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2012 IL App (3d) 110176-UB

Order filed March 1, 2012
Modified Upon Denial of Rehearing April 17, 2012

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 14th Judicial Circuit,
)	Henry County, Illinois
Plaintiff-Appellee,)	
)	
v.)	Appeal No. 3-11-0176
)	Circuit No. 09-CF-267
)	
AWAD R. RASRAS,)	Honorable
)	Charles H. Stengel,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* In a case in which the defendant was convicted of retail theft, the appellate court held that because the defendant stipulated to the admission of a videotape into evidence, he waived his argument that the circuit court erred when it admitted the videotape. The appellate court also held that the defendant was proven guilty beyond a reasonable doubt and that he failed to prove trial counsel was ineffective.

¶ 2 The defendant, Awad R. Rasras, was convicted of retail theft (720 ILCS 5/16A-3(a) (West 2008)), and was sentenced to 24 months of conditional discharge. He filed several

posttrial motions, all of which were denied, and the defendant appealed. On appeal, the defendant argues that: (1) the court erred when it admitted a surveillance video into evidence; (2) the State failed to prove him guilty beyond a reasonable doubt; (3) the court erred when it denied his motion to reconsider the denial of his motion for a new trial; and (4) trial counsel was ineffective for failing to object to the introduction of the video and for failing to require the State to establish a foundation for the video. We affirm.

¶ 3

FACTS

¶ 4 The State charged the defendant with retail theft (720 ILCS 5/16A-3(a) (West 2008)) after an incident that occurred on August 6, 2009, at a Wal-Mart in Kewanee. The State alleged that the defendant intended to take 18 cans of baby formula from the store without paying for them.

¶ 5 While addressing preliminary matters before the start of the bench trial, defense counsel told the circuit court that the attorneys intended to show the Wal-Mart surveillance video recording, and that he wanted several of the witnesses to watch it.

¶ 6 Matthew Johnson testified that he was an asset protection associate for the Kewanee Wal-Mart on the night of the incident. At around 9:30 p.m., he observed the defendant placing large quantities of baby formula into his shopping cart. Johnson considered the defendant's actions suspicious because he had never before seen someone place that amount of baby formula into a cart. The defendant left the area and walked to the checkout area. Johnson followed the defendant and took up an observation point. He also called the store on his cell phone and informed a customer service manager that he was observing the defendant and to allow the transaction to be completed.

¶ 7 Johnson observed the defendant place six or seven cans of formula on the conveyor belt. Johnson did not notice if the cashier, Kami Verway, ever sought assistance from another cashier. He did see the customer service manager approach Verway, but did not hear what was said.

¶ 8 After the defendant finished his transactions, Johnson approached the defendant in the vestibule, which is past the last checkout lane, and asked to see his receipts. The three receipts (and the photographs of the items also entered into evidence) indicated that at 9:41 p.m., the defendant purchased: "Downy liquid," "Diapers," one bottle of baby formula for \$3.99, 10 smaller cans of baby formula for \$2.39 each, and five larger cans of baby formula for \$8.79 each. At 9:43 p.m., the defendant purchased one larger can of baby formula for \$3.76 and nine of the same larger cans of baby formula for \$8.79 each. At 9:44 p.m., the defendant purchased nine cans of baby formula for \$8.79 each. Johnson testified that the defendant had obtained a price override using a Walgreens receipt, but the defendant had 18 cans of formula in his cart for which he had not paid. The photographs entered into evidence indicated that the 18 cans that the defendant did not pay for were the larger size cans.

¶ 9 Johnson asked the defendant to accompany him to the asset protection interview room. On the way, Johnson asked the defendant why he was purchasing so much baby formula. The defendant said that he intended to resell it at his store.

¶ 10 Johnson also testified that the defendant's explanation for the 18-can discrepancy was that he told the cashier how many cans he intended to purchase, but the cashier made a mistake. Further, Johnson stated that it was protocol in these situations to ask the individual how much cash he or she was carrying at the time, although they do not check to verify the amount. The defendant told Johnson that he had \$1,800 in cash on his person.

¶ 11 Verway testified that on the night of the incident, she was on her second day of training on the cash registers. The defendant told her that he wanted to have the baby formula split into three transactions because he was purchasing it for three different families who were unable to buy the formula themselves.

¶ 12 The defendant started handing her cans of formula, but the cashier behind Verway told her to enter the items into the register by quantity, rather than by scanning each item. The defendant told Verway the quantities. Verway had difficulty understanding the defendant, who had an accent, so she verified the amounts with him by repeating the amount back to him and obtaining verification from him. Verway said she also looked into the defendant's cart and "kind of counted the rows and multiplied," and believed that the numbers the defendant gave her were accurate. Verway also testified that Wal-Mart employees are instructed to take the customer's word on how many items are in their cart.

¶ 13 The defendant also requested a price override, but Verway did not know how to perform an override. She turned her head to ask a nearby cashier to assist her, and she did not recall leaving her post to seek assistance. While that cashier was talking to Verway, the defendant also started telling Verway what buttons to press. The defendant told her that he used to work for Wal-Mart. Verway knew that a price override required a local competitor's advertisement, and she said the defendant showed her a Walgreens advertisement.

¶ 14 The customer service manager, Elizabeth Gibson, approached after the transactions were completed and asked the defendant if he wanted the cans bagged. He declined, saying that he had boxes in the car that he would use.

¶ 15 After Verway finished testifying, the prosecutor informed the court that it had no further

witnesses. However, the prosecutor also stated, "I believe [defense counsel] and I have agreed that we're going to play the video." The court asked defense counsel which witnesses he wanted to view the video. Defense counsel named Johnson, Verway, and Gibson. The video was played, and the court admitted the video into evidence without objection by defense counsel.

¶ 16 After the State rested, defense counsel moved for a directed finding. Defense counsel inferred that Verway was to blame for the 18-can discrepancy because she did not verify the number of items in the defendant's cart. During his argument, defense counsel referenced the surveillance video and claimed that it did not support Verway's testimony that she attempted to verify the number of items or that she turned to ask for assistance during the transactions. The court denied defense counsel's motion.

¶ 17 Defense counsel called Gibson to the stand. Gibson agreed that the video showed her assisting Verway during the transaction. Gibson verified that Johnson called her to inform her of his observation of the defendant and to tell her to allow the transaction to be completed. Gibson stated that she was not asked to assist Verway in determining how many items the defendant had in his cart, and she did not see Verway attempt to verify the number of items in the cart. Gibson also verified that Wal-Mart's general policy is to take the customer's word on how many items are in the customer's cart.

¶ 18 The defendant testified that he lived in Louisville, Kentucky. He stated that during the summer, he traveled around to make extra money because his full-time position as a math professor at a Louisville community college did not provide enough income to support his family. On the night in question, he was in Kewanee to buy baby formula at a reduced price using a Walgreens advertisement. When asked why he split the transaction into three, the

defendant stated that "I've been told from other stores they have limit [*sic*] in the quantity and the machine wouldn't take more than 24 cans, sometimes 12 cans."¹

¶ 19 The defendant stated that during the transactions, he asked for a price override, but Verway did not know how to perform the override. She left her post to ask for assistance, which was not reflected on the surveillance video. He also stated that the video did not show her asking for or receiving any assistance on the price override.

¶ 20 The defendant denied that he worked for Wal-Mart in the past and denied telling Verway that he did. He agreed that he talked to her during the price override, but claimed that he was only telling her to press "Enter" because he saw the other cashier doing that.

¶ 21 He also testified that he stacked the items in his cart to make them easy to count and he told Verway the number of items he had in his cart. He did not notice any discrepancy and said that he was tired and distracted that night because he had been driving all day, suffered from sleep apnea, and had "very severe personal problems," which included two disabled children, one of whom was facing a possible heart operation. He also stated that he had been treated since 1996 for concentration issues and forgetfulness.

¶ 22 In his closing argument, defense counsel again referenced the surveillance video and argued that Verway was solely responsible for the 18-can discrepancy. Defense counsel argued that the video did not show Verway seeking assistance with the transaction. Defense counsel also noted the defendant's strong accent and argued that there was no evidence that the defendant

¹ When Verway was asked whether she was aware of any limitation on the quantity of items the defendant was buying, she responded, "I later found out that there was a limit on formula purchases and in each transaction, which I had no knowledge of."

attempted to conceal the number of items in his cart.

¶ 23 The circuit court found that Johnson and Verway were credible, and that the defendant was not credible. The court noted that the defendant told Johnson and Verway different stories as to why he was purchasing so much baby formula. The court also noted that the defendant was a math professor, "so he's used to saying the word "nine," "eighteen," "ten," for it to be understood." Noting the video, the court found that the evidence showed the defendant knew what he was doing, knew how many cans of formula he had, and attempted to control the situation by showing Verway only the items he wanted her to see. Accordingly, the court found the defendant guilty of retail theft.

¶ 24 New counsel for the defendant filed numerous posttrial motions, all of which were denied. After the defendant was sentenced to 24 months of conditional discharge, the defendant filed a motion to reconsider—not the sentence, but the denial of the other posttrial motions. Another new attorney filed a supplemental motion to reconsider, which alleged ineffective assistance of trial counsel for failing to professionally analyze the surveillance video, as well as the denial of a fair trial because "[t]he video was not an accurate representation of the transaction," which she argued was apparent from the testimony of the witnesses at trial.

¶ 25 At the request of the defendant, the court allowed the defendant to have an expert travel to the Kewanee Wal-Mart to "examine and confirm its authenticity in its native digital environment."

¶ 26 At the hearing on the defendant's supplemental motion to reconsider, the expert testified that the video admitted into evidence was an edited copy that was pieced together from different cameras and did not contain the entire time the defendant was in the store before he was

detained. Further, the expert testified that Wal-Mart claimed it no longer had the original footage, as it had been recorded over, despite the expert's testimony that the video system they used would have placed the footage into "safe mode" to prevent it from being recorded over. The expert testified that he did not see a chain of custody with respect to the handling of the video, and opined that the video was unreliable and could not be authenticated. On cross-examination, the expert stated that he first viewed the video on October 10, 2010, and contacted Wal-Mart about viewing the original sometime around November 2010. In retrospect, he stated that he would not have been surprised if Wal-Mart no longer had the original video by November 2010, given that the defendant was found guilty in June 2010. He saw no evidence of malicious editing in the clip of the defendant at the cash register.

¶ 27 During arguments, defense counsel argued that the video was "tampered with" and was done as part of a scheme to "set up" the defendant.

¶ 28 At the close of the hearing, the circuit court found that "[trial counsel] did not object to the introduction of the tape, so the chain of custody and foundation was established." The court also found that the testimony of the witnesses at trial was of paramount importance, not the video. Accordingly, the court denied the defendant's motion. The defendant appealed.

¶ 29 ANALYSIS

¶ 30 On appeal, the defendant argues that: (1) the court erred when it admitted a surveillance video into evidence; (2) the State failed to prove him guilty beyond a reasonable doubt; (3) the court erred when it denied his motion to reconsider the denial of his motion for a new trial; and (4) trial counsel was ineffective for failing to object to the introduction of the surveillance video and for failing to require the State to establish a foundation for the video.

¶ 31 The defendant's first argument is that the circuit court erred when it admitted a surveillance video into evidence.

¶ 32 The determination of whether evidence is admissible at trial is a matter within the circuit court's discretion, and we will not disturb that determination absent an abuse of that discretion. *People v. Chambers*, 2011 IL App (3d) 090949, ¶ 10.

¶ 33 "Parties who agree to the admission of evidence through a stipulation are estopped from later complaining about that evidence being stipulated into the record." *People v. Calvert*, 326 Ill. App. 3d 414, 419 (2001). In this case, when the prosecutor finished presenting witnesses, the prosecutor said, "I believe [defense counsel] and I have agreed that we're going to play the video." Defense counsel told the court that he wanted Verway, Johnson, and Gibson to view the video as well. The video was played, and the court admitted the video into evidence without objection by defense counsel. Because defense counsel stipulated to the admission of the surveillance video, he has waived any claim on appeal that the circuit court erred when it admitted the video into evidence.² *Calvert*, 326 Ill. App. 3d at 419.

¶ 34 The defendant's second argument is that the State failed to prove him guilty beyond a

² While the defendant requests this court to address the issue under the plain-error doctrine, plain-error review is not available to this defendant due to the stipulation. See *People v. Bush*, 214 Ill. 2d 318, 337 (2005) (rejecting a defendant's request for plain-error review of a waived argument that no foundation was established for an expert's testimony, as the defendant waived the foundation requirement by stipulating to the testimony's admissibility, and holding that "[t]he trial court's admission of that opinion was therefore not only not plain error, it was not error at all"); see also *Calvert*, 326 Ill. App. 3d at 419.

reasonable doubt.

¶ 35 As charged in this case, a person commits retail theft when he or she knowingly:

"Takes possession of, carries away, transfers or causes to be carries away or transferred, any merchandise displayed, held, stored or offered for sale in a retail establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise."

720 ILCS 5/16A-3(a) (West 2008).

¶ 36 When a defendant challenges the sufficiency of the evidence to convict, we view the evidence in the light most favorable to the State and assess whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is not the function of this court to retry the defendant. *People v. Robinson*, 368 Ill. App. 3d 963, 983 (2006).

¶ 37 Our review of the record reveals that the evidence was sufficient to convict the defendant of retail theft. Johnson testified, and the receipts entered into evidence showed, that the defendant attempted to leave Wal-Mart without having paid for 18 of the cans of baby formula in his cart. Verway testified that she relied on the defendant's numbers of how many items were in the cart, which was customary for Wal-Mart employees. She repeated the numbers back to the defendant, who confirmed them. Trial counsel cross-examined Johnson and Verway, but the court found Johnson and Verway credible. The court also found the defendant not credible, in part because he gave different stories to Johnson and Verway as to why he was purchasing so much formula in three transactions. There is nothing in the record to indicate that we should

disturb these credibility findings. See *People v. Bannister*, 236 Ill. 2d 1, 18 (2009) ("[a]s the finder of fact, it was the trial court's responsibility to resolve alleged inconsistencies and conflicts in the evidence, as well as to weigh the testimony and determine the credibility of witnesses"). Under these circumstances, we hold that a rational trier of fact could indeed have found the essential elements of retail theft proven beyond a reasonable doubt.

¶ 38 The defendant's third argument is that the circuit court erred when it denied his motion to reconsider the denial of his motion for a new trial. The defendant claims that the court should have either reversed his conviction or granted him a new trial because the video was not the original, authentic tape.

¶ 39 Despite the defendant's attempts to style this argument as an entirely new issue, the defendant essentially repeats his foundation-based argument that the surveillance video should not have been entered into evidence. As we held above, the defendant has waived any argument with regard to whether the court erred when it admitted the surveillance video into evidence. See *Calvert*, 326 Ill. App. 3d at 419.

¶ 40 The defendant's fourth argument is that trial counsel was ineffective for failing to object to the introduction of the surveillance video and for failing to require the State to establish a foundation for the video.

¶ 41 To establish that trial counsel provided ineffective assistance, a defendant must show that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). "The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of

counsel." *People v. Colon*, 225 Ill. 2d 125, 135 (2007).

¶ 42 "[I]n order to establish deficient performance, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. [Citations.] Matters of trial strategy are generally immune from claims of ineffective assistance of counsel. [Citation.]" *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Our review of the record in this case reveals that the defendant cannot overcome the presumption that trial counsel's performance was sound trial strategy. Trial counsel stipulated to the entry of the video into evidence because he used it in support of his theory that no fraud on the part of the defendant occurred and that the onus for the discrepancy was on Verway. Given the strength of the testimonial evidence against the defendant, there is nothing in the record to indicate that trial counsel's strategy was unsound. See *People v. West*, 187 Ill. 2d 418, 432-33 (1999) (noting that unsound strategy exists if counsel's actions entirely fail to subject the State's case to any meaningful adversarial testing). Under these circumstances, we hold that the defendant has failed to establish that defense counsel was ineffective.

¶ 43 CONCLUSION

¶ 44 The judgment of the circuit court of Henry County is affirmed.

¶ 45 Affirmed.