

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ROBERT MAKENS,

Defendant-Appellant.

UNPUBLISHED

October 28, 2003

No. 233458

Lenawee Circuit Court

LC No. 00-000077-AR

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant, operations manager of a pay phone provider National Communications (NCI), was convicted of larceny of a pay phone valued between \$200 and less than \$1,000, MCL 750.356(4)(a). The pay phone was owned by NCI's competitor, KNK Phones (KNK). The district court sentenced defendant to thirty days jail, eighteen months' probation, 120 hours of community service, and fines and costs. Defendant appealed to the circuit court, which affirmed his conviction and sentence. Defendant appeals to this Court by leave granted. We reverse.

Defendant argues there was insufficient evidence presented for a rational jury to find beyond a reasonable doubt that he committed larceny. In reviewing a challenge to the sufficiency of the evidence, this Court considers the evidence presented in the light most favorable to the prosecution to determine whether a rational juror could have found that the elements of the crime charged were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences arising therefrom can sufficiently establish the elements of a crime. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). To prove a criminal defendant's state of mind, minimal circumstantial evidence is sufficient. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001).

Larceny consists of the following elements: (1) the actual or constructive taking of goods or property belonging to another; (2) an asportation or carrying away; (3) the carrying away with the specific, felonious intent to permanently deprive the owner of his property; and (4) the taking

must occur without the owner's consent and against his will. *People v Cain*, 238 Mich App 95, 119-121; 605 NW2d 28 (1999).¹

The prosecution presented the jury with two theories to establish defendant's larceny conviction: (1) an agency theory; and (2) an aider and abettor theory. As to the agency theory:

At common law and under statutes declaratory thereof, one who merely advises, encourages, or procures another to commit a theft, and who is not present when the theft is committed, ordinarily is not a principal in the crime, but is only an accessory [sic] before the fact, as where he plans the larceny and furnishes instrumentalities for its commission, but is neither actually nor constructively present; *but if the agent by whom the theft is effected is not criminally responsible or has no knowledge that a crime is being committed, the person who incites or induces the act of such innocent person is the principal in the crime, and not an accessory before the fact, even though he is not present when the theft is consummated.* [52A CJS, Larceny, § 57, p 486 (emphasis added).]

Michigan courts have long recognized that a defendant's criminal liability may be predicated on actions accomplished by an agent under the advice or direction of the defendant. *People v McGuire*, 39 Mich App 308, 314; 197 NW2d 469 (1972); *People v Fisher*, 32 Mich App 28, 33; 188 NW2d 75 (1971) (noting in a larceny case that the asportation element need not be effectuated by the perpetrator of the crime, but may be accomplished by a confederate or an innocent agent), quoting *People v Alexander*, 17 Mich App 30, 32; 169 NW2d 190 (1969).

Here, a rational juror could have found beyond a reasonable doubt that defendant accomplished the taking of the KNK pay phone by advising, directing or encouraging Thompson to remove the phone. There was testimony that defendant participated in setting NCI policy requiring the removal of unidentified pay phones of NCI competitors and their subsequent placement in the NCI warehouse for "safekeeping." In addition, defendant told a state trooper that he and his brother owned and operated NCI, and that "the person that removed the payphone . . . would have been acting under his [defendant's] authority," and that he was responsible for the removal of the KNK phone.

Further, a rational jury could have found that defendant had the specific intent to permanently deprive the owner of its phone at the time it was taken. While defendant argues that the KNK phone was returned within approximately two weeks after its removal, defendant did not initiate the return of the phone to KNK. Defendant arranged for the return only after the police contacted him in regard to the missing KNK phone that the owner of KNK, Merillat, had reported stolen. Further, the prosecution presented evidence pursuant to MRE 404(b) to support the inference that when defendant had other rival companies' pay phones removed, he intended to permanently deprive them of their property. Because minimal circumstantial evidence can constitute proof of a defendant's criminal intent, and because the evidence must be viewed in the light most favorable to the prosecution, we conclude that the circumstantial evidence of record

¹ The parties stipulated that the removed KNK phone had a value between \$200 and \$1,000, MCL 750.356(4)(a).

afforded an adequate basis for the jury's rational conclusion beyond a reasonable doubt that defendant intended to permanently deprive KNK of its phone. *Nowack, supra* at 400; *Ortiz, supra* at 301.

However, we find that there was insufficient evidence to support defendant's conviction as an aider and abettor, MCL 767.39. To support defendant's conviction pursuant to an aiding and abetting theory of guilt, the prosecutor had to show that (1) the crime was actually committed, (2) defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) at the time that he gave aid and encouragement, defendant had (a) the requisite intent necessary to be convicted of the crime as a principal, or (b) knowledge that the principal intended its commission. *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001); *People v Tanner*, 255 Mich App 369, 418-419; 660 NW2d 746 (2003). "An aider and abettor must have the same requisite intent as that required of a principal. *Tanner, supra* at 419 citing *People v Barrera*, 451 Mich 261, 294, 547 NW2d 280 (1996). "To sustain an aiding and abetting charge, the guilt of the principal must be shown beyond a reasonable doubt, but the principal need not be convicted." *Id.* citing *Barrera, supra* at 294-295.

"The principal flaw in the prosecutor's theory is that there is insufficient evidence to support it." *Tanner, supra* at 421. "While the trier of fact may draw reasonable inferences from facts of record, it may not indulge in inferences wholly unsupported by any evidence, based only upon assumption." *People v Petrella*, 424 Mich 221, 275; 380 NW2d 11 (1985). Specifically, there was no evidence presented by the prosecution showing that Thompson, as a principal, intended to permanently deprive KNK of its pay phone. Significantly, in closing argument, the prosecutor argued the following in support of an aiding and abetting theory:

I told you in openings statements, I wasn't going to be able to show you that he was the one that took it right out of the ground. I told you early on I didn't even know who that was. We found out during trial that it was Andy Thompson who actually took the item out of the ground. But, I also told you that that the person who aids and assists someone in doing that is just as responsible as the person who commits the act, in this case, takes the telephone out of the ground. And in this case, [defendant] did assist, did help, did aid, did procure, did in fact help set the company policy of NCI.

The prosecution's theory was that defendant was guilty because he encouraged or assisted Thompson to remove the pay phone through NCI's phone removal policy, which defendant established. However, this theory and the evidence presented to support it does not address Thompson's culpability in removing the pay phone. While the prosecution presented evidence pursuant to MRE 404(b) to support the inference that defendant intended to permanently deprive KNK of its phone, no inference can be drawn from this evidence that Thompson also possessed this intent. The MRE 404(b) evidence was offered directly against defendant by other competitors and established only that defendant may have intended to permanently deprive them of their pay phones. Even if defendant, while intending to permanently deprive KNK of the phone, encouraged Thompson to remove the KNK phone, defendant cannot have aided and abetted the commission of the crime of larceny because no evidence was presented that

Thompson intended a larceny. “When the defendant stands convicted on one of two theories, one of which is permissible and one of which is not, the inability to say for sure on which the conviction rests demands reversal.”² *People v Acosta*, 153 Mich App 504, 510; 396 NW2d 463 (1986) citing *People v Gilbert*, 55 Mich App 168, 174; 222 NW2d 305 (1974); see also *Tanner*, *supra* at 421. Accordingly, defendant’s conviction for larceny of a pay phone valued between \$200 and less than \$1,000, is reversed. Because of our disposition of this issue on appeal, defendant’s other claims of appeal need not be addressed.

Reversed.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Brian K. Zahra

² We note that the jury did not complete a special verdict form to indicate whether defendant was found guilty of larceny as a principal or aider and abettor. Moreover, although the members of the jury were polled after delivering their verdict, they were not asked whether defendant was found guilty of larceny as a principal or aider and abettor.