

NOTICE
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2013 IL App (4th) 120654-U

NO. 4-12-0654

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 19, 2013
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | McLean County |
| BRIAN LEE BIRGE, |) | No. 12CF102 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Robert L. Freitag, |
| |) | Judge Presiding. |

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Appleton and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in denying defendant's motion for a directed verdict on count II (felony theft over \$500) where the State presented sufficient evidence of the stolen items' fair market value.

¶ 2 In May 2012, a jury acquitted defendant, Brian Lee Birge, of residential burglary (720 ILCS 5/19-3(a) (West 2010)) (count I) but convicted him of theft (possession of stolen property—value exceeding \$500) (720 ILCS 5/16-1(a)(4) (West 2010)) (count II) and theft (possession of stolen property of any value with a previous residential burglary conviction) (720 ILCS 5/16-1(a)(4) (West 2010)) (count III). In July 2013, the trial court sentenced defendant to five years' imprisonment and assessed, *inter alia*, a \$5 "State Police OP Assistance Fee" (705 ILCS 105/27.3a(1.5), (5) (West 2010)).

¶ 3 Defendant appeals, arguing (1) the trial court erred in denying his motion for a

directed verdict on count II where the State failed to present evidence of the fair market value of the stolen items and (2) he is entitled to *per diem* credit against the \$5 "State Police Op Assistance Fee." We affirm as modified and remand with directions.

¶ 4

I. BACKGROUND

¶ 5

On February 15, 2012, a grand jury indicted defendant on the following charges: (1) residential burglary, a Class 1 felony (count I) (720 ILCS 5/19-3(a), 3(b) (West 2010)); (2) theft (possession of stolen property—value exceeding \$500), a Class 3 felony (720 ILCS 5/16-1(a)(4), (b)(4) (West 2010)) (count II); and (3) theft (possession of stolen property of any value with a previous residential burglary conviction), a Class 4 felony (720 ILCS 5/16-1(a)(4), (b)(2) (West 2010)) (count III).

¶ 6

During defendant's May 2012 trial, John West testified he returned to his house after a fire had damaged it in January 2012 and found a television and other items missing. West found the back door had been forced open and discovered a number of power tools he used in his woodworking shop had been taken. An investigation led police to a local pawnshop and revealed some of the tools had been pawned by defendant for \$225. Those pawned tools were returned to West but the remaining tools and television were never recovered.

¶ 7

During a police interview, defendant stated he bought the tools from a drug addict for \$100. Defendant stated he knew nothing else about the tools. According to defendant, he had difficulty finding work and would frequently try to buy items from people cheaply and then try to sell them for more money. The interview was videotaped and played for the jury.

¶ 8

West testified the value of the returned tools was approximately \$1,500 or \$1,600. (He valued the unreturned tools at \$2,500. However, those tools are not at issue here).

Regarding the individual value of the recovered tools, West testified as follows:

"Well, right-angle drill, about 130 dollars, the half-inch Dewalt, this is a cord—corded drill. This one here is about [a] hundred dollars. The jigsaw Dewalt is about 135 dollars. The pin nailer is 139 dollars, and the staple gun is about 139. The Bosch hammer drill, that's about four hundred dollars for that one. The Dremel tool is about 59. Bostich finish nailer is 130 dollars and both of these pin nailers here, they are 130 dollars; and the Dewalt 14-volt, that's only about a 60-dollar drill there."

West also identified a Dewalt charger for the cordless drill as one of the stolen tools recovered from the pawnshop but did not relate a specific value for it.

¶ 9 On cross-examination, West stated all the figures he provided were the purchase prices of the tools. West testified while the tools were not brand new, the pin nailers, Dremel tool, and the Dewalt jigsaw "were all purchased within the last two months prior to the fire." The Dewalt jigsaw had never even been used. With regard to the age of the other tools, West testified the corded drill was "roughly" a year old, the cordless drill was "about two years old," the finish nailer was "roughly a year and a half old," and the hammer drill was three or four years old. West did not testify as to the condition of any of the tools, but photographs of the 11 recovered tools were introduced into evidence.

¶ 10 Defendant did not present any evidence. Instead, at the close of the State's case, defendant's trial counsel moved for a directed verdict on count II and the following colloquy took place:

"MR. TUSEK [(defendant's trial counsel)]: [Count II] requires proof that the property exceeded value of five hundred dollars. Mr. West testified regarding the property, but he told us the prices he purchased them for. There is no doubt they are, in the parlance of trade, used *** once he's taken them out of the store and out of the package, they become used property and the price changes. I think we all know the minute you drive a new car off the lot, you lose a thousand dollars. We don't know what the loss in value for these tools are. No one told us that, and Mr. West is an owner. He's not an expert. So he's not qualified to give us the used prices. The measure of value is what a willing buyer is willing to pay and [what] a willing seller is willing to take. There is evidence of that. The only exchange was at the pawn shop [*sic*], where a willing buyer gave 225 dollars. A willing seller took it. So, I think that's the only evidence of the value of these tools that we have.

* * *

MR. WORKMAN [(assistant State's Attorney)]: Well, Your Honor, the evidence that we have is the value of what the victim placed on those tools. Some of those tools were purchased just as recently as just a couple of months prior to that, and there is no evidence about these tools losing their value; and People's Exhibits [5] through 15 clearly depict those tools.

The jurors will have an opportunity to look at those tools and see the condition that they were—are in, and the value of it is basically a question of fact for the jury; and I think they've got plenty of evidence. Defendant can certainly argue about the transaction at the pawn shop [*sic*], but I think the counter argument to that is that was a pawn, not a purchase. And I think People's Exhibits One and Two clearly show that. They're not going to give the full value of those tools. But there is a— there is certainly enough evidence that has been presented that a trier of fact could find that the value of the property that was stolen is more than five hundred dollars and that the defendant's motion should be denied on that basis."

Defense counsel responded as follows:

"[A]s I said, *** we're requiring the jury to make suppositions or to rely on their [*sic*] experience and well in excess of what we would ask of them in just applying common sense. They would have to know the—it's a used value. I mean used or reconditioned is not the same as new; and the only evidence we have is the new value, and they're not new anymore."

The trial court then denied defendant's motion for a directed verdict, stating the following:

"While I agree with [defendant] that there is certainly a lot of wiggle room in terms of the value of evidence, there is evidence there. Mr. West did testify as to the purchase price of all of those

various items, and there was also cross-examination and testimony about the age of the items. Some of them were newer than others, and he testified a little further about how some of them had not been used and some had, so I agree there is—there is some question there frankly; but I think there is sufficient evidence there to go to the jury. It will be for them to determine whether that is proof beyond a reasonable doubt of their value, and they will clearly be instructed that that's their burden on that element in and of itself."

¶ 11 Thereafter, the jury found defendant guilty of theft (counts II and III) but not guilty of residential burglary (count I).

¶ 12 At defendant's July 2012 sentencing hearing, the trial court merged counts II and III and sentenced defendant to five years' imprisonment. Defendant was also assessed various fines and costs, including a \$5 "State Police OP Assistance Fee."

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues (1) the trial court erred in denying his motion for a directed verdict on count II where the State failed to present evidence of the fair market value of the stolen items and (2) he is entitled to *per diem* credit against the \$5 "State Police OP Assistance Fee."

¶ 16 A. Motion for Directed Verdict

¶ 17 Defendant argues the trial court erred in denying his motion for a directed verdict on count II where the State failed to present any evidence of the fair market value of the stolen

items. We disagree.

¶ 18 "[A] motion for a directed verdict of not guilty asks whether the State's evidence could support a verdict of guilty beyond a reasonable doubt." (Emphasis omitted.) *People v. Connolly*, 322 Ill. App. 3d 905, 915, 751 N.E.2d 1219, 1227 (2001). The evidence must be considered in a light most favorable to the State, and "[t]he trial judge does not pass upon the weight of the evidence or the credibility of the witnesses in testing the sufficiency of the evidence to withstand a motion for a directed verdict." *Connolly*, 322 Ill. App. 3d at 915, 751 N.E.2d at 1227. We review *de novo* a trial court's ruling on a motion for a directed verdict. *Connolly*, 322 Ill. App. 3d at 917-18, 751 N.E.2d at 1229.

¶ 19 The State charged defendant with, *inter alia*, Class 3 felony theft (possession of stolen property exceeding \$500) (720 ILCS 5/16-1(a)(4), (b)(4) (West 2010)). Depending on the value of the property stolen, theft may be punished as a Class A misdemeanor up to a Class X felony. See 720 ILCS 5/16-1(b) (West 2010). "When a charge of theft of property exceeding a specified value is brought, the value of the property involved is an element of the offense to be resolved by the trier of fact as either exceeding or not exceeding the specified value." *People v. Perry*, 224 Ill. 2d 312, 320, 864 N.E.2d 196, 202 (2007) (quoting 720 ILCS 5/16-1(c) (West 2000); *People v. Rowell*, 229 Ill. 2d 82, 91, 890 N.E.2d 487, 492 (2008) (the value of the property involved is an element of the offense to be resolved by the trier of fact). An element of an offense must be proved beyond a reasonable doubt. *People v. Furby*, 138 Ill. 2d 434, 446, 563 N.E.2d 421, 425-26 (1990). Thus, count II required the State to prove beyond a reasonable doubt the value of the tools exceeded the \$500 statutory threshold.

¶ 20 "It is well-settled law that the value of stolen property is the fair cash market value

at the time and place of the theft." *Perry*, 224 Ill. 2d at 336, 864 N.E.2d at 211 (citing *People v. Brown*, 36 Ill. App. 3d 416, 421, 343 N.E.2d 700, 703 (1976) (original or replacement cost is not the standard for determining value)). However, cost combined with proof of condition, quality, modernness, or obsolescence may be sufficient to show value. *Brown*, 36 Ill. App. 3d at 421, 343 N.E.2d at 703-04; *People v. Langston*, 96 Ill. App. 3d 48, 54, 420 N.E.2d 1090, 1094 (1981).

¶ 21 The State maintains sufficient evidence was presented from which the jury could have reasonably inferred the tools were worth more than the \$500 statutory minimum needed to qualify the offense as a Class 3 felony. We agree.

¶ 22 Contrary to defendant's argument in the trial court the State needed an expert to testify as to value, a consumer who is familiar with the stolen property is competent to testify as to the property's value. *People v. Foster*, 199 Ill. App. 3d 372, 392, 556 N.E.2d 1289, 1302 (1990). West testified on direct examination the value of the property at issue was between \$1,500 and \$1,600 and he provided those values to the police. See *People v. Cobetto*, 66 Ill. 2d 488, 491, 363 N.E.2d 854, 856 (1977) (testimony the stolen items were worth at least \$150 found sufficient to support a conviction for theft over \$150). While it is true on cross-examination he was asked whether the "prices" he gave were his "purchase prices" and he answered in the affirmative, the question did not ask him whether the "values" he testified to were based only on purchase price. Moreover, the age and condition of the items were before the jury. We find there was sufficient evidence of value based on the quality, age, condition, and price of the tools for a reasonable fact finder to conclude beyond a reasonable doubt the tools were worth more than \$500. See *Brown*, 36 Ill. App. 3d at 421, 343 N.E.2d at 703-04 ("although proof of cost alone is insufficient, cost together with other proof, relating to condition, quality and modernness or

obsolescence, may afford the basis for a valid finding as to value").

¶ 23 B. *Per-Diem* Credit Against Defendant's \$5 Fine

¶ 24 Defendant argues he is entitled to a \$5 credit against the \$5 "State Police OP Assistance Fee" for presentence time he spent in custody. The State concedes defendant is entitled to the credit and we agree.

¶ 25 "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110-14(a) (West 2010). Although labeled a "fee," this court has found the "State Police OP Assistance Fee" is, in fact, a fine, because it does not reimburse the State for costs incurred in a defendant's prosecution. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31, 979 N.E.2d 1030. Here, the record reflects defendant spent 152 days in presentence custody. Because defendant's \$5 "State Police OP Assistance Fee" was a fine, he is entitled to \$5 credit against that fine for time spent in presentence custody. Accordingly, we remand with directions to apply \$5 credit against defendant's \$5 "State Police OP Assistance Fee."

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we remand with directions to apply \$5 in *per diem* credit to defendant's \$5 "State Police Op Assistance Fee" and for the issuance of an amended sentencing judgment so reflecting. We affirm defendant's conviction as modified. Because the State successfully defended a portion of the criminal judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194,

199 (1978)).

¶ 28 Affirmed as modified and remanded with directions.