2011 IL App (4th) 110387-U

Filed 12/16/11

NO. 4-11-0387

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

STEVE BRINK,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
JO ANN GULLY,	)	No. 08LM1
Defendant-Appellant.	)	
	)	Honorable
	)	William O. Mays,
	)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Where plaintiff presented evidence creating "reasonable doubt" that a completed gift of a ring occurred, the trial court's finding defendant failed to meet her burden of proof showing the ring was a gift was not against the manifest weight of the evidence.

¶ 2 In January 2008, plaintiff, Steve Brink, filed a complaint for replevin against defendant, Jo Ann Gully, seeking the return of two chairs, a canoe basket, a camera, and a diamond ring. After a three-day bench trial, the Adams County circuit court concluded defendant had failed to prove by clear and convincing evidence a completed gift of the diamond ring was made by plaintiff and thus ordered the diamond ring be returned to plaintiff. The court did not rule on the other property, finding neither party met their burden of proof.

¶ 3 Defendant appeals, arguing the trial court erred by finding plaintiff had not given her the diamond ring as a gift. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The parties began dating in 1998, and in 2001, defendant moved into plaintiff's home. The parties resided together in plaintiff's home until April 2006 when defendant moved to Missouri. Plaintiff's January 2008 replevin complaint alleged defendant had unlawfully detained several items of property that belonged to him, including a diamond ring. In March 2008, defendant filed a motion to dismiss the complaint for lack of specificity, which the trial court granted. In June 2008, plaintiff filed a first-amended complaint, which described the ring as a platinum diamond ring.

¶ 6 In September 2010, the trial court commenced a bench trial on plaintiff's first-amended complaint. The court heard evidence over three days, and the trial ended in January 2011. The evidence related to the matter on appeal is as follows.

¶ 7 Plaintiff testified he had been acquainted with John "Grizzly" Slaten, a jewelry salesman, and bought jewelry from him several times. At some point, he asked Slaten to give him a call if he came across a nice diamond ring. Around summer 2001, Slaten called plaintiff about a diamond ring, and plaintiff purchased the five-diamond platinum ring from Slaten for $28,000. At trial, plaintiff had no written proof of the transaction. After the purchase, plaintiff placed the diamond ring, which he described as an engagement ring, in his pocket and went home. At home, defendant removed the diamond ring from plaintiff's pocket. Plaintiff denied giving defendant the diamond ring at that time and denied the purchase occurred around defendant's March 30 birthday. After defendant looked at the diamond ring, plaintiff put the diamond ring in his gun vault and locked the vault. Plaintiff had other jewelry that belonged to him in the vault. According to plaintiff, defendant did not have the combination to the vault.

Plaintiff did not have the diamond ring sized to fit defendant.

¶ 8 From 2001 to December 2005, plaintiff recalled taking the diamond ring out of his vault three times. On one occasion, plaintiff removed the diamond ring from his vault because defendant had asked to wear it to Sharon Borrowman's Christmas party. Another time, defendant wore the diamond ring when the parties went on "a pretty high end cruise." Defendant also wore the diamond ring to one of her company functions. On those three occasions, plaintiff did not tell defendant the diamond ring was hers. He also stated defendant needed tape on occasion to make the diamond ring fit. Moreover, plaintiff did not recall defendant telling anyone the diamond ring was a birthday gift from him. While plaintiff had given defendant a vacuum and a little silver ring, he had never bought her a birthday present that cost around $28,000.

¶ 9 In December 2005, Duane and Julie Venvertloh were at plaintiff's home for dinner. Plaintiff had known Duane since they were kids. The parties and the Venvertlohs went many places together and were good friends. The parties and the Venvertlohs were also involved in an LLC together, and plaintiff and Duane had a business relationship involving a Holiday Inn. At the December 2005 dinner, Duane mentioned he was interested in buying a Perazzi shotgun so plaintiff went to his vault and removed two Perazzi shotguns. When he removed the guns, the diamond ring was in his vault. Plaintiff and Duane then went outside with the guns and left the vault open. When plaintiff went back inside, defendant was wearing the diamond ring. Defendant showed off the diamond ring to the Venvertlohs. Plaintiff did not hear defendant tell the Venvertlohs the diamond ring was a birthday gift from him. Someone did ask a question about marriage, and plaintiff indicated no marriage was planned. Eventually, the guns

were returned to this vault but not the diamond ring.

¶ 10 According to plaintiff, defendant kept the diamond ring and hid it from him in the house. Plaintiff asked for the diamond ring back numerous times, but defendant would not give it back. Plaintiff and two of his employees searched the house but could not find the diamond ring. Defendant finally showed plaintiff a secret compartment in her jewelry box and said she kept the diamond ring there. Plaintiff later went back to the jewelry box to retrieve the diamond ring, and the diamond ring was not there. In April 2006, defendant told plaintiff the diamond ring was in a lockbox at her uncle's bank in Barry, Illinois. Around July 2006, the parties had a business meeting in Barry with the Venvertlohs, and defendant indicated she would get the diamond ring out of the lockbox for plaintiff. After the meeting, defendant was upset and refused to get the diamond ring. Also, in July 2006, plaintiff reported the diamond ring stolen to the Adams County sheriff's department. The diamond ring was insured under plaintiff's homeowner's policy.

¶ 11 Additionally, plaintiff admitted that, while he was on an airplane, he wrote defendant a note on a napkin that stated the following: "Your birthday card, the ring broke me, so this is it, but now you know I really love you. Love, Clyde." He mailed the note to defendant because he "wasn't around. " Plaintiff could not recall what year he would have written the note.

¶ 12 Defendant testified plaintiff gave her the diamond ring along with the aforementioned note written on yellow scrap paper for her birthday in March 2001. At that time, they were at plaintiff's home. The diamond ring fit her finger when she received it. Defendant testified plaintiff told her Slaten had sized it. According to defendant, plaintiff often gave her expensive gifts such as a car, tennis bracelets, diamond earrings, a watch with diamonds, and

rings. Defendant later explained a car she traded in went toward the purchase price of the new car that she said was a gift from plaintiff. Defendant denied receiving a vacuum cleaner from plaintiff. Defendant stated she did not wear the diamond ring daily and never wore the diamond ring to her job as a hairstylist. The diamond ring was kept in plaintiff's vault, and at one time, she had the combination to the vault. Defendant also stated the vault was left open most of the time. Defendant's exhibit No. 4 was a September 11, 2003, photograph of the parties, in which she is wearing the diamond ring.

¶ 13 Defendant testified the evening with the Venvertlohs at plaintiff's home happened in December 2001, not December 2005. The diamond ring did not return to the vault after December 2001. From then on, she either wore the diamond ring or kept it in a jewelry box in the master bedroom. Defendant received a ring box from Julie in March 2002 for defendant's birthday and kept the diamond ring in that box. The ring box fit into her jewelry box. In spring 2006, defendant put the diamond ring in her mother's lockbox in a bank in Barry. In surrebuttal, defendant admitted she went to the bank in Barry but decided not to put the diamond ring in the lockbox. Instead, she bought a safe and hid it in her new house.

¶ 14 Borrowman testified she had known plaintiff for years, and her son went to college with plaintiff's son. She met defendant through plaintiff. Borrowman explained she had a Christmas party at her house every year from 2000 until 2009. The parties had come to more than one of her Christmas parties. At one of those parties, defendant wore the diamond ring. Borrowman recalled a conversation between the parties, during which defendant stated plaintiff gave her the diamond ring and plaintiff denied giving defendant the diamond ring. Plaintiff told Borrowman he bought the diamond ring as an investment. When Borrowman asked if it was an

engagement ring, they both replied no. Borrowman testified she may have seen defendant wear the diamond ring on one other occasion. Defendant told Borrowman she did not wear the diamond ring because the diamonds were so big her fingers would not go together. According to Borrowman, the diamond ring seemed to fit defendant and did not have any tape on it.

¶ 15 Duane testified he was at plaintiff's home in December 2005 and was sure it was 2005 because he had three children at the time and his youngest child was born in 2005. While at plaintiff's home, plaintiff removed some Perazzi guns from the vault in plaintiff's basement. Duane did not know if the vault was left open. He and plaintiff took the guns upstairs. While they were upstairs, defendant and Julie came up the stairs. Defendant was showing Julie the diamond ring, which defendant had on her finger. Duane testified the diamond ring looked like an engagement ring, and he asked plaintiff, "When is the wedding?" Plaintiff responded, "I'm not sure I'm giving it to her yet." Defendant did not state the diamond ring was a birthday gift from plaintiff. Duane had never seen the diamond ring before that day, and he and his wife frequently socialized with the parties. After seeing the diamond ring at plaintiff's home in December 2005, Duane saw defendant wear the diamond ring on one other occasion at a Christmas party a few weeks later.

¶ 16 Julie testified she had known plaintiff for 10 to 12 years. Her testimony about the December 2005 evening at plaintiff's was similar to Duane's. She added that once Duane and plaintiff had left with the guns, defendant took her to the vault because defendant wanted to show her a diamond ring plaintiff had purchased. At the vault, defendant reached inside, grabbed the diamond ring, and put it on. Julie did not see defendant take anything else out of the vault. Julie did not remember any conversation with defendant in which defendant indicated the

diamond ring was a birthday gift from plaintiff. After the December 2005 evening, defendant stated she did not have a box for the diamond ring, and Julie bought a box and gave it to defendant.

¶ 17 Joan Upschulte testified she had known plaintiff for years from shooting at the gun club and knew defendant through plaintiff. Upschulte socialized with the parties by going out to eat after shooting at the gun club. Upschulte also went to a concert with them and stayed at plaintiff's home in the Ozarks after shooting there. Upschulte saw defendant wearing the diamond ring between 2002 and 2004. Upschulte saw the diamond ring "[a] lot" and tried it on "a lot." If Upschulte and defendant were at the gun club or in the Ozarks, defendant wore the diamond ring. Upschulte had also seen plaintiff's birthday note to defendant about the diamond ring. Many people at the gun club thought the diamond ring was an engagement ring. Both plaintiff and defendant made it clear the diamond ring was not an engagement ring. Upschulte recalled the diamond ring was a birthday gift. She and plaintiff had discussed the diamond ring and note, and plaintiff stated it was a birthday gift.

¶ 18 Bill Pounds, a former general sales manager at one of plaintiff's car dealerships, testified he had been on the same trap shooting team at the gun club as plaintiff since 2003. They would shoot once or twice a week. At times, defendant was at the gun club with plaintiff. Pounds saw defendant 10 to 12 times and never discussed a diamond ring with her or observed her showing off any ring. Pounds also knew Upschulte and saw defendant and Upschulte together. Pounds admitted he was not at the gun club to look at people's jewelry and did not pay attention to jewelry.

¶ 19 In rebuttal, plaintiff testified, in April 2000, he only paid the $1,000 difference

between defendant's trade-in and her new car. Plaintiff also testified he did not join a regular league at the gun club until 2005. According to plaintiff, defendant would have been with him at the gun club twice a year at most. Plaintiff also testified he did not become a Perazzi dealer until January 2003. In 2001, he may have had one Perazzi gun, but it was not one Duane would have been interested in.

¶ 20 Robert Yow, who bought and sold jewelry, testified the diamond ring had a retail replacement value of $40,000 to $55,000 and a wholesale value of $20,000. Yow also knew Slaten and stated he would not have sized the diamond ring. However, Slaten had people who did work for him that could size a ring. Additionally, Yow described the diamond ring as an anniversary or engagement ring and not a cocktail ring. Steve Sturhan, a jeweler, appraised the diamond ring as having a replacement value of $51,660. Sturhan also testified the diamond ring could be an engagement ring or a cocktail ring.

¶ 21 Karla Bainter, the assistant vice president of the First National Bank of Barry, testified she knew defendant and defendant did not have a lockbox at the bank in 2006 or at a prior time. Defendant's father had a lockbox at the bank, and defendant's mother was listed as the deputy. Defendant's name was not on the contract, and she would not have been allowed into the lockbox. The entry card for defendant's father's lockbox indicated it had not been entered since its rental in December 1975.

¶ 22 On April 26, 2011, the trial court entered a written order, finding defendant had failed to meet her burden of proof that a completed gift of the diamond ring had occurred. Thus, the court ordered defendant to return the diamond ring to plaintiff. On May 3, 2011, defendant filed a notice of appeal in compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008),

and thus this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 23 II. ANALYSIS

¶ 24 Defendant's sole argument on appeal is the trial court erred by finding plaintiff did not give the diamond ring to defendant as a gift.

¶ 25 When testimony is conflicting in a bench trial, a reviewing court will not disturb the trial court's findings unless they are against the manifest weight of the evidence. *Bazydlo v. Volant*, 164 Ill. 2d 207, 215, 647 N.E.2d 273, 277 (1995). "A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Bazydlo*, 164 Ill. 2d at 215, 647 N.E.2d at 277. We give such deference to the trial court, as the trier of fact, because it had a superior position "to observe witnesses while testifying, to judge their credibility, and to determine the weight their testimony should receive." *Bazydlo*, 164 Ill. 2d at 214-15, 647 N.E.2d at 276-77.

¶ 26 In this case, plaintiff brought a replevin action. "[I]n a replevin action, the plaintiff bears the burden to 'allege and prove that he [or she] is lawfully entitled to possession of the property, that the defendant wrongfully detains the property and refuses to deliver the possession of the property to the plaintiff.' " *Carroll v. Curry*, 392 Ill. App. 3d 511, 514, 912 N.E.2d 272, 275 (2009) (quoting *International Harvester Credit Corp. v. Helland*, 130 Ill. App. 3d 836, 838, 474 N.E.2d 882, 884 (1985)). In response to the replevin action, defendant asserted plaintiff gave her the diamond ring as a birthday gift. The elements necessary to establish a valid gift are "(1) donative intent and (2) absolute and irrevocable delivery of the subject property to the donee." *In re Estate of Wittmond*, 314 Ill. App. 3d 720, 730, 732 N.E.2d 659, 666 (2000). "Donative intent is intention on the part of the donor that there be a present and irrevocable

transfer of the subject gift; delivery of the gift is the means whereby the intent is given effect." *In re Estate of Poliquin*, 247 Ill. App. 3d 112, 116, 617 N.E.2d 40, 43 (1993). Moreover, donative intent is determined at the time of the alleged transfer of property. *In re Estate of Nelson*, 132 Ill. App. 2d 544, 552, 270 N.E.2d 65, 71 (1971). "What the parties did or said at the time of the transaction is what controls; not what is said later." *Nelson*, 132 Ill. App. 2d at 552, 270 N.E.2d at 71. The alleged recipient of the gift must prove a valid gift by clear, convincing, and unequivocal evidence. *Wittmond*, 314 Ill. App. 3d at 729-30, 732 N.E.2d at 666. " 'Clear and convincing evidence is defined as the quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the veracity of the proposition in question.' " *In re Nicholas L.*, 407 Ill. App. 3d 1061, 1075, 944 N.E.2d 384, 396 (2011) (quoting *In re Suztte D.*, 388 Ill. App. 3d 978, 984-85, 904 N.E.2d 1064, 1070 (2009)). While the definition uses the term "reasonable doubt," the clear-and-convincing-evidence standard amounts to more than a preponderance but does not quite reach the degree of proof necessary to convict a person of a crime. *In re Lisa P.*, 381 Ill. App. 3d 1087, 1092, 887 N.E.2d 696, 701 (2008). Defendant does not contest the shifting of the burden of proof to her.

¶ 27 While defendant presented evidence showing the diamond ring was a birthday gift from plaintiff, plaintiff presented ample evidence for which a trier of fact could have found a "reasonable doubt" existed that a completed gift of the diamond ring occurred here. The trier of fact could have reasonably found plaintiff's evidence called into question both donative intent and absolute and irrevocable delivery. Plaintiff testified he purchased the diamond ring in the summer 2001, and after allowing defendant to look at the diamond ring, he locked the diamond ring in his gun vault, which contained other jewelry belonging to him. According to plaintiff,

the diamond ring remained in his vault from the time of purchase until the December 2005 dinner with the Venvertlohs, except on three occasions when he recalled allowing defendant to wear it. When Duane asked about the diamond ring in December 2005, plaintiff indicated he had not given defendant the diamond ring yet. After that night, defendant refused to return the diamond ring. The Venvertlohs testimony supports plaintiff's description of the events. Plaintiff also testified he was the one who had the diamond ring insured.

¶ 28 Moreover, defendant's photograph could have been one of the three occasions plaintiff allowed defendant to wear the diamond ring (in his brief, he states it was the cruise without citation to his testimony to that effect) or another occasion that plaintiff forgot about. Thus, the photograph does not erase a "reasonable doubt." The birthday note also does not eliminate a "reasonable doubt." The note still makes sense with plaintiff's version of the events. Plaintiff bought the diamond ring as an engagement ring for defendant and was waiting to give it to her when the time was right, and defendant was aware of the purchase because she saw the diamond ring when he brought it home. Thus, he was broke and could not afford anything more than the note, but an engagement ring was forthcoming.

¶ 29 Defendant also argues Upshulte was the only witness that lacked "a financial interest in the outcome." However, defendant overlooks Borrowman, who stated plaintiff denied giving defendant the diamond ring at Borrowman's Christmas party. She also indicated she only saw the diamond ring one other time besides the Christmas party, which is consistent with plaintiff's version of the events.

¶ 30 Additionally, defendant spends a large portion of her briefs attacking plaintiff's credibility and his witnesses' credibility. However, it was the role of the trial court, as the trier of

fact, to assess the witnesses' credibility and to determine the weight to be given to their testimony, and not this court. *Helping Others Maintain Environmental Standards v. Bos,* 406 Ill. App. 3d 669, 688, 941 N.E.2d 347, 366 (2010). Furthermore, as the trial court noted, this case involved a large amount of conflicting testimony. It was also the trial court's duty to resolve those conflicts in the parties' evidence. *Bos,* 406 Ill. App. 3d at 688, 941 N.E.2d at 366.

¶ 31 Accordingly, we conclude the trial court's finding defendant failed to meet her burden of proof the diamond ring was a gift to her was not against the manifest weight of the evidence.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the Adams County circuit court's judgment.

¶ 34 Affirmed.