COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1308 **Cir. Ct. No. 2008SC8927**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

RAJIB MITRA,

PLAINTIFF-APPELLANT,

V.

SCHMIDT'S AUTO, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JUAN B. COLÁS, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] This is a small claims action in which Rajib Mitra seeks from Schmidt's Auto, Inc., the value of a radar/laser detector system

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

that, according to Mitra, was missing when his automobile was returned to his family. The circuit court dismissed Mitra's complaint, concluding that he had not established at trial that the radar/laser system was taken from his automobile either by Schmidt's Auto or during the time the automobile was in the custody of Schmidt's Auto. For the reasons explained below, we affirm.

BACKGROUND

¶2 Mitra's automobile was seized by the Madison Police Department in November 2003 and at that time it had a radar/laser detector system. The police department did not remove the radar/laser system from the automobile. After the police department completed its investigation of the automobile, John Schmidt of Schmidt's Auto towed it to the Schmidt's Auto premises, where it was placed in a high security lot. It remained there until it was released to Mitra's mother in April 2004.

¶3 Mitra's complaint against Schmidt's Auto alleges that the radar/laser detector system was not in the automobile when it was returned to his family in April 2004, and it was not separately returned to him. The complaint alleges that the system is valued at $800 and seeks that amount from Schmidt's Auto.

¶4 At the trial de novo to the court in February 2009, Mitra testified. He also called his mother and a police officer involved in the impoundment and investigation of the automobile in November 2003.[2] John Schmidt testified for the defense. Schmidt testified that he did not know if the equipment was in or on the

[2] Mitra's father was present at the trial and was examined by the court and also examined by Mitra.

automobile when he released it to Mitra's mother, but that it was highly unlikely anyone could have removed it from the automobile while it was parked in the high security lot at Schmidt's Auto.

¶5 After the evidence closed, the circuit court made the following findings and conclusions:

> Okay. Well, the plaintiff has the burden to prove by the greater weight of the credible evidence to a reasonable certainty that this property was taken by the defendant or the defendant's employees. And there's some things that I think are clearly established by the greater weight of the credible evidence to a reasonable certainty and one of them is that there was a radar detector installed in the manner that was described by the plaintiff at the time that the police took control of the vehicle and at the time that they turned the vehicle over to Schmidt's.
>
> I think we have ample evidence in the form of the contemporaneous police reports and the testimony of Detective Zwart that the radar detector that has been described was in the vehicle at the time the police had the vehicle and at the time they turned it over to Schmidt's Towing.
>
> And the testimony I think is also credible that within a couple of days of picking up the vehicle Ms. Mitra looked through the vehicle and that's the first time that she can say definitely that there was not a radar detector in the vehicle. So there's this time during which from November until April the vehicle is parked in the secure Schmidt's parking area and then the two days when it is parked unsecured in Ms. Mitra's driveway.
>
> I think that based upon the evidence that we have here I can't conclude that the plaintiff has shown by the greater weight of the credible evidence that this item was taken during the time that Schmidt's had it or by Schmidt's Auto. I think it's equally possible—both witnesses are credible and I think it's equally possible that it was taken during the time that it was parked at Ms. Mitra's house. Both Mr. Schmidt and Ms. Mitra are credible about the precautions that are taken, and it seems to me that it's as likely that someone somehow entered the car at Ms. Mitra's house as that someone somehow entered this car at Schmidt's Auto.

> And so I'm going to deny the plaintiff's claim and I'm going to dismiss the case. Thank you, Mr. Mitra.

¶6 Mitra moved for reconsideration on the ground that the court had misconstrued his mother's testimony and, when properly construed, her testimony was that the radar/laser system was missing when Schmidt's Auto released the automobile to her. The circuit court held a telephone hearing at which Mitra appeared, and no one from Schmidt's Auto appeared. After reviewing Mitra's mother's testimony, the court concluded it had not made any material error of fact in construing her testimony and denied the motion for reconsideration.

DISCUSSION

¶7 On appeal Mitra renews his challenge to the court's assessment of his mother's testimony and contends that the court's findings of fact were clearly erroneous because of the court's misunderstanding of her testimony.

¶8 When we review a challenge to a circuit court's factual findings, we accept those findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). It is the role of the circuit court to assess the credibility of the witnesses, weigh the testimony, and resolve conflicts in the evidence. ***Rivera v. Eisenberg***, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980). This role includes construing a witness's testimony and resolving any conflicts in it. ***Thomas v. State***, 92 Wis. 2d 372, 381-82, 284 N.W.2d 917 (1979). It is also the role of the circuit court to draw inferences from the evidence, and when more than one reasonable inference may be drawn from the evidence, we accept the inference drawn by the trier of fact. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979).

¶9 Mitra testified that the radar/laser detector was mounted on the lower middle part of the automobile's windshield with two suction cups and connected to a control module which was below the dashboard to the right of the parking brake release. The system also included laser sensors placed to the left and right of the front license plate and on the rear license plate, which were connected to the control module by wires.

¶10 Mitra's mother testified on direct examination that when she took possession of the automobile from Schmidt's Auto, it did not have the device mounted by suction cups on the lower part of the windshield, and it did not have the box to the right of the parking brake release. She did not know whether there was a black box on the rear plate, and she did not testify one way or the other as to whether the automobile had a small black box mounted to the left and right of the front license plate because she could not see those on the photograph of the automobile that Mitra showed her.[3]

¶11 On Schmidt's cross-examination of Mitra's mother, he asked the following questions and received the following answers:

> Q. When you picked the vehicle up, you noticed that those—radar detector was gone?
>
> A. No.
>
> Q. When did you realize that there was something missing?
>
> A. When Rajib was double-checking to see what was there and what wasn't there when I got it home.

[3] Mitra submitted into evidence photographs of the automobile that were taken by the police when the automobile was impounded.

> Q. And approximately how long was that after you picked up the car?
>
> A. Probably a day or two. I'm not sure.
>
> Q. And he was just going—how was he communicating with you as far as what was—
>
> A. On the telephone at that time, yes.

¶12 Mitra asserts that, because the court said his mother's testimony was credible, the court was obligated to believe her answers on direct that she did not see any equipment in the automobile on the day she picked it up and was obligated to construe the testimony above to be consistent with that. In other words, according to Mitra, the court was obligated to construe his mother's testimony to mean that, although she didn't see the equipment on the day she picked it up, she didn't know that it should have been there until a day or two later, when she talked to Mitra. We do not agree.

¶13 First, the court did not state that it found credible his mother's testimony that she did not see the equipment in the automobile on the day she picked it up. Rather, the court found that "within a couple of days of picking up the vehicle … that's the first time that she can say definitely that there was not a radar detector in the vehicle…." The court's comments on the credibility of both Mitra's mother and Schmidt are made in the context of the precautions that each testified were taken when the automobile was in the custody of each.[4]

[4] Specifically, Mitra's mother testified that after she returned to her home with the automobile, it was either in the garage or in the yard, and it stayed there probably a week before it was moved again. The garage is locked and when she parks an automobile in the driveway, she locks it so that if somebody were to break into the automobile, they would have to either pick the lock or break the window or otherwise gain access to the inside of the automobile. She testified she had never noticed any signs that the automobile had been broken into after she got it home.

(continued)

¶14 Second, the court was not obligated to construe Mitra's mother's testimony quoted in paragraph 11 to be consistent with her testimony that the equipment was not in the automobile on the day she picked it up. The court was free to resolve the ambiguities in her testimony in a different way as long as it was reasonable. The distinction between seeing the equipment was not there and knowing it should have been there is not so obvious from her testimony that Mitra's proposed construction is the only reasonable one. It is also reasonable to construe her answers in paragraph 11 as saying she did not see ("notice") that the equipment was gone on the day she picked it up. The circuit court explained in denying the motion for reconsideration that this is how it viewed this testimony.

¶15 Third, other testimony of Mitra's mother gives rise to a reasonable inference that she was not certain that the equipment was not in the automobile on the day she picked it up. She testified that there was a list that she obtained when she picked up Mitra's belongings and on the list was all of the items that were

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With respect to precautions taken while the automobile was at Schmidt's Auto, Schmidt testified that the automobile was in a lot surrounded by the chain link fence that was lighted and had a video surveillance system with four cameras. The dispatch office, which is open and staffed twenty-four hours a day, is right next to this lot, and the gate into the lot is right next to the front door of the office. The automobile was not moved after he parked it, and the keys were in a secured lockbox in the office. Anyone who goes into the automobile or moves the automobile must write that on an inventory sheet that stays with the automobile; he had checked the inventory sheet, and nothing was marked on it. Because a radar detection system takes some time to be removed, it would be hard for anyone to get into the lot and remove it without being seen by an employee. Schmidt has roughly sixty employees. As for the possibility of an employee taking the equipment from the automobile, although they would have access, one employee is not left in charge of everything at one time; and in order to remove this equipment, there would have to be more than one employee involved, because an employee taking the equipment would be seen by another employee. Schmidt also testified that impounded automobiles are sealed when Schmidt's Auto receives them from the police department, and Schmidt's Auto leaves them that way. He knew that the automobile did not have any broken windows and it was not forced into. He himself never went into the automobile to determine what was inside because Schmidt's Auto does not do that with impounded automobiles.

supposed to be on or in the automobile, but she didn't remember if she picked that up before or after she obtained the automobile. She did not think that before she went to pick up the automobile Mitra told her she should expect to see a radar/laser detector in it. She also testified on re-direct, when Mitra asked her if, in checking to see that the windshield was clear, she would notice if there was a radar/laser detector mounted to the windshield: "Yes, I think I *would* have." (Emphasis added.)

¶16 Mitra does not argue that, if the court's finding is not clearly erroneous—the finding that his mother could not say definitely the radar/laser detector was not in the automobile until a day or two after picking up the automobile—the court erred in dismissing his complaint. Accordingly, we affirm the dismissal.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.