UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1408

September Term, 2014

L'TANYA R. DIVERS

v.

STATE OF MARYLAND

Zarnoch,
Leahy,
Rodowsky, Lawrence F.
(Retired, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: August 21, 2015

The appellant, L'Tanya Divers, was charged with theft of property of a value greater than $10,000 but less than $100,000 in violation of Maryland Code (2002, 2012 Repl. Vol.), § 7-104 of the Criminal Law Article (CL) and the unlawful taking of a motor vehicle in violation of CL § 7-105. On June 4, 2015, following a bench trial in the Circuit Court for Charles County, Divers was convicted of both charges. On August 7, 2014, she received a sentence of fifteen years' incarceration for the general theft conviction, all but eighteen months of which were suspended. Her conviction for the unlawful taking of the motor vehicle merged for purposes of sentencing.[1] Divers presents a single issue for our review:

> "Was the evidence insufficient to support the conviction for a violation [of CL] § 7-105?"

We hold that the evidence was sufficient and affirm.

Factual Background

On the evening of November 5, 2012, Divers entered the showroom of Ken Dixon Chevy Buick, Inc. (the dealership),[2] a car dealership located at 2298 Crain Highway in Waldorf, Maryland. She met with the sales manager, Mr. Walter Pine, and sought to purchase a new Chevrolet Cruze.

Pine testified that the value of the vehicle was approximately $21,000. In order to finance the purchase, Pine prepared a credit application for Divers using information that

[1]CL § 7-105(d)(2) expressly provides "[i]f a person is convicted under § 7-104 of this part and this section for the same act or transaction, the conviction under this section shall merge for sentencing purposes into the conviction under § 7-104 of this part."

[2]By the time of trial the name of the dealership had changed to "Waldorf Chevy Cadillac."

she provided to him. In addition to a list of references and proof of residence, Divers provided Pine with proof of income in the form of three paystubs. The paystubs appeared to have been issued by "L&K Recovery," a repossession company located at 7702 Poplar Hill Lane in Clinton, Maryland. The completed credit application indicated that Divers was employed as an office manager at L&K Recovery, where she had worked for three years, with an annual salary of $38,400.

Pine submitted the credit application to a financing company and shortly thereafter obtained an "approval," which he testified meant that a bank was willing to finance the purchase based on the information provided, subject to verification. Upon receiving the approval from the financing company, Pine proceeded with the remaining steps of the purchase process which culminated with Pine giving Divers the keys to the vehicle. She then drove the vehicle from the dealership.

Later on, Pine received a call from the financing company that had issued the loan approval. Pine testified that based on the exchange he endeavored to reach Divers by phone "to try and get her to return the vehicle." Pine also testified that he called L&K Recovery after speaking to the financing company, "just to make sure that the bank didn't make a mistake."

Rhonda Wallace, employed as an office manager by L&K Recovery, testified that she received a call from the dealership in November 2012 seeking to verify Divers' employment information. Wallace testified that L&K Recovery operated a few locations and employed

a total of approximately twenty-five people, each of whom she knew by name. At the Poplar Hill Lane location referenced on the paystubs, and where Wallace was employed, there were between eight and ten staff members. Wallace testified that Divers did not work for L&K Recovery in 2012 and, indeed, that Divers had never worked for L&K Recovery. Moreover, Wallace testified that the paystubs which Divers provided to the dealership did not match the appearance of those which were actually issued to L&K Recovery employees. She also testified that an individual named Robin Lytle had been hired by L&K Recovery in September 2012 but was "let go" toward the end of 2012 "for reasons relating to this incident," meaning, "because of paystubs being doctored."

Pine testified that he relied upon the information that Divers provided to him when he gave her the keys and allowed her to leave with the vehicle.

> "[THE STATE]: So you rely on the fact that they work where they say they work?
>
> "[MR. PINE]: *I rely upon the information they give me*; yes."

(Emphasis added).

He later clarified that although an individual's paystubs are only one item of information that he typically relies on when selling someone a car, he would not sell a car to someone whom he knew to be unemployed.

> "[THE STATE]: And with respect to this case, you testified earlier in response to one of [defense counsel]'s questions that you look at numerous things when you decide whether or not to finance. One of them is the paystubs, right?

"[MR. PINE]: Yes.

"Q. *If someone doesn't have a job are you gonna give them a car*?

"A. *No*."

(Emphasis added).

Despite numerous calls to the phone number that Divers had provided, Pine was never able to get in contact with her. He confirmed that no payments were ever received for the vehicle that she had taken and the deal was never funded by the finance company. He testified that despite enlisting the help of a repossession company, the vehicle had never been returned or recovered.[3]

Defense counsel moved on two occasions for a judgment of acquittal as to the charge of motor vehicle theft, arguing both times that the use of deception only operated to obtain the loan, as opposed to obtaining the vehicle, and that ownership of the vehicle transferred to Divers by operation of law upon delivery of the keys. In addition, defense counsel suggested that the delivery indicated consent on the part of the dealership for Divers to take the vehicle. Both motions were denied by the trial court.

[3]At the conclusion of the bench trial, after the guilty verdicts had been delivered, defense counsel informed the court that he "believe[d] the car actually was impounded in the District of Columbia." The court then inquired when the dealership had been informed that their vehicle was impounded in D.C. The State responded, "I can help answer that; today." The record is not clear whether the vehicle was in fact ever recovered.

Discussion

Divers does not challenge her conviction of violating CL § 7-104 which is part of the Consolidated Theft Statute, CL §§ 7-101 through 7-110. Section 7-104(b) provides:

> "(b) A person may not obtain control over property by willfully or knowingly using deception, if the person:
>
> "(1) intends to deprive the owner of the property;
>
> "(2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
>
> "(3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property."

Indeed, her argument begins with the following concession:

> "What happened in this case appears to fit the mold of the old crime of false pretenses, rather than larceny. As Judge Moylan explained in his treatise:
>
> > "'Because of the early emphasis on the breach of the peace occasioned by a trespassory taking, common law larceny was inherently a crime against ownership. When fraud was used to induce the transfer of the property, if mere possession were transferred there was a case, as earlier discussed, of larceny by trick. *When the owner was induced by fraud, however, to part with actual ownership and not mere possession, there was no crime of larceny, even of the larceny-by-trick variety.* To fill that gap in the law, Maryland, by chapter 319 of the Acts of 1835, created the statutory crime of false pretenses.'
>
> "Charles E. Moylan, Jr., *Maryland's Consolidated Theft Law and Unauthorized Use* § 1.7 (2002)."

Appellant's Brief at 4 (emphasis in original).

Appellant's sole contention is that the evidence was insufficient to support her conviction under CL § 7-105, which reads in relevant part:

> "A person may not knowingly and willfully take a motor vehicle out of the owner's lawful custody, control, or use without the owner's consent."

CL § 7-105(b).

Divers' argument on § 7-105 relies on her conviction of violating § 7-104(b). To the extent she obtained ownership of the motor vehicle, she did so through fraud and thereby committed what formerly was known as "false pretenses" and is now theft by deception. *See* CL § 7-102(a); *State v. Manion*, 442 Md. 419, 433, 112 A.3d 506, 514 (2015).[4]

She notes that under the proscription in § 7-105(b) a person may not "take" a motor vehicle without consent. Here, Divers submits, she did not "take" the vehicle. Rather, the dealer transferred it to her. And further, says Divers, she had the owner's consent. Appellant's position is that § 7-105(b) does not embrace a taking that is accomplished by

[4]CL § 7-102(a) provides:

> "Conduct described as theft in this part constitutes a single crime and includes the separate crimes formerly known as:
> "(1) larceny;
> "(2) larceny by trick;
> "(3) larceny after trust;
> "(4) embezzlement;
> "(5) false pretenses;
> "(6) shoplifting; and
> "(7) receiving stolen property."

false pretenses. In other words, per Divers, the only taking criminalized by CL § 7-105(b) is a trespassory taking.

This is the sort of hair-splitting that the Consolidated Theft Statute was designed to extinguish. That statute was intended "to eliminate [the] technical and absurd distinctions that have plagued the larceny related offenses and produced a plethora of special provisions in the criminal law" by consolidating "previously existing larceny-related theft offenses ... into this one offense." *Jones v. State*, 303 Md. 323, 328, 493 A.2d 1062, 1064 (1985) (citation omitted).

The plain language of the statute tells us that "to take" is included within "'[e]xert control.'" CL § 7-101(d)(1), a definitional section for the Consolidated Theft Statute, provides: "'Exert control' includes to take, carry away, appropriate to a person's own use or sell, convey, or transfer title to an interest in or possession of property."

Most pertinent is the definition of "theft" in CL § 7-101(m). It reads:

> "(1) 'Theft' means the conduct described in §§ 7-104 through 7-107 of this subtitle.
>
> "(2) 'Theft' includes motor vehicle theft, unless otherwise indicated."

Thus, it would seem clear that the General Assembly intended that a taking satisfying § 7-105 could be *any* taking accomplished by conduct proscribed by any subsection of § 7-104, including the theft by deception subsection, by which control could be exerted over a motor vehicle.

The legislative history confirms our construction. The basic statute, consolidating the types of theft now listed in CL § 7-102(a), was enacted by ch. 849 of the Acts of 1978 and codified as Maryland Code (1957), Article 27, §§ 340-344. Present CL § 7-104 was Article 27, § 342. Present CL § 7-105 was not enacted until 1995, by ch. 268 of the Acts of that year, and codified as Article 27, § 342A. It is an unauthorized use statute. Its principal purpose was "'to provide both felony status and enhanced punishment for the unauthorized use of a motor vehicle.'" *In re Landon G.*, 214 Md. App. 483, 509, 78 A.3d 431, 447 (2013) (quoting JUDGE CHARLES E. MOYLAN, JR., MARYLAND'S CONSOLIDATED THEFT LAW AND UNAUTHORIZED USE, § 16.5 (MICPEL 2001)). When present § 7-105 was initially enacted, there was a general unauthorized use statute, then Article 27, § 349, now CL § 7-203(a) that covered certain chattels in addition to motor vehicles, but the General Assembly directed that the new felony statute be codified following Article 27, § 342, as § 342A, and not following Article 27, § 349, the more general unauthorized use statute. *See Landon G.*, 214 Md. at 510-11, 78 A.3d at 447-48. The new statute was made part of the Consolidated Theft Statute. The same legislation that added the motor vehicle unauthorized use felony to the Consolidated Theft Statute added "theft" as a definitional term. It provided: "'Theft' means theft as defined in §§341-345 of this subheading including motor vehicle theft unless otherwise indicated." Md. Code (1957, 1996 Repl. Vol.), Art. 27, §340(m) (now CL §7-101(m)(1) and (2)). Section 7-105 clearly includes statutory theft by deception as a means of taking a motor vehicle.

Divers' contention that she took the vehicle with the dealership's consent fails for similar reasons. She claims.

> "Pine testified that [the dealership] received approval of Ms. Divers' financing. Based on this approval, Mr. Pine handed the keys to Ms. Divers and she drove the vehicle off the lot that night. This physical act of handing the keys to Ms. Divers represented consent on the part of Mr. Pine (and [the dealership]) for Ms. Divers to drive the car off the lot, i.e., to take the vehicle out of the dealership's 'custody, control, or use.'"

Appellant's Brief at 7 (record references omitted).

The State counters, and we agree, that "fraud in the inducement obviated [the dealership]'s consent in permitting Divers to take the vehicle[.]" Appellee's Brief at 6. *See Farlow v. State*, 9 Md. App. 515, 517-18, 265 A.2d 578, 580 (1974) ("Consent to possession obtained by fraud ... is the same as no consent so far as trespass is concerned."). The approval for financing, referenced by Divers as the basis for Pine's consent, was the direct result of her providing the dealership with false paystubs. This is evidenced by the fact that once it became known that the information contained in the paystubs was fraudulent, the financing approval was withdrawn, the deal was never funded, and the dealership endeavored in vain to have Divers return the vehicle to the dealership. Any indication of consent on the part of the dealership for Divers to take the vehicle was rendered a nullity by the admitted use of deception in obtaining it.

The evidence, viewed in the light most favorable to the State, was sufficient to show that Divers knowingly and willfully took a motor vehicle from the dealership's lawful

custody without its consent. The evidence was therefore sufficient to support her conviction for a violation of CL § 7-105.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANT.