

No. 1-14-2175

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 813
)	
RAYMOND WAVER,)	Honorable
)	Paula M. Daleo,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Defendant's conviction for possession of his mother's credit card is affirmed. The State established that defendant lacked his mother's consent to use the card.
- ¶ 2 Following a bench trial, defendant Raymond Waver was convicted of the possession of the credit or debit card of another and of criminal trespass to a residence. The trial court sentenced defendant to one year in prison. On appeal, defendant contends his conviction for possession of the credit card should be reversed because the State did not prove that he knew he lacked consent from his mother to use her credit card.

¶ 3 Defendant was charged with residential burglary, aggravated identity theft, and possession of a credit card of another. As to the latter offense, the charge against defendant alleged that he "received the credit card of another, to wit: card number ending in 7931, issued to Delores Waver, without the cardholder's consent, with the intent to use it, sell it, or transfer it to a person other than the issuer or cardholder" in violation of section 17-32. A violation of that statute is a Class 4 felony. 720 ILCS 5/17-32(c)(2) (West 2012).

¶ 4 At trial, Delores Waver, defendant's mother, testified she was 86 years old and lived at 10301 Elizabeth Street in Westchester with Bruce Waver, another son. Defendant had also lived at the house at times. Delores kept her purse in the living room next to a chair and kept her credit cards and identification in her wallet with a small amount of cash.

¶ 5 Delores testified that in the past, she had given defendant her credit card to use and that defendant would reimburse her later. When Delores allowed defendant to use her card, it was not on an "open basis," meaning that defendant would ask her each time he wanted to use the card. When defendant no longer lived in the house, Delores would put the credit card in an envelope and put it under the door mat for defendant to take. She testified defendant could only use her card when he specifically asked her if he could use it.

¶ 6 In the spring of 2012, Delores and Bruce told defendant he could no longer live in the house. However, defendant was still living at the house in November 2012. Delores testified that on about November 26, 2012, defendant called her to remove some items from her house. The Westchester police were present when defendant took his belongings.

¶ 7 On November 29, 2012, Delores had a heart attack and was transported to LaGrange Memorial Hospital, where she stayed for a week. Delores did not take her purse to the hospital.

Delores testified that she did not give defendant permission to go into her house or use her credit card while she was in the hospital. She stated that defendant did not have a house key at that time. When she was discharged from the hospital, Bruce told her someone had entered the house while she was in the hospital and had gone into her purse.

¶ 8 Delores identified at trial a credit card issued by Fifth Third Bank that had been in her purse in November 2012. That credit card was entered into evidence.

¶ 9 Bruce Waver testified that he lived with Delores starting in 2006, and he corroborated her testimony about telling defendant in the spring of 2012 that he could no longer live in the house. Bruce testified that defendant had been abusive to their mother and that Delores had called the police on more than one occasion to remove defendant from the premises. Defendant, Delores and the Westchester police had a conversation in the house at which Bruce was present. During the summer of 2012, defendant returned to the house to pick up some belongings and was escorted by the police because he was not allowed to enter the house by himself. Defendant did not return to Delores' house after that day.

¶ 10 On November 29, the day that Delores was admitted to the hospital, Bruce returned to the house after work and noticed an open bag of chips in the kitchen, which he said was unusual because his mother was in the hospital and no one else was living there. Bruce scanned the house to see if anything else was out of place and saw that Delores's purse was open and on the floor next to the couch. Bruce opened Delores's wallet and found one or more credit cards were missing. Bruce called his mother at the hospital to ask if she had her credit cards. He also noticed that a set of house keys was missing from a rack in the kitchen. Bruce contacted the bank that issued the credit card to cancel it and also contacted Westchester police. Bruce testified he was

not aware that Delores previously let defendant use her card or that Delores left her card in an envelope under the doormat for defendant to use. Bruce stated that neither he nor Delores gave defendant permission to enter the house.

¶ 11 Hasamukhbhai Patel testified that in the early afternoon hours of November 29, 2012, he was working at the front desk of the Hillside Manor Hotel in Hillside. Defendant had stayed at the hotel for the previous five days and stopped at the desk to pay a portion of his bill. Patel testified that defendant offered as payment a credit card in the name of Delores Waver, and a receipt retained by Hillside Manor as proof of that payment was entered into evidence. Defendant left the hotel in a taxi.

¶ 12 Westchester Police Detective Ron Miklas testified that between 3:35 and 4 p.m. on November 29, 2012, he received a call on his police radio and went to Hillside Manor. Detective Miklas spoke to Patel about the use of stolen credit cards and asked if defendant had checked into a room. Detective Miklas then went to a room but did not locate defendant. Patel gave the detective defendant's registration card and credit card receipt.

¶ 13 Detective Miklas then spoke to Mohamed Arbani, a taxi driver, and proceeded to an assisted living facility in LaGrange where he located defendant. Upon searching defendant, the detective recovered two credit cards bearing the name of Delores Waver, including the Fifth Third Bank credit card, and a set of keys, which he stated were the keys missing from Delores's residence.

¶ 14 Following the close of the State's case-in-chief, defendant testified he was 65 years old. He denied that Delores had asked him to move out of the house. Defendant testified that his

mother had placed her credit card and cash in an envelope under the front doormat for him "50 times over the years."

¶ 15 Defendant testified that on November 29, 2012, he was being treated for heart problems at Elmhurst Memorial Hospital. Defendant said he called Delores at LaGrange Hospital before he was discharged. When asked if he and Delores discussed a credit card, defendant responded that "was the farthest thing from my mind." Upon leaving the hospital, defendant went to Delores's house, "which is what I call my residence" because he did not have his wallet. At the house, defendant retrieved his wallet. He acknowledged that he later paid for a room at Hillside Manor and then went to the assisted living facility. Defendant said his "next stop" was going to be the hospital.

¶ 16 When defendant was asked when Delores gave him permission on November 29 to use her credit card, he responded: "When I spoke with her in the hospital, I said I may be a little short of cash to get there to see you, Ma. She goes, well, you know the routine." The prosecutor raised a hearsay objection, and the trial court ruled that Delores's response to defendant's remark was inadmissible hearsay.

¶ 17 On cross-examination, defendant stated he lived in the Hillside motel for four or five days and had not lived at Delores's house since September 2012. Defendant said he and Bruce had not spoken in several years.

¶ 18 After learning on November 29 that his mother was hospitalized, defendant left Elmhurst Hospital "against medical advice" to be with her. When he arrived at Delores's house, he had a snack and looked in her purse. Defendant identified the Fifth Third Bank credit card as belonging

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to Delores and said he was allowed to use it "[o]n numerous occasions," and that he would pay her back later.

¶ 19 The following exchange then occurred in defendant's cross-examination:

"Q. On this particular day though – in November, she never gave you any permission to use any of those cards, is that right?

A. You did not hear me. When I talked to her at the hospital, I said I might have difficulty getting there. She goes, use your best --

Q. Wait, wait.

THE COURT: Wait, wait.

Q. Let me ask you –

THE COURT: Do you want to have him finish the answer?

A. Sure.

THE COURT: Answer it."

¶ 20 Defendant stated that his mother remarked: "Use your best avenue. I would like to see you."

¶ 21 Defendant admitted to using Delores's credit card to pay for a room at Hillside Manor and then proceeding to the assisted living facility to make arrangements for payment. He stated he planned to go to the hospital to see his mother after those stops.

¶ 22 In its rebuttal, the State introduced copies of defendant's two prior convictions for aggravated battery of a peace officer and one prior conviction for aggravated DUI. Defendant also entered a guilty plea in 2008 to a charge of unlawful use of an identification card. In closing

argument, defense counsel argued that according to defendant's testimony, he believed that Delores consented to his use of the credit card.

¶ 23 In finding defendant guilty of possession of Delores's credit card, the trial court noted defendant did not live in her house in 2012. The trial court found defendant's claim that he was not asked to move out of the residence was not credible, given the testimony as a whole.

¶ 24 The trial court stated:

"Also, there is no doubt in my mind that on November 29th, the defendant did not have the authority to use Delores's card. Even he stated that when he talked to his mother and told her that he might have trouble getting to that hospital to see her, she didn't say to him go and get my credit card and use it. She just said to try the best you can to get here.

I guess in his mind he believed that he had authority then to go into her purse and take her credit card."

¶ 25 The trial court found the State did not meet its burden of proving that defendant committed residential burglary; however, the court found defendant guilty of the lesser included offense of criminal trespass to a residence. The court found the State did not sustain its burden as to aggravated identity theft.

¶ 26 The court and both attorneys then discussed the charge of possession of a credit card. The court noted: "This possession of another's credit card – I am not sure how this Count 3 is charged because it says possession of another's identification card which is a Class A misdemeanor [under section 17-32(a)]." The State responded that defendant was charged under section 17-32(b) with the offense of unlawful possession of a credit or debit card. The court stated it was finding defendant guilty of criminal trespass to a residence and "straight theft" and that the third

count was not "charged correctly." The prosecutor clarified that both the statutory citation and the body of the charge referred to the offense of possession of a credit card under section 17-32(b).

¶ 27 The trial court found that pursuant to the last sentence of section 17-32(b), defendant was guilty because he was found to be in possession of two of Delores's credit cards. The court found that not only did the evidence establish that defendant possessed those credit cards with the intent to use them, defendant used one of the cards. The court sentenced defendant to one year in prison and issued a two-year order of protection against defendant as to both Delores and Bruce.

¶ 28 On appeal, defendant contends the State failed to prove that he committed the offense of possession of Delores's credit card as defined in section 17-32(b) of the Criminal Code.

Defendant contends the State did not prove that he knew Delores did not consent to his use of the card, pointing to the trial court's remark that after defendant spoke to Delores on November 29, "in [defendant's] mind, he believed that he had authority then to go into her purse and take her credit card." The State responds that section 17-32(b) does not require proof of defendant's knowledge of the cardholder's lack of consent to use the card.

¶ 29 The parties' arguments raise an issue of statutory construction. The parties do not cite, nor has this court's independent research revealed, any Illinois cases describing the elements of section 17-32(b) in detail.

¶ 30 An issue of statutory interpretation is reviewed *de novo*. *People v. Tolbert*, 2016 IL 117846, ¶ 12. This court's primary objective in construing a statutory scheme is to ascertain and give effect to the intent of the legislature, and the most reliable indicator of that intent is the plain and ordinary language of the statute. *People v. Minnis*, 2016 IL 119563, ¶ 25. A court must view

the statute as a whole, and each word, clause and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous. *Id.* In considering a statute's language, we may contemplate the reason for the law, the problems sought to be remedied, the purposes to be achieved and the consequences of construing the statute in one way or another. *Id.* Moreover, this court presumes the legislature did not intend to create absurd or unjust results. *Id.*

¶ 31 Section 17-32(b) provides:

"A person commits the offense of possession of another's credit or debit card when he or she receives a credit card or debit card from the person, possession, custody, or control of another without the cardholder's consent or if he or she, with knowledge that it has been so acquired, receives the credit card or debit card with the intent to use it or sell it, or to transfer it to a person other than the issuer or the cardholder. The trier of fact may infer that a person who has in his or her possession or under his or her control 2 or more such credit cards or debit cards each issued to a cardholder other than himself or herself has violated this Section." 720 ILCS 5/17-32(b) (West 2012).

¶ 32 The offense of possession of another's credit or debit card, as set out in section 17-32(b), contains three elements. The first element is established when a person receives the card from the person, possession, custody or control of another.

¶ 33 The second element can be proved in one of two ways, depending upon the facts of the charged case. The second element can be proved by showing either: (1) that the person who received the card did so without the cardholder's consent; or (2) that the person received the card with the knowledge it was acquired without the cardholder's consent. This element therefore contemplates two potential ways to charge an offender under the statute: an offender who obtains

a credit card without the cardholder's consent or an offender to whom a credit card is given and who knows the card was obtained without the cardholder's consent.

¶ 34 The third element of possession of another's credit or debit card is the person's intent to use or sell the card or to transfer the card to a person other than the issuer or the cardholder.

Contrary to the position of both parties on appeal that the statute does not include a mental state, this element contains the culpable mental state of the offense.

¶ 35 We now consider defendant's suggested reading of section 17-32(b). Defendant reads the statute to include two forms of the offense. Focusing on the first half of the statute, defendant contends the State was required to prove three elements in this case: (1) receiving a credit or debit card (2) from another's person, possession, custody or control and (3) without the cardholder's consent. Defendant also sets out a "secondary offense" containing the elements of: (1) receiving a credit or debit card (2) knowing the card was acquired without the cardholder's consent and (3) with the intent to use, sell or transfer the card. Defendant does not further discuss that set of elements.

¶ 36 Next, defendant argues the set of elements relevant to his case does not include a required mental state, and he points out that every criminal offense, other than those imposing absolute liability, must include a mental state to be proved. Defendant contends that a "knowing" mental state must be read into the offense, namely that he knew he lacked Delores's consent to possess the card, and he asserts the State failed to establish that element.

¶ 37 We reject defendant's contention that the statute requires us to read a knowing mental state into its language. Where the express language of a statute provides a mental state, the court may not read into the statute a different or additional culpable mental state. *People v. Laws*, 2016

IL App (4th) 140995, ¶ 34; see also *Miller v. Department of State Police*, 2014 IL App (5th) 130144, ¶ 22 (noting that courts should not add requirements or impose limitations inconsistent with the statute's plain meaning under the guise of statutory construction). To read the statute as defendant argues would insert language that the legislature did not include. Because section 17-32(b) includes a mental state, we find inapposite the cases cited by defendant in which courts have read a knowing mental state into a statute. See, e.g., *People v. Gean*, 143 Ill. 2d 281, 288 (1991).

¶ 38 Although defendant cautions that this court should read the statute "in a way that avoids imposing criminal liability on innocent actors," his reading of section 17-32(b) does just that. Under defendant's proposed elements, a person could be charged with a felony for merely possessing a credit card without the cardholder's consent, even if the person lacked the intent to use the card. The offense of possession of another's credit card can be analogized to the offense of the possession of burglary tools, where the possession of the item is inherently innocuous and does not necessarily represent a criminal act, absent any further intent. See generally *People v. Clerk*, 68 Ill. App. 1021, 1029-30 (1979) (in offense of possession of burglary tools, where the tools can be used for both an innocent and an illegal purpose, the intent of the possessor is the "most important element" and the "offense is usually complete when tools are possessed with intent to burglarize or for another felonious purpose"). As with the intent of the offender committing the possession of burglary tools, we can conclude that the gravamen of the offense of possession of a credit card of another is the defendant's intent to use the card.

¶ 39 In conclusion on this point, the State was required under section 17-32(b) to prove that defendant possessed his mother's credit card without her consent and that defendant intended to use the credit card. The State was not required to prove that defendant knew he lacked his mother's consent to use her credit card.

¶ 40 We next consider whether the State proved defendant's guilt beyond a reasonable doubt. When a defendant has challenged the sufficiency of the evidence on appeal, this court must determine if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Fernandez*, 2014 IL 115527, ¶ 13. It is the province of the trier of fact to consider the credibility of the witnesses and determine the weight to be given their testimony and also to resolve inconsistencies and conflicts in the evidence and draw reasonable inferences from the facts presented. *People v. Bradford*, 2016 IL 118674, ¶ 12. A reviewing court will not substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of witnesses. *Id.*; *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Accordingly, on appeal from a criminal conviction, this court will not reverse the judgment of the trial court unless the evidence is so unreasonable, improbable or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Bradford*, 2016 IL 118674, ¶ 12.

¶ 41 Again, a person commits possession of another's credit card when he receives possession of the card, either without the cardholder's consent or with the knowledge that it was acquired without the cardholder's consent, with the intent to use the card. 720 ILCS 5/17-32(b) (West 2012). The State presented evidence that defendant had possession of his mother's credit card without her consent with the intent to use it. Defendant testified that he took Delores's credit card

from her purse on November 29, 2012. Delores testified that she did not give him permission to use her credit card at that time.

¶ 42 It is often only possible to prove a defendant's intent by circumstantial evidence. See generally *People v. Gharrett*, 2016 IL App (4th) 140315, ¶ 55. However, intent can also be shown by a defendant's actions. Here, defendant's intent to use the card in this case was established by his actual use of the card. On November 29, 2012, defendant used the card as payment at the Hillside Manor Hotel. Therefore, the State proved that defendant possessed the card without his mother's consent and with the intent to use the card.

¶ 43 Furthermore, defendant's conviction can be affirmed on the basis of a separate finding of the trial court, which has not been addressed by either party on appeal. The last sentence of section 17-32(b) provides that the trier of fact "may infer that a person who has in his or her possession or under his or her control 2 or more such credit cards or debit cards each issued to a cardholder other than himself or herself has violated this Section." 720 ILCS 5/17-32(b) (West 2012).

¶ 44 At trial, the State presented the testimony of Ron Miklas, a Westchester police detective, that defendant had in his possession, at the time of his arrest, two credit cards in the name of Delores Waver, including the Fifth Third Bank card that Delores identified as her card at trial. The trial court expressly found that defendant violated the statute by being in possession of two credit cards bearing her name, in addition to finding that defendant possessed the cards with the intent to use them and without Delores's consent.

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¶ 45 In conclusion, viewing the evidence in the light most favorable to the State, the elements of the offense of possession of another's credit card were established beyond a reasonable doubt. Accordingly, the judgment of the circuit court is affirmed.

¶ 46 Affirmed.