

2011 IL App (2d) 100657-U  
No. 2-10-0657  
Order filed November 1, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CF-3066
	)	
TERRELL JONES,	)	Honorable
	)	Kathryn E. Creswell,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices McLaren and Burke concurred in the judgment.

**ORDER**

*Held:* The defendant was proved guilty beyond a reasonable doubt of the illegal receipt and use of a credit card.

¶ 1 On January 5, 2010, the defendant was charged by indictment with two counts of unlawful use of a credit card (720 ILCS 250/8(I), 8(ii) (West 2008)) and one count of receiving a credit card of another (720 ILCS 250/4 (West 2008)). Following a bench trial, the defendant was found guilty on all counts and sentenced to six years' imprisonment. The defendant appeals, arguing that he was not proved guilty beyond a reasonable doubt. We affirm.

¶ 2 I. BACKGROUND

¶ 3 A grand jury indicted the defendant on two counts of unlawful use of a credit card (counts I and III) and on one count of receiving a credit card of another (count II). Specifically, the indictment charged that the defendant, with the intent to defraud the issuer, Orchard Bank, obtained gas by (1) “representing without the consent of the cardholder, Celia Travis, that he was the holder of Orchard Bank Credit Card number xxxx xxxx xxxx 0897, issued to Celia Travis \*\*\*\*” (720 ILCS 250/8(ii) (West 2008)) (count I); and (2) using Celia Travis’s credit card, ending in number 0897, without her consent (720 ILCS 250/8(I) (West 2008)) (count III). The indictment also alleged that the defendant received an Orchard Bank credit card, ending in number 0897, “knowing it had been acquired from the person of Celia Travis, the cardholder, without the consent of Celia Travis, with the intent to use said credit card” (720 ILCS 250/4 (West 2008)) (count II).

¶ 4 On March 30, 2010, the defendant waived his right to a jury trial and a bench trial commenced. At trial, Celia Travis testified that on March 5, 2009, at about 12:40 p.m., she was at the Jewel Osco store on Schiller Street in Elmhurst. While she was shopping, a woman approached her and asked her a question about Jello. Travis’s purse was in the child-seat section of her shopping cart, which was on her right side, behind her. The woman was also behind her. Travis’s purse was unzipped. Travis answered the woman’s question but was facing the food. When Travis was finished shopping, she went to the cash register. At that time, she discovered that her wallet and change purse were not in her purse. She thought that perhaps the items fell out in her car. She searched her car and found nothing. She then went home, but still could not find her wallet or change purse. She went back to Jewel and talked to a manager. Then she went back home and called the police.

¶ 5 Travis testified that she had some coins and between \$7 and \$13 in her change purse. Her wallet contained her Mastercard credit card, driver’s license, and other important papers. The credit

card was issued by Orchard Bank. Travis initially testified that her credit card ended in number 0890 but acknowledged that it could have been 0897, because Orchard Bank had issued her another credit card. After she spoke with the police she called the credit card company and reported the credit card stolen.

¶ 6 Monica Milone testified that she works for HSBC, the company that issues and finances credit cards for Orchard Bank. She was assigned to look at Travis's account. Milone identified People's Exhibit No. 1 as a printout of Travis's Orchard Bank credit card statement. Milone placed an "X" next to a transaction that occurred on March 5, 2009. That transaction occurred at the Delta Sonic gas station in Elmhurst. The amount charged was \$21.67. The credit card that was used for that transaction was 5440455094110890. The account was an Orchard Bank credit card in the name of Celia Travis. People's Exhibit No. 1 was admitted without objection.

¶ 7 Kenneth Basel testified that he was the assistant director of loss prevention for Delta Sonic Car Wash. He conducts internal and external investigations, security work, and training for nine locations in the Chicagoland area. The Elmhurst Delta Sonic was one of those nine locations. There is only one Delta Sonic in Elmhurst, located at the corner of 83 and North Avenue. He conducted an external investigation at the Elmhurst location. At that store, there is a digital video recorder that records video from 16 different cameras all day long. One of the cameras is located on the west side of the convenience store facing west. It shows four gas pumps that are located on that side of the building. The camera is about 40 feet from the pumps. He reviewed the video from that camera for the date of March 5, 2009, from approximately 1:13 until 1:20 in the afternoon.

¶ 8 Basel identified People's Exhibit No. 3 as a printout of the Mastercard credit card transactions that took place at the gas pumps of the Delta Sonic on March 5, 2009. Basel placed an "X" on the printout next to a transaction that occurred at 1:17:16 in the afternoon. The amount of

that charge was \$21.67. People's Exhibit No. 3 was admitted without objection. The State then played the video from the Delta Sonic of March 5, 2009. This was marked and admitted as People's Exhibit No. 2.

¶ 9 The video shows a man pulling up to a gas pump at the Delta Sonic in a white car. The man exited the vehicle, approached the pump, and made a motion as if swiping a credit card at the pump. The man was the only person near the pump. The man pumped gas into his car. It appeared that the man then placed the gas pump handle on the ground. The man went to speak to the driver in a vehicle that was waiting behind his car. The man then pulled his white car forward and the car behind him pulled close to the pump. The man then picked the pump handle off the ground and pumped gas into the second vehicle. Thereafter, both vehicles pulled away.

¶ 10 Detective Paul Carney testified that he was an Elmhurst police officer. He spoke with the defendant on October 7, 2009, at the Du Page County jail. Detective Carney identified the defendant in court. The conversation took place in an inmate interview room. One other officer was present. Detective Carney advised the defendant of his *Miranda* rights. The defendant said he would speak with the detectives, but he refused to sign a *Miranda* form. Detective Carney testified that the purpose of the interview was to investigate a pickpocket incident that occurred at the Jewel on Schiller Street in Elmhurst on March 5, 2009. A credit card theft occurred at the Jewel and the card was subsequently used at the Delta Sonic. The Delta Sonic was about one mile away from the subject Jewel.

¶ 11 Detective Carney further testified that he showed the defendant a picture of a female that he felt was involved in the theft. The defendant stated that he knew her by the name of "Red." Detective Carney explained the investigation to the defendant and showed him the video of the Delta Sonic transaction. The defendant admitted that it was him on the video and that he pumped the gas.

The defendant denied, however, that he was the one who swiped the credit card at the pump. The defendant stated that he went to the Jewel with Red, but he stayed in the car. Red went into the Jewel. When Red came out, she gave the defendant the stolen credit card, which he then used at the Delta Sonic. The defendant also stated that he had been out with her many times pickpocketing and stealing wallets. There were also other men that worked with “Red.” After they stole credit cards, they would usually buy gift cards and split the proceeds. The defendant told Detective Carney that he eventually threw the card in the sewer. The defendant also told Detective Carney that, at the Delta Sonic, he received \$15 cash for filling up the vehicle that was behind his vehicle.

¶ 12 On cross-examination, Detective Carney acknowledged that he could not identify the defendant from the video alone. The only reason he knew it was the defendant on the video was because of the defendant’s admission. Detective Carney testified that he did not record his conversation with the defendant and the defendant did not make a written statement.

¶ 13 Thereafter, the State rested. The defendant moved for a directed finding. The trial court denied the motion. The defense rested. Following closing arguments, the trial court found the defendant guilty of all three counts. The defendant did not file any posttrial motions. On June 25, 2010, following a sentencing hearing, the trial court merged counts I and III and imposed sentence on counts I and II, unlawful use of a credit card and receiving a credit card of another. The trial court sentenced the defendant to concurrent six-year sentences of imprisonment on each count. Thereafter, the defendant filed a timely notice of appeal.

¶ 14

## II. ANALYSIS

¶ 15 On appeal, the defendant contends that he was not proved guilty beyond a reasonable doubt. He argues that the credit card number in the indictment did not match the proofs at trial and that the cardholder did not testify that she did not authorize his receipt or use of her credit card. We

acknowledge that the defendant did not raise these issues in a posttrial motion. However, it is well settled that the sufficiency of the evidence can be challenged for the first time on appeal. *People v. Letcher*, 386 Ill. App. 3d 327, 330 (2008).

¶ 16 When a defendant challenges the sufficiency of the evidence supporting his conviction, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Id.* It is not the function of this court to retry the defendant. *People v. Ramos*, 316 Ill. App. 3d 18, 22 (2000). “[T]his court will not substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses [citation], and will not reverse a criminal conviction unless the evidence is so unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant’s guilt [citation].” *People v. Campbell*, 146 Ill. 2d 363, 375 (1992).

¶ 17 In order to find the defendant guilty of the unlawful use of a credit card the State had to prove that the defendant, with intent to defraud Orchard Bank, obtained gas by using a credit card without the consent of the cardholder. *People v. Murray*, 262 Ill. App. 3d 1056, 1065 (1994). To find the defendant guilty of receiving the credit card of another, the State had to prove that the defendant received Travis’s credit card, knowing that it was taken without her consent, and that he intended to use it. *People v. McKnight*, 55 Ill. App. 3d 1052, 1055 (1977).

¶ 18 The State proved these elements beyond a reasonable doubt. Travis’s testimony showed that her credit card ended up missing shortly after she spoke to a woman at the Jewel. Travis reported her credit card stolen. Travis’s Orchard Bank credit card statement showed that there was a charge of \$21.67 on her credit card at the Delta Sonic gas station on the day she reported her credit card stolen. A video recording from the Delta Sonic, and the Orchard Bank and Delta Sonic credit card

transaction records, showed that a male used Travis's credit card to fill his car and another car with \$21.67 worth of gas. This occurred shortly after, and in the vicinity where, Travis discovered her credit card missing. In addition, according to Detective Carney's testimony, the defendant identified himself as the man in the video using Travis's credit card to fill his car with gas. The defendant told Detective Carney that he regularly worked with a woman by the name of Red who stole credit cards. He admitted that he was at the Jewel shortly before he filled his tank with gas. Red went into the Jewel and then came out and gave him the stolen credit card. Although the defendant denied physically swiping the credit card at the pump, the video shows that no one else besides the defendant was near the pump when the credit card was used.

¶ 19 The defendant argues that he was not proved guilty of the charged offenses because the indictment identified Travis's credit card number as ending in "0897" and the proof at trial showed that Travis's credit card that was unlawfully received and used ended in "0890." However, "a variance between a crime charged and the crime proved is not fatal to the conviction unless the variance is material and it misleads the accused in making his defense or exposes him to double jeopardy." *People v. Durdin*, 312 Ill. App. 3d 4, 7 (2000). The variance between the charge and the proof in the instant case was not so material or prejudicial as to necessitate a new trial.

¶ 20 First, the alleged variance was not of such character that it misled the defendant in preparing his defense. At trial, the defendant's defense was that he was not the man in the video and that his confession to the police was questionable in light of the fact that it was not recorded and he did not make a written statement. The defendant did not argue that he had permission to use a different credit card of Travis's or that some other credit card of Travis's had been stolen. Further, during discovery the defendant was provided with an affidavit from Orchard Bank that stated that Travis's credit card account ending in "0890" had formerly ended in "0897." Travis, therefore, did not have

more than one credit card; rather, at some point the credit card number was changed on the same account. As such, had the indictment indicated that the unlawfully used/received credit card number ended with “0890,” the defendant’s defense would have remained unchanged. See *People v. Santiago*, 279 Ill. App. 3d 749, 753 (1996) (rejecting defendant’s fatal-variance claim where indictment and proof at trial varied as to armed robbery victim’s name, because variance did not hinder the preparation of his defense; defendant did not deny that the victim was robbed but claimed that the victim mistakenly identified him).

¶ 21 Moreover, the defendant is not exposed to double jeopardy. The indictment is clearly sufficient to be pleaded in bar of another prosecution. The indictments set forth the charged offenses, the issuer of the credit card, the date of the offenses, the county where they occurred, the cardholder’s name, and the type of merchandise obtained with the card. If any future prosecution were attempted, prior prosecution on the same facts could be proved by resort to the record. See *People v. Arndt*, 351 Ill. App. 3d 505, 518-19 (2004).

¶ 22 In so holding, we note that the defendant’s reliance upon *People v. Daniels*, 75 Ill. App. 3d 35 (1979), and *People v. Durdin*, 312 Ill. App. 3d 4, (2000), is unpersuasive. In *Daniels*, the indictment alleged that the defendants committed armed robbery by taking cash from the victim but the proof at trial only concerned the taking of a watch. *Id.* at 40. The reviewing court found not only that there was a variance between the charging instrument and the evidence adduced at trial, but that the evidence adduced at trial was circumstantial and insufficient to prove the defendant guilty of the charged offense beyond a reasonable doubt. *Id.* at 40-41. Specifically, the State had not shown that the victim owned or wore a watch or that the watch that one of the defendants had was taken from the victim. *Id.* at 41. In the present case, unlike *Daniels*, the evidence adduced at



trial was sufficient to prove the defendant guilty of the charged offenses beyond a reasonable doubt.

¶ 23 In *Durdin*, the defendant was charged with delivery of cocaine within 1,000 feet of a school. 312 Ill. App. 3d at 5-6. At trial, witnesses testified that the defendant delivered “blow” and the parties stipulated that the controlled substance at issue was heroin. *Id.* at 7. The reviewing court reversed the defendant’s conviction because the State failed to prove that the defendant knew he was delivering cocaine, an element of the offense. *Id.* Specifically, the reviewing court stated that the “[d]efendant was convicted and sentenced for delivery of cocaine when there was no evidence that cocaine was delivered by the defendant. Defendant was convicted of the *wrong* crime.” (Emphasis in original.) *Id.* at 8. In the present case, unlike *Durdin*, the defendant was not convicted of the wrong crime. Even though the indictment alleged the wrong credit card number, the State proved that the defendant unlawfully received and used Travis’s credit card ending in “0890.”

¶ 24 The defendant’s next contention on appeal is that the State failed to prove that Travis did not authorize the receipt or use of her credit card. The defendant argues that Travis did not specifically testify at trial that she did not authorize the defendant to receive or use her credit card at the Delta Sonic. Nonetheless, to prove guilt beyond a reasonable doubt, the trier of fact need not disregard the inferences that flow normally from the evidence. *People v. Jenkins*, 117 Ill. App. 3d 33, 39-40 (1983). Travis’s testimony showed that she did not consent to the defendant’s receipt and use of her credit card. Travis testified that after she realized her wallet and change purse were missing she looked for them in her car and at her home. She then went back to the Jewel to talk to a store manager and called the police to report her credit card stolen. The reasonable inference from this testimony is that Travis did not give the defendant permission to use her credit card. She would not have searched her car and home for her wallet, returned to speak with a store manager at Jewel,

called the police, or reported her credit card stolen had she given it to the defendant with authorization to use it.

¶ 25 Furthermore, the testimony of Detective Carney also demonstrates that Travis did not consent to the defendant's receipt and use of her credit card. Detective Carney testified that the defendant admitted being with a woman that he regularly worked with to conduct pickpocketing. The defendant told Detective Carney that the woman came out of the Jewel and handed him the stolen credit card that he subsequently used at the Delta Sonic. The defendant ultimately threw the credit card in the sewer. Based on this evidence, the trial court found that the credit card was stolen. The evidence in this case is not so unsatisfactory as to justify a reasonable doubt of the defendant's guilt. Accordingly, we decline to disturb the trial court's determination. See *Campbell*, 146 Ill. 2d at 375.

¶ 26

### III. CONCLUSION

¶ 27 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 28 Affirmed.