MEMORANDUM DECISION

APPELLANT PRO SE

Eric Jenkins
Evansville, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Eric Jenkins,
Appellant-Defendant,

v.

Keith Whitler,
Appellee-Plaintiff.

June 21, 2021

Court of Appeals Case No. 21A-SC-15

Appeal from the Vanderburgh Superior Court

The Honorable Jill R. Marcrum, Magistrate

Trial Court Cause No. 82D05-2001-SC-567

Friedlander, Senior Judge.

[1] Eric Jenkins appeals from the decision of the small claims court in favor of Keith Whitler in his action against Jenkins for selling a defective ice machine. The trial court entered a judgment in favor of Whitler in the sum of $800.00, plus post-judgment interest and court costs. Jenkins contends that the small claims court

erred by: 1) abusing its discretion when reviewing the evidence, and 2) failing to address Whitler's alleged perjury. We affirm.

[2] Jenkins promoted the sale of an ice machine on Facebook Marketplace for $1,000.00, and Whitler messaged Jenkins to set up a time to meet in person to see the product. On January 19, 2020, Whitler came to Jenkins' property to inquire about the product. There, the parties negotiated the purchase price for the machine and agreed upon the purchase price of $800.00. Jenkins told Whitler that if the ice machine did not work he could bring it back and his money would be refunded. After the sale concluded, Jenkins assisted Whitler in securing the ice machine in the back of his truck.

[3] On January 21, Whitler communicated to Jenkins that the machine was not working. At first, Jenkins offered some help with the ice machine by encouraging Whitler to check the machine manual for guidance. Whitler, however, had already checked the manual and wanted his money back, but Jenkins was not willing to provide a refund and then became nonresponsive to Whitler's further requests to resolve the matter.

[4] Whitler brought this action in small claims court seeking a refund for the defective ice machine. Even after filing suit, he contacted Jenkins in a final effort to resolve the matter out of court, but Jenkins refused. At trial, both Whitler and Jenkins testified, and each had the opportunity for cross-examination and presentation of other evidence. After taking the matter under advisement, the small claims court

held in favor of Whitler in the sum of $800.00, plus post-judgment interest and costs. Jenkins now appeals.

[5] Here, we observe as an initial matter that Whitler did not provide an appellate brief. It is not our burden to argue on the appellee's behalf. *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753 (Ind. 2014). Further, "we will reverse the trial court's judgment if the appellant's brief presents a case of prima facie error." *Id.* at 758. Moreover, "[p]rima facie error in this context is defined as, 'at first sight, on first appearance, or on the face of it.'" *Id.*

[6] Jenkins asserts the small claims court erred by failing to address Whitler's alleged perjured testimony. Jenkins further argues that the small claims court failed to review this "evidence properly." Appellant's Br. p. 2.

[7] Judgments in small claims courts are subject to review as prescribed by relevant Indiana rules and statutes. Ind. Small Claims Rule 11(A). In addition, Trial Rule 52 provides that claims tried in a bench trial are subject to appellate review and that the clearly erroneous standard of review is applicable. *See Vance v. Lozano,* 981 N.E.2d 554, 557-58 (Ind. Ct. App. 2012). More specifically, the appellate court cannot set aside the judgment, "unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." *Id.*

[8] "In determining whether a judgment is clearly erroneous, the appellate tribunal does not reweigh the evidence or determine the credibility of witnesses but considers only the evidence that supports the judgment and the reasonable

inferences to be drawn from that evidence." *City of Dunkirk Water and Sewage Dept. v. Hall*, 657 N.E.2d 115, 116 (Ind. 1995). Further, the judgment in favor of the party who has the burden of proof will be affirmed, "if the evidence was such that from it a reasonable trier of fact could conclude that the elements of the party's claims were established by a preponderance of evidence." *Id.*

[9] First, Jenkins claims the small claims court erred in reviewing the evidence. Whitler had the burden of proving by a preponderance of the evidence that Jenkins sold him a defective ice machine that warranted a refund. In this situation, we have an oral agreement for the sale of the ice machine. "The existence of a contract is established by evidence of an offer, acceptance, consideration, and a manifestation of a mutual assent." *Troutwine Estates Dev. Co., LLC v. Comsub Design and Eng'g, Inc.*, 854 N.E.2d 890, 897 (Ind. Ct. App. 2006). Through his testimony and the evidence of messages between the parties, Whitler established at trial that he and Jenkins entered an oral contract for the purchase of the ice machine. Moreover, the record shows that there was an offer on Facebook Marketplace for $1,000.00 for the ice machine. Whitler reached out to Jenkins inquiring about the machine via Facebook Messenger. When they met in person, they negotiated the price of the machine from $1,000.00 to $800.00. The parties agreed on the amount, and Whitler paid for the machine and took it home.

[10] We conclude that the evidence establishes by a preponderance of the evidence that Whitler and Jenkins entered into an oral agreement for the purchase of the ice machine. Jenkins did not offer evidence to negate any of the elements to show that there was not an oral agreement between the parties. Additionally, Jenkins never

refuted that he told Whitler that he could bring the ice machine back if it did not work. *See* Tr. Vol. II, pp. 6, 7, 9, 17.

[11] Next, Jenkins contends Whitler committed perjury, and the small claims court failed to acknowledge it. This assertion fails here because Jenkins never raised this issue while in the small claims court. "[A] party may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court." *Sedona Dev. Group Inc., v. Merrillville Rd. Ltd. P'ship*, 801 N.E.2d 1274, 1280 (Ind. Ct. App. 2004). As such, Jenkins' argument is waived for our review. *See id.*

[12] Waiver notwithstanding, Jenkins' argument is unsuccessful on the merits. It is the small claims court's responsibility, as the trier of fact, "to assess the credibility of witnesses." *City of Dunkirk*, 657 N.E.2d at 116. For a perjury claim, Jenkins must show that Whitler "[made] a false, material statement under oath or affirmation." *See* Ind. Code 35-44.1-2-1 (2014). Jenkins alleges that Whitler falsely claimed that Jenkins never turned the ice machine on when they met in person. Appellant's Br. p. 3. This is simply a challenge to Whitler's credibility as it pertains to this matter. We will not reassess a witness's credibility on appeal. *See* Trial Rule 52 ("due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses"). Furthermore, the question of whether the ice machine was turned on before Whitler purchased it does not overcome the unrefuted evidence that the machine was purchased and failed to perform. Jenkins did not deny that he agreed to allow Whitler to return it if it was faulty or offer any evidence to the contrary. The small claims court did not err by failing to find that Whitler made false material statements while testifying.

[13]For the reasons stated above, we affirm the judgment of the small claims court.

[14]Judgment affirmed.

May, J., and Pyle, J., concur.