COURT OF APPEALS
DECISION
DATED AND RELEASED

June 24, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0018-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES R. BROWNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. James Brownson appeals a judgment convicting him of theft by failure to return a rented computer as a habitual criminal. He argues that the State failed to present sufficient evidence to support the conviction. He also appeals an order denying his motion for a new trial based on newly discovered evidence. He argues that the trial court improperly exercised its

discretion when it concluded that the new evidence was not likely to change the verdict. We reject these arguments and affirm the judgment and order.

Theft by failure to return rental property is committed by one who intentionally fails to return any personal property which is in his possession by virtue of a written lease or rental agreement within ten days after the lease or rental agreement has expired. *See* § 943.20(1)(3), STATS. Brownson's defense was that he was not a renter of the computer, but a purchaser, and that he did not intentionally fail to return rental property because he believed he had the right to retain the property under the sales agreement. In support of this argument, Brownson presented his own testimony and that of family members, and the written agreement with MicroRentals, focusing on the fact that the computer purchase price was included along with a statement that "MicroRentals allows purchase of the above system and will apply 70% of rental fees as discount" and Brownson's insertion "will get initial payment by 4/15/94."

The test for sufficiency of the evidence is whether the trier of fact, acting reasonably, could be convinced by evidence it had the right to believe and accept as true, that each of the elements was proved beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 756 (1990). The credibility of the witnesses and the weight of the evidence are matters for the trier of fact to determine. This court must construe the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, this court must adopt the inference that supports the verdict.

Viewing the evidence in the light most favorable to sustaining the conviction, we conclude that the State presented sufficient evidence to support the verdict. The computer was delivered to Brownson's residence on April 11, 1994.

On that date, Brownson signed the contract that cannot be reasonably construed as a sales agreement. The agreement lists the "end date" as 5/11/94 and the "rental term" as one month. The notation regarding applying part of the rental fees to any future purchase reinforces the parties' mutual intent that the payment be regarded as a rental fee. In addition, after not receiving the scheduled payment by April 15, MicroRentals sent a demand letter on April 18 to Brownson informing him of the provisions of the agreement and the potential criminal penalties for his actions. Brownson did not make the first monthly payment until April 27, 1994. When the agreement expired on May 11, 1994, MicroRentals notified Brownson that the rental agreement had ended and demanded return of the computer. On May 11, at the time the rental contract expired, Brownson had not yet returned the computer and had not tendered payment for the computer if he believed he was buying it.

Brownson's knowledge that the contract was a rental agreement and not a purchase agreement is shown by his own correspondence to MicroRentals in which he referred to the rental agreement. The letters from MicroRentals and a telephone conversation also belie Brownson's testimony that he believed that he had the right to retain the computer. Brownson's belated sporadic payments are not sufficient to invoke any rights he may have had to purchase the computer and do not establish his lack of knowledge that he was required to return the computer, particularly since the payments were only made after threat of prosecution.

After the trial, Brownson discovered a MicroRentals ad in the Yellow pages for the Oshkosh telephone directory that indicated that MicroRentals provided "Rent-to-Own" services. Brownson contends that this newly discovered evidence entitles him to a new trial because it impeaches the testimony of MicroRentals' owner and employee who testified that they did not provide that service.

The trial court properly exercised its discretion when it concluded that this new evidence was not reasonably likely to produce a different result in a new trial. *See* ***State v. Coogan***, 154 Wis.2d 387, 394-95, 453 N.W.2d 186, 188 (Ct. App. 1990). A different result in a new trial is improbable for several reasons. First, Brownson had not seen the ad at the time he signed the agreement with MicroRentals. The ad was placed in the fall, 1992 directory which had expired by the time the parties entered the contract. Existence of the ad had no effect on Brownson's expectations regarding his duties under the rental agreement. Second, MicroRentals' owner's and employee's testimony that they had never advertised a rent-to-own business was not an important question at trial. The question was whether their agreement with Brownson was a rental or sales agreement. The question of whether they had ever agreed to rent-to-own contracts with anyone has little to do with their conduct and expectations in this case. Brownson contends that the new evidence would undermine their credibility. Their credibility was not a substantial issue in the case. The trial court relied primarily on the written agreement. In addition, new evidence that merely impeaches the credibility of witnesses is not by itself a basis for a new trial. *See* ***Simos v. State***, 53 Wis.2d 493, 499, 192 N.W.2d 877, 880 (1972). Third, MicroRentals' owner and employee provided a reasonable explanation for the discrepancy. The owner testified that the ad was placed in the Yellow Pages before the business got started. He decided not to provide that service. Both witnesses' testimony that they did not advertise or provide a rent-to-own service was reasonably explained in a manner that does not impugn their general credibility.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.