2011 IL App (4th) 100342-U

Filed 9/15/11

NO. 4-10-0342

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
MARICELA NASIR,	)	No. 09CF1427
Defendant-Appellant.	)	
	)	Honorable
	)	Scott B. Diamond,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justice McCullough concurred in the judgment.
Justice Appleton dissented.

ORDER

¶ 1 *Held:* (1) The trial court did not violate the best evidence rule by allowing the State to introduce photocopies of checks instead of the originals as evidence defendant committed deceptive practices.

(2) The evidence was sufficient to convict defendant of deceptive practices.

¶ 2 On March 18, 2010, following a jury trial, defendant, Maricela Nasir, was convicted of deceptive practices in excess of $150 (720 ILCS 5/17-1(B)(d), 17-1(B) (West 2008)), a Class 4 felony. On April 30, 2010, the trial court sentenced defendant to 24 months' probation and ordered her to pay $4,053.30 in restitution to J. Hoelting Produce.

¶ 3 Defendant appeals, arguing (1) the trial court violated the best evidence rule by admitting photocopies of checks as evidence she committed deceptive practices and (2) her conviction should be vacated because she was not proved guilty beyond a reasonable doubt.

¶ 4 I. BACKGROUND

¶ 5 In September 2009, the State charged defendant with one count of deceptive practices in excess of $150. Specifically, the information stated as follows:

> "[T]he said defendant, within a 90 day period, with intent to defraud and intent to obtain control over certain property of J. Hoelting Produce being produce, knowingly delivered 4 bank checks to J. Hoelting Produce, dated July 18, 2008, July 21, 2008, July 22, 2008 and July 24, 2008, drawn on National City Bank, payable to J. Hoelting Produce in the amount of $4,053.30, and signed as maker Maria Nasir, knowing said check would not be paid by the depository."

¶ 6 At defendant's jury trial in March 2010, Robert Tipsword testified he was a co-owner of J. Hoelting Produce located in Decatur, Illinois. In July 2008, defendant and/or her agent purchased merchandise from the store for defendant's business, Tasty's Chicago Grill. Initially, whoever purchased the merchandise on behalf of Tasty's Chicago Grill would personally visit the store and pay cash. However, in the middle of July, the business arrangement changed, and any order placed by defendant would be subsequently delivered and paid by check.

¶ 7 The State introduced photocopies of four checks dated July 18, 2008, July 21, 2008, July 22, 2008, and July 24, 2008, and Tipsword identified them as the checks received from defendant in exchange for merchandise purchased from J. Hoelting Produce and delivered to defendant. He testified the checks were returned unpaid from the bank for insufficient funds.

¶ 8 Tipsword testified he confronted defendant at her restaurant about the returned

checks. According to Tipsword, upon informing defendant he needed to collect on the checks, she responded, " 'I don't want to pay [them],' " or " ' I'm not going to pay [them].' "

¶ 9 Tipsword stated the checks introduced into evidence and shown to him on direct examination were not the original checks and were instead photocopies he obtained from the bank and turned over to the police. When asked whether he believed the copies were made from the "bank's electronic records," he responded in the affirmative. Tipsword admitted he could not recall who accepted the checks on behalf of his company without looking at his records. Tipsword further admitted defendant might have "come in [to the store] and prepaid" for the merchandise. He testified he first learned about the bad checks when his wife informed him that a check was returned unpaid for insufficient funds.

¶ 10 Matthew Dausman, the assistant branch manager for National City Bank, testified the photocopies, exhibit Nos. 1-4, introduced by the State are copies of the checks written on a National City Bank checking account. He further testified the copies are records made in the regular course of business at or near the time of the transaction.

¶ 11 The State introduced a copy of a July 2008 National City Bank statement for an account held by Tasty's Chicago Grill, showing from July 16, 2008, to July 31, 2008, defendant had several nonsufficient funds and overdraft charges. Further, the statement showed an ending balance of $309.11 and three stop-payment charges.

¶ 12 On cross-examination, Dausman testified the July 2008 bank statement also showed credits for $22,571.51 in deposits and $10,694.91 in miscellaneous credits. He also testified approximately $1,600 was debited from the account for various fees imposed by the bank.

¶ 13 Cory Barrows, a detective with the Decatur police department, testified he conducted an investigation regarding a complaint of possible bad checks tendered by defendant, doing business as Tasty's Chicago Grill. In the course of his investigation, he spoke with defendant about the bad checks she had written in July 2008. According to Barrows, defendant admitted writing the checks. Further, defendant told Barrows "they" were opening another restaurant in Fairview Plaza with a relative, and things were not going well at that restaurant. Defendant told Barrows "they" did not have the money to cover the checks at the time because of the problems "they" were having with the other location.

¶ 14 On cross-examination, Barrows testified defendant indicated the checks would have been paid "if Hoelting would have waited a little while and [resubmitted them]." She also told Barrows she offered to pay cash for the largest check when the driver arrived with a subsequent delivery, but Tipsword refused to make any more deliveries.

¶ 15 Before the State rested its case, it sought the admission of People's exhibit Nos. 1 through 4 into evidence (the photocopies of the checks). Defendant's counsel objected on the grounds an offering party was not allowed to introduce photocopies into evidence under the best evidence rule unless an explanation was given for why the originals were not being offered. Further, counsel argued no testimony was presented the copies accurately reflected the originals. The State argued the proper foundation for introduction of the photocopies into evidence had been laid, and it was not required to present the original checks because the photocopies were made in the regular course of business. Further, the State argued the testimony indicated the photocopies were fair and accurate copies of the originals. As explanation for why the original checks were not offered as evidence, the State noted an original check usually "goes back to the

person who wrote [it] for their records." Defense counsel disagreed and countered a check returned as unpaid will normally be returned to the person who attempted to cash it.

¶ 16 The trial court agreed with the State and admitted the exhibits under the "Business Record Rules." Further, the court stated as follows regarding the best evidence rule:

> "I'm going to take the position that I think it should be admitted under the problems of commerce today or some statute which you can also argue at a post-trial motion[.]"

¶ 17 After the State rested its case, defense counsel moved for a directed verdict, arguing the State failed to prove (1) defendant knew the checks were not going to be paid at the time she tendered them to J. Hoelting Produce, and (2) defendant had intent to defraud. The trial court determined the State established a *prima facie* case, and the issue of whether defendant committed deceptive practices was a question of fact for the jury.

¶ 18 After the trial court's denial of the motion for directed verdict, defendant testified. Defendant admitted writing the checks in question but denied her intent was to defraud Tipsword. When she wrote the checks, she believed they would be paid because money from credit cards and cash deposits were being deposited into the checking account daily. According to defendant, Tipsword sought immediate payment on all four checks when he confronted her at the store. Because she could not afford to pay all four checks immediately, she offered to pay the largest check. However, Tipsword refused her offer.

¶ 19 On cross-examination, defendant admitted she had several nonsufficient-fund charges and overdraft charges on her account in July 2008. She also admitted she had a few stop-payment charges, including a charge for stopping payment on the fourth check written to J.

Hoelting Produce in the amount of $337.54. When asked whether she kept a balance in her check register, she replied, "[to] the best of my knowledge."

¶ 20 On redirect examination, she testified she authorized a stop-payment order on the fourth check because she "didn't want anything else to bounce because it was getting to the point where it was going to get bad." She further testified she "was going to take care of [the payment] on [her] end by going to Hoelting and then taking care of the check."

¶ 21 After hearing all of the evidence, the jury found defendant guilty of deceptive practices in excess of $150. In March 2010, defendant filed a motion for new trial or for judgment notwithstanding the verdict, arguing (1) she had not been proved guilty beyond a reasonable doubt, and (2) the trial court erred by admitting People's exhibit Nos. 1 through 4 over defendant's objection. In April 2010, the trial court denied defendant's motion finding the "trial was a question of fact for the jury." Additionally, the court sentenced defendant to 24 months' probation and ordered her to pay $4,053.30 in restitution to J. Hoelting Produce.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 On appeal, defendant argues (1) the trial court violated the best evidence rule by admitting photocopies of checks as evidence she committed deceptive practices and (2) her conviction should be vacated because she was not proved guilty beyond a reasonable doubt.

¶ 25 A. Best Evidence Rule

¶ 26 Defendant argues the trial court violated the best evidence rule by allowing the State to admit photocopies of the checks rather than the originals. Specifically, defendant argues the State did not introduce any evidence the original checks were unavailable as required by the

best evidence rule. The State counters the best evidence rule was not violated for the following reasons: (1) the rule does not apply when a party seeks to prove a fact that has an existence independent of documentary evidence, (2) defendant is estopped from asserting application of the best evidence rule because she elicited extensive testimony as to the contents of the checks, and (3) even if the rule applied in this case, the court did not abuse its discretion by finding the State laid a sufficient foundation for the admission of the photocopies into evidence.

¶ 27 "The best evidence rule states a preference for the production of original documentary evidence when the contents of the documentary evidence are sought to be proved." *People v. Vasser*, 331 Ill. App. 3d 675, 685, 770 N.E.2d 1194, 1202-03 (2002). Under this rule, the original writing should be introduced into evidence unless the original is shown to be lost, destroyed, or unavailable. *Electric Supply Corp. v. Osher*, 105 Ill. App. 3d 46, 48, 433 N.E.2d 732, 734 (1982). If the original is lost, destroyed, or unavailable, the offering party must prove the following: (1) the prior existence of the original, (2) the original is currently unavailable, (3) the authenticity of the substitute, and (4) the proponent's diligence in attempting to procure the original. *Electric Supply Corp.*, 105 Ill. App. 3d at 48-49, 433 N.E.2d at 734. "The sufficiency of the evidence showing that it is not within the offering party's power to produce the original depends upon the circumstances of each case and is within the discretion of the trial court." *In re Estate of Weiland*, 338 Ill. App. 3d 585, 604, 788 N.E.2d 811, 827 (2003).

¶ 28 Here, the State failed to introduce any evidence the original checks were lost, destroyed, or unavailable when it presented the photocopies to be introduced into evidence. Therefore, strict adherence to the best evidence rule would suggest the State failed to lay the proper foundation before it sought to admit the photocopies into evidence. However, the court in

People v. Bowman, 95 Ill. App. 3d 1137, 1142, 420 N.E.2d 1085, 1089 (1981), noted "the current trend of the law of evidence away from strict adherence to 'best evidence' foundation requirements where photocopies and other duplicates of original written instruments are involved." Although the *Bowman* court determined sufficient foundation was laid for the introduction of a photocopy into evidence, the court recognized the Federal Rules of Evidence allowed the admission of a duplicate to the same extent as an original unless (1) a genuine question exists as to the authenticity of the original, or (2) it would be unfair to admit the duplicate as a substitute for the original. *Bowman*, 95 Ill. App. 3d at 1142-43, 420 N.E.2d at 1089. Accordingly, the court determined as follows:

> "[A] duplicate of a document should be admissible in Illinois to the same extent as an original unless a genuine issue is raised as to the authenticity of the original or unless it would be unfair to admit the duplicate as an original under the circumstances present in the case where the document was offered into evidence." *Bowman*, 95 Ill. App. 3d at 1143, 420 N.E.2d at 1090.

Additionally, we note the rule set forth in the Federal Rules of Evidence and in *Bowman* was recently codified in the Illinois Rules of Evidence. See Ill. R. Evid. 1003 (eff. Jan. 1, 2011) ("A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.").

¶ 29 In the present case, defendant raised no issue as to the authenticity of the original checks. Also, nothing in the record suggests it would be unfair to admit the duplicate in lieu of

the original. The witnesses testified People's exhibit Nos. 1 through 4 were photocopies of the checks defendant wrote to J. Hoelting Produce and were subsequently returned by the bank as unpaid due to insufficient funds or a stop-payment order. A proper business records foundation was laid by the bank witness for admission of the duplicate checks. Accordingly, we find the trial court properly admitted the photocopies of the checks.

¶ 30 B. Sufficiency of the Evidence

¶ 31 Next, defendant argues her conviction should be vacated because she was not proved guilty beyond a reasonable doubt. Specifically, defendant argues the State failed to prove (1) she had knowledge her bank account contained insufficient funds to cover the checks at the time the checks were tendered to J. Hoelting Produce, and (2) she had intent to defraud.

¶ 32 When considering a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Shepard*, 193 Ill. App. 3d 910, 914, 550 N.E.2d 599, 601 (1990). The trier of fact is in the best position to judge the credibility of the witnesses, and "due consideration must be given to the fact that it was the trial court and jury that saw and heard the witnesses." *People v. Wheeler*, 226 Ill. 2d 92, 114-15, 871 N.E.2d 728, 740 (2007). Accordingly, "[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." *Shepard*, 193 Ill. App. 3d at 914, 550 N.E.2d at 601. "The relevant question is whether, if 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 crime beyond a reasonable doubt." *Shepard*, 193 Ill. App. 3d at 914, 550 N.E.2d at 601.

¶ 33 To sustain its burden in a prosecution for deceptive practices, the State must prove

the following beyond a reasonable doubt: (1) defendant issued or delivered the checks in question, (2) defendant obtained money or property in return, (3) defendant knew at the time the checks were tendered that the account had insufficient funds to pay the checks, and (4) defendant acted with the intent to defraud. 720 ILCS 5/17-1(B)(d) (West 2008); *People v. Butcher*, 257 Ill. App. 3d 1051, 1054-55, 630 N.E.2d 198, 200 (1994). Additionally, a deceptive-practices conviction becomes a felony if (1) the total value of the property obtained exceeds $150 and (2) all of the transactions occurred within a 90-day period. 720 ILCS 5/17-1(B) (West 2008).

¶ 34 A deceptive-practices conviction requires the defendant have the specific intent to defraud at the time he or she tendered the check. *Butcher*, 257 Ill. App. 3d at 1055, 630 N.E.2d at 200. Therefore, intent to defraud cannot be inferred from a defendant's subsequent refusal or failure to pay the dishonored check. *People v. Bormet*, 142 Ill. App. 3d 422, 426, 491 N.E.2d 1281, 1284 (1986). The requisite intent is defined in the deceptive-practices statute as follows:

> "To act with the 'intent to defraud' means to act wilfully, and with the specific intent to deceive or cheat, for the purpose of causing financial loss to another, or to bring some financial gain to oneself. It is not necessary to establish that any person was actually defrauded or deceived." 720 ILCS 5/17-1(A)(iii) (West 2008).

¶ 35 Additionally, the deceptive-practices statute provides as follows:

> "Failure to have sufficient funds or credit with the depository when the check or other order is issued or delivered, or when such check or other order is presented for payment and dishonored on each of 2 occasions at least 7 days apart, is prima facie evidence

> that the offender knows that it will not be paid by the depository, and that he or she has the intent to defraud." 720 ILCS 5/17-1(B)(d) (West 2008).

However, "the State may not rely entirely on the statutory inference of intent but must bolster that *prima facie* showing with some corroborating evidence." *Butcher*, 257 Ill. App. 3d at 1055, 630 N.E.2d at 200. Ultimately, the question of intent to defraud is for the trier of fact to determine after considering all of the circumstances of the case. *Butcher*, 257 Ill. App. 3d at 1055, 630 N.E.2d at 200.

¶ 36 In the present case, the jury's determination defendant was guilty of deceptive practices was supported by the evidence adduced at trial. First, the checks in question were not isolated bad checks but were instead part of a series of bad checks tendered by defendant at this time. As shown in defendant's July 2008 bank statements, defendant was assessed numerous fees for overdraft charges, nonsufficient funds, and stop-payment charges throughout the month of July. In particular, she was assessed a nonsufficient-fund fee and an overdraft charge a few days prior to writing the first check at issue. Because defendant was assessed multiple fees for nonsufficient-fund charges and overdraft charges during the month of July, the jury could reasonably infer she was aware insufficient funds were in the account to cover the checks tendered to J. Hoelting Produce.

¶ 37 Additionally, certain testimony by Barrows and Tipsword could be viewed by the jury as establishing defendant's intent to defraud. Barrows testified plaintiff admitted writing the checks and explained "they" were having money problems because of difficulties with opening a new restaurant, which resulted in insufficient funds in the checking account when the checks

were presented for payment. Although defendant testified this statement was not an indication of her state of mind when she tendered the checks to J. Hoelting Produce, the jury was not required to accept her testimony and was allowed to make its own credibility determinations.

¶ 38 According to Tipsword, when he confronted plaintiff about paying the checks, she responded, " 'I don't want to pay [them]' " or " 'I'm not going to pay [them].' " Defendant, citing *Bormet*, 142 Ill. App. 3d at 426-27, 491 N.E.2d at 1284, argues this testimony cannot be used by the jury as evidence of her intent to defraud. In *Bormet*, 142 Ill. App. 3d at 426-27, 491 N.E.2d at 1284, the court determined a defendant's subsequent act of not paying a dishonored check could not be used as corroborating evidence to support the inference of intent to defraud created by section 17-1(B)(d) of the deceptive-practices statute. However, unlike in *Bormet*, 142 Ill. App. 3d at 427, 491 N.E.2d at 1284, this was not the only evidence presented to the jury on the issue of whether defendant had intent to defraud.

¶ 39 Also, the stop-payment order on the fourth tendered check and the numerous insufficient-fund fees assessed on defendant's account could be viewed as further evidence of defendant's intent to defraud. Defendant relies on *People v. Ogunsola*, 87 Ill. 2d 216, 221, 429 N.E.2d 861, 863-64 (1981), to argue this evidence cannot be used as corroborating evidence of intent. In *Ogunsola*, 87 Ill. 2d at 221, 429 N.E.2d at 863-64, the supreme court determined it was error to fail to instruct the jury regarding the necessity of finding defendant had the intent to defraud at the time the check was tendered, in addition to knowledge the check would not be paid by the depository. In the present case, the jury was instructed it had to find defendant acted with intent to defraud and that term was defined for the jury. Defendant contends *Ogunsola* stands for the proposition a stop-payment directive by the drawer of a check can never be considered as

evidence of intent to defraud. As the supreme court clarified, however, "[e]specially where there is a dispute whether a debt is owed, such an inference [of fraud] seems contrary to common sense." *Ogunsola*, 87 Ill. 2d at 221, 429 N.E.2d at 864. There was no evidence before the jury of any dispute regarding the goods provided to the defendant or that payment was owed. Indeed, defendant testified she stopped payment on the fourth check, not because of any dispute with the seller, but simply because she knew the check would bounce. The evidence here showed defendant (1) was assessed numerous fees for nonsufficient-fund charges and overdraft charges during July, including charges on two unpaid checks a few days prior to her writing the first dishonored check at issue here; (2) tendered a fourth check to J. Hoelting Produce in exchange for merchandise and subsequently authorized a stop-payment order on the check because she "didn't want anything else to bounce"; and (3) made a statement to Barrows that could reasonably be interpreted by the jury as establishing her intent to defraud.

¶ 40 The evidence here was sufficient to raise questions of fact concerning defendant's knowledge the checks would not clear and her intent to defraud. We cannot say, after viewing all the evidence in the light most favorable to the State, no rational trier of fact could find defendant guilty beyond a reasonable doubt.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal.

¶ 43 Affirmed.

¶ 44 JUSTICE APPLETON, dissenting:

¶ 45 I respectfully dissent from the majority's disposition on the basis that I find insufficient evidence of defendant's intent to defraud, especially in light of the fact that the authorities did not pursue charges against defendant until 14 months after the utterance of the checks, coincidentally, shortly after defendant filed a petition for bankruptcy.