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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0390**

State of Minnesota,
Respondent,

vs.

George Maurel Carroll,
Appellant.

Filed May 6, 2008
Affirmed
Minge, Judge
Hon. Barbara R. Hanson

Clay County District Court
File No. K8-05-1255

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Brian J. Melton, Clay County Attorney, Heidi M.F. Davies, Chief Criminal Clay County Attorney, 807 North 11th Street, Moorhead, MN 56561 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges his conviction of theft by swindle, arguing that the evidence is insufficient to prove that he took his employer's property or that he intended to swindle his employer. We affirm.

FACTS

Appellant George Carroll began working for Comfort Masters Mechanical (CMM) on February 10, 2003. CMM is a heating, ventilation, and air-conditioning company. Although CMM employees are required to have their own tools, they are authorized to charge them on CMM's account. CMM deducts money from employees' paychecks to pay for the tools.

Carroll needed tools when he began working at CMM. To obtain them, he charged tools on CMM's account. About a year after Carroll began working for CMM, it noticed that his charges had become excessive. On March 6, 2004, Carroll's supervisors told him he could no longer charge tools on the CMM account without pre-approval. It had also come to CMM's attention that Carroll was moonlighting, in violation of company policy, and CMM asked him to stop.

Because Carroll continued to make purchases on the company account, engaged in unauthorized moonlighting, and bought two furnaces for his personal customers, CMM terminated his employment on October 15, 2004, and reported his conduct to the county attorney. Carroll was charged with one count of theft by swindle, in violation of Minn. Stat. § 609.52, subds. 2(4), 3(3)(a) (2004).

At trial, a CMM employee testified that Carroll had purchased a total of \$2,146.20 after March 6, 2004, without authorization. This included \$1,593.28 for two furnaces purchased for unauthorized moonlighting jobs. Carroll's supervisor also testified that when confronted about the furnaces, Carroll told him to take the cost of the purchases out of his paycheck. CMM testified that although Carroll had paid back a significant amount through deductions to his paycheck, Carroll was charging the account at a faster rate than he was repaying CMM and still owed a substantial amount to CMM.

Carroll testified that he was not told until one month prior to his termination that he could not make purchases without prior approval, and that he had received prior approval from CMM's owner for the purchases of the two furnaces. He also testified that he paid off all of his purchases, and that he always disclosed his name when making purchases on the CMM account.

The jury found Carroll guilty of theft by swindle. He later pleaded guilty to a separate theft-by-swindle charge and to a charge of failure to register as a sex offender. The plea agreement called for all three convictions to be sentenced concurrently. Carroll was sentenced to an executed prison term of 13 months for the three convictions. This appeal follows.

DECISION

On appeal, the issue is whether there is sufficient evidence to sustain a conviction of theft by swindle. "When reviewing a claim for sufficiency of the evidence, we are limited to ascertaining whether, given the facts in the record and any legitimate inferences that can be drawn from those facts, a jury could reasonably find that the

defendant was guilty of the charged offense.” *State v. Asfeld*, 662 N.W.2d 534, 544 (Minn. 2003) (quotation omitted). We assume that the jury believed the state’s witnesses and disbelieved any contrary evidence and view the evidence in the light most favorable to conviction. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). Despite the foregoing, the jury must have acted with due regard for the presumption of innocence and the necessity of overcoming that presumption by proof beyond a reasonable doubt. *State v. Combs*, 292 Minn. 317, 320, 195 N.W.2d 176, 178 (1972).

If a conviction is based on circumstantial evidence, the court applies a more stringent standard.¹ *Bernhardt v. State*, 684 N.W.2d 465, 477 (Minn. 2004). Circumstantial “evidence is entitled to the same weight as any evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of guilt.” *Bias*, 419 N.W.2d at 484; *see also State v. Walen*, 563 N.W.2d 742, 750 (Minn. 1997). Because the jury is in the best position to evaluate circumstantial evidence, its verdict is entitled to deference. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

¹ In *Bernhardt*, our supreme court adopted the definitions of direct and circumstantial evidence found in Black’s Law Dictionary. Direct evidence is defined as “[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” *Bernhardt*, 684 N.W.2d at 477 n.11 (alteration in original) (quotation omitted). Circumstantial evidence is “[e]vidence based on inference and not on personal knowledge or observation” and “[a]ll evidence that is not given by eyewitness testimony.” *Id.* (alterations in original) (quotation omitted).

A. Proof of Loss

The first issue is whether the state failed to prove theft because Carroll paid CMM what he owed them. A person commits a theft when he or she “intentionally and without claim of right takes . . . 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) (2004). Theft includes taking property of another with the intent to exercise only temporary control. *Id.*, subd. 2(5).

Carroll points out that his paystubs show significant payments to CMM by deduction from his paychecks. According to Carroll’s latest paystub, in 2004 he repaid CMM \$3,475 for his charged purchases. Before March 6, 2004, he had repaid CMM \$850. Thus, according to his paystubs, Carroll repaid CMM \$2,625 after that date while he only charged \$2,146.20 in that same period. Carroll maintains that this proves he repaid CMM for all of his unauthorized charges.

But at trial CMM’s administrative manager testified that Carroll had not repaid CMM for purchases made after March 6, 2004. She testified that the significant payments Carroll made only covered his earlier obligations. Furthermore, CMM’s owner testified that Carroll still owed the company between \$500 and \$1,000. Under the sufficiency of the evidence standard, we must take these statements as true. Because there is evidence that these purchases were made without the required prior approval of CMM, because Carroll charged more than he could repay, and because he undisputedly used the CMM charge account to at least temporarily obtain CMM financial resources,

we conclude that there is sufficient evidence to support the conclusion that Carroll took property of another without that person's consent and that the loss exceeded \$500.

B. Swindle

The second issue is whether the state failed to prove Carroll had the intent to swindle CMM. Theft by swindle occurs where a person “by swindling, whether by artifice, trick, device, or any other means, obtains property or services from another person.” Minn. Stat. § 609.52, subd. 2(4) (2004). Theft by swindle is “intended to reach cheats and swindlers of all kinds” and cannot be covered by a single definition, but “it may be fairly said that the statute punishes any fraudulent scheme, trick, or device whereby the wrongdoer deprives the victim of his money or property by deceit or betrayal of confidence.” *State v. Ruffin*, 280 Minn. 126, 130, 158 N.W.2d 202, 205 (1968) (quotations omitted). A conviction of theft by swindle ultimately requires an affirmative intent to defraud. *State v. Pirsig*, 670 N.W.2d 610, 615 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004); *see also State v. Flicek*, 657 N.W.2d 592, 598 (Minn. App. 2003) (stating that swindle requires showing affirmative fraudulent or deceitful behavior).

Intent may be inferred by the fact-finder from the totality of circumstances. *State v. Raymond*, 440 N.W.2d 425, 426 (Minn. 1989); *State v. Alladin*, 408 N.W.2d 642, 648 (Minn. App. 1987), *review denied* (Minn. Aug. 12, 1987). It is typically proven by circumstantial evidence. *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997). To defraud is to “cause injury or loss to (a person) by deceit.” *Black's Law Dictionary* 434 (7th ed. 1999).

Carroll argues that because he put his name on all of his purchase orders and expected the company to recover the amount of his charges through paycheck deductions, the evidence shows that he was not trying to deceive CMM. Here, Carroll continued to make purchases after being told he could not do so. The total amount of unauthorized purchases was \$2,146.20. Those purchases included two furnaces, costing \$1,593.28, for Carroll's moonlighting jobs. There was evidence that Carroll was paid by his customers for the furnaces, but that he did not repay CMM for at least \$500 of these purchases. According to Carroll's paystubs, CMM never deducted more than \$125 per paycheck.

The jury may infer that Carroll intended the natural and probable consequences of his actions. *Cooper*, 561 N.W.2d at 179. Here, there is credible testimony that Carroll obtained furnaces for his own private moonlighting business activity by using the credit of CMM. The evidence allowed the jury to conclude that Carroll was using CMM credit over its objection and that he was setting CMM up for a financial loss. It could further conclude that he had embarked on a scheme to collect money from his moonlighting customers and to finance that independent work by using the unauthorized credit of his employer all at the risk that the scheme would collapse with his having spent his customers' money and CMM having paid for their furnaces.

Carroll's actions are akin to writing an unauthorized check. *See* Minn. Stat. § 609.52, subd. 2(3)(i) (2004) (stating theft by false representation occurs where one uses a check knowing he is "not entitled to draw upon the drawee therefor [sic] or to order the payment or delivery thereof"). Carroll held out that he was authorized to purchase expensive items on CMM's account knowing that he was not so authorized. The

definition of “swindle” is broad enough to reach this “betrayal of confidence.” *See Ruffin*, 280 Minn. at 130, 158 N.W.2d at 205. We conclude that the evidence is sufficient to support the jury verdict.

Affirmed.

Dated: