeds until all the items were sold. The court's credibility determination supports the inference that defendant's assurances were a deceptive, self-serving delay tactic that he used to conceal his specific intent to defraud Konow.

¶ 25 Defendant relies on cases that are factually distinguishable. Defendant contends that this case is like *People v. Reich*, 241 Ill. App. 3d 666 (1993), where the defendant was convicted of theft by deception in that he, over the course of eight months, fraudulently induced the complainants to enter into a contract for the construction of a home. The project was plagued by cost overruns and shoddy work. On appeal, the State argued that the defendant's impractical methods and substandard equipment, when viewed in light of his knowledge and experience in the construction business, established that he never really intended to perform on the contract. *Reich*, 241 Ill. App. 3d at 671. The appellate court disagreed, noting that the defendant's business consisted mainly of installing foam insulation and building additions to existing homes and that defendant was "obviously not an experienced home builder." *Reich*, 241 Ill. App. 3d at 671. The court concluded that "[d]isplaying poor workmanship, however, is not a crime, and the State's contention that defendant merely 'put on a show, went through the motions, in order to

slowly bleed [the complainants] of all the money they had' is not supported by the record.” *Reich*, 241 Ill. App. 3d at 671. The court held that the evidence of the defendant's poor workmanship, even in conjunction with his construction experience, was “simply insufficient to establish an intent to defraud on defendant's part.” *Reich*, 241 Ill. App. 3d at 671. Unlike in *Reich*, where the defendant partially completed the construction project, the evidence in this case shows that defendant did not partially perform according to the consignment agreement. Defendant sold some of Konow's items, but he neither forwarded the sale proceeds nor returned the unsold items after repeated demands by Konow.

¶ 26 Defendant also relies on *People v. Jensen*, 103 Ill. App. 3d 451 (1982), where the defendant, through use of a “sob story,” deceived several victims into lending him money. They did not specify that the money needed to be repaid, but the defendant stated that he would repay the money. The appellate court reversed the defendant's conviction of theft by deception, holding that the defendant's repayment declarations were not proven false and that the lack of repayment did “not necessarily negate an intention to repay.” *Jensen*, 103 Ill. App. 3d at 455. Here, Konow was induced to give his property to defendant based on upon defendant's false assurances that he would sell the property on consignment. The circumstantial evidence of defendant's actions after Konow demanded payment of the sale proceeds shows that, when defendant entered into the agreement, he never intended to pay or return the property. Defendant responded to Konow's demands by giving him “the runaround” to avoid returning the unsold items or providing any payment.

¶ 27 If this court were to consider the evidence *de novo*, we might reach a different result, but as a reviewing court, we shall not retry defendant and we afford the judgment substantial deference. When considering all of the evidence in the light most favorable to the prosecution,

we conclude that a rational trier of fact could have found the essential elements of theft by deception beyond a reasonable doubt. See *Cunningham*, 212 Ill. 2d at 278.

¶ 28

III. CONCLUSION

¶ 29 For the preceding reasons, the judgment of the circuit court of Kendall County is affirmed.

¶ 30 Affirmed.