

No. 1-12-3603

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 MC 33838
)	
LISA HARRIS-KEY,)	Honorable
)	Ketki Shroff Steffen,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶ 1 **Held:** We reversed defendant's finding of guilt where the evidence was insufficient to establish she committed theft of property belonging to United Parcel Service.

¶ 2 Following a bench trial, defendant Lisa Harris-Key, was found guilty of theft of property valued at less than \$500 belonging to United Parcel Service (UPS) and was placed on six months of supervision and ordered to pay various fines and fees. On appeal, defendant argues: (1) the State failed to prove her guilty beyond a reasonable doubt; (2) her due process rights were violated when the trial court accepted her jury waiver; and (3) the \$35 serious traffic violation

fee and the \$35 traffic court supervision fee were improperly assessed. We reverse the finding of guilty as not supported by the evidence.

¶ 3 At the bench trial, John Devries, detective commander of the Harwood Heights police department, testified that he was assigned to investigate a theft which occurred on June 4, 2012. The investigation began on June 16, 2012, when his department received a complaint from a person named Marianne Romito, of 7525 Lawrence Avenue in Harwood Heights, about a missing package from the Home Shopping Network (HSN). Two people named Marianne Romito lived in the condominium building at that address and Detective Devries contacted one of them on June 28, 2012. As part of his investigation, Detective Devries also obtained a surveillance video from a camera in the building's lobby. After viewing the surveillance video, Detective Devries testified that he spoke by phone with someone at UPS about a package delivery shown in the video. Based on information from UPS, he requested and received information from the post office in Norridge as to the time mail was delivered to the building on June 4. Detective Devries also contacted HSN regarding the whereabouts of the package reported missing.

¶ 4 At Detective Devries' request, a UPS employee viewed the surveillance video and then signed the criminal complaint against defendant, who was employed as a mail carrier for the United States Postal Service (USPS). Over defendant's objection, Detective Devries explained that UPS was the complainant in this case because UPS was liable for the missing package until it is signed for or received by the person to whom it is addressed. The trial court admitted this statement solely for the purpose of explaining "why the detective did what he did," or for his "state of mind." Over defendant's objection as to foundation, the detective also testified that the person to whom the package was addressed never received it.

¶ 5 Although the surveillance video displayed an inaccurate timestamp, the parties stipulated that it was a true and accurate depiction of the June 4, 2012, incident at issue and the surveillance video was entered into evidence. The surveillance video shows defendant enter the lobby of the building with her mailbag and go to the bank of mailboxes on a wall. The date and time stamp on the surveillance video at that point in the video shows June 4, 2012, 2:38:36 a.m. Defendant opens the outer doors to the individual mailboxes and begins to empty her bag of mail onto the ledge in front of the mailboxes. Defendant's back is to the surveillance camera. Seconds later, a man dressed in a shirt and shorts with no visible tags or identification marks on his clothing, enters the lobby. The time stamp on the surveillance video is 2:39:07 a.m. The man walks behind defendant, who is standing in front of the mailboxes. He places a package (which appears to be in the shape of a large envelope) on the ledge to the right of defendant. After the man leaves the lobby, defendant continues sorting the mail, with the delivered package on the ledge to her right. The package moves slightly to the right as defendant moves items of mail. Later, defendant bends over the ledge, picks up the package, and moves it to the far-left side of the ledge. She places other items of mail on top of the package and continues to sort the mail and place it into mailboxes. About five minutes later, defendant again picks up the package. Based on the camera angle, it is unclear whether defendant places the package into a mailbox, or in front of her on the ledge. Defendant then continues to sort the mail. Shortly thereafter, defendant gathers up the items remaining on the ledge and places them in her bag. As defendant begins to close the outside mailbox doors, a woman enters the lobby and takes mail from a box. Defendant then closes the doors to the mailboxes. After she closes the doors to the mailboxes and exits the lobby, the package is no longer on the ledge. Throughout most of the video,

defendant's back is to the camera and, because she is standing in front of the mailboxes, the view of certain individual mailboxes and parts of the ledge are blocked.

¶ 6 On September 19, 2012, Detective Devries and his partner met with defendant at the police station. After waiving her *Miranda* rights, defendant denied any knowledge of a missing package. Detective Devries then showed defendant the surveillance video. When the detective was asked what was defendant's reaction to the surveillance video, he testified as follows:

"[Detective Devries]: She identified it was her in the video after watching it a couple of minutes. She remembers being there in the afternoon. That is her route. She does not remember taking the package, however, it doesn't look good, she says. And maybe it was a mistaken identity where she took it by mistake, brought it back to outgoing mail, and she could have left it inside her post office."

¶ 7 On cross-examination, Detective Devries admitted defendant denied stealing any package. He acknowledged the surveillance video did not show defendant placing the package into her mail bag before she left the lobby, and agreed with defense counsel's statement: "The best you can say from viewing the surveillance video is there is a package and later there is no package." When asked whether defendant could have placed the package into one of the mailboxes, Detective Devries responded, based on his viewing of the surveillance video, that the package was too large. However, the detective never saw the actual package and did not know the exact size of the interior of the individual mailboxes. Detective Devries also testified that the last time he saw the package on the surveillance video, it was right in front of defendant, but he did not see where the package went.

¶ 8 On redirect, the following colloquy occurred between the Assistant State's Attorney and Detective Devries about the package which had been placed on the ledge:

"Q. What does she do with this package?

A. She moves it to her left at which time she is shuffling mail around on the ledge.

Q. Where is she in relationship to the [surveillance] camera?

A. Directly in front of it.

Q. Is her back turned to it?

A. Yes, it is.

Q. Okay.

A. And she closed the mail door to all the mail units at which time she moves the package directly in front of her.

Q. Is this now - - Is the package then out of view of the camera?

A. That's correct.

Q. But it's in front of her directly?

A. Right. And the mail doors are already closed by this time.

Q. I see. So you are able to deduce that it was not put into the mailbox because it was out on the ledge after the mailbox door was closed, is that correct?

A. That's correct.

Q. And did she put any mail into the mail boxes after she closed the door?

A. No.

Q. And then what was your next - - When was the next time that the package was visible at that point?

A. It was never visible after that point. You just see her putting stuff into her mail bag. When she turns around and walks out the door which is directly to her left, maybe two feet, the ledge is completely cleaned off.

Q. Did you see her put anything into the mail bag, I mean, specific items?

A. I just see her hands moving and things were going in there. I can't tell exactly what was specific, no.

Q. So you know things were put in there. You just don't know what.

A. That's correct.

Q. And you know that the package is not there anymore?

A. That's correct.

Q. So you deductively reason that she took the package?

MR. GREENBURG: Objection.

THE COURT: Overruled.

THE WITNESS: That's correct."

However, the surveillance video actually shows the doors to the mailboxes remained open at the time defendant moved the package in front of her and remained open until the ledge was clear of mail.

¶ 9 Jason Hladilek, a UPS security investigator, testified that Detective Devries informed him that sometime in June a UPS package "had gone missing." Mr. Hladilek testified from a UPS document that a package was shipped by HSN and delivered to the inner lobby of 7525 West Lawrence Avenue at 3:36 p.m. on June 4, 2012. The document was generated based on a tracking number given to Mr. Hladilek by Detective Devries. Detective Devries obtained the number from HSN. This document, State exhibit number 2, was admitted into evidence, but is not part of the record. Mr. Hladilek said Ms. Romito had filed a complaint with UPS. According to Mr. Hladilek, UPS was responsible for the loss. He told Detective Devries that

UPS would be paying HSN the amount HSN had paid UPS to have the package delivered, plus \$100, based on UPS's "blanket coverage."

¶ 10 Debra Green, a 24-year employee and union steward of the USPS, testified she had known defendant for 14 years and considered her a friend. When asked about defendant's reputation for honesty, Ms. Green said the USPS has never received any complaints about defendant. According to Ms. Green, USPS employees routinely picked up UPS parcels which have been returned and that such packages would bear a UPS label which indicates that they are returnable to the USPS.

¶ 11 Ms. Green watched the surveillance video and believed defendant rolled the package to fit into the mailbox based on defendant's movements and on the fact that her hands were empty when she pulled them back.

¶ 12 During its closing arguments, the State contended that the package from HSN was not received by Ms. Romito. The trial court interrupted the State's argument and said: "None of that is in the evidence. All of that is hearsay. That cannot come in. If you are arguing evidence, that's not evidence."

¶ 13 In finding defendant guilty of theft, the trial court considered the surveillance video. The trial court stated the package depicted in the video was "soft" and did not appear to be a box. The trial court further found that because the UPS employee delivered the package in front of defendant, it was "obvious" the package was "being delivered to one of the residents." The trial court further stated:

"It is clear to me from the video that she takes the package. She moves it from the left to the right.

At the time when you are picking up something, to put it right in front of you to the mailboxes, why is there a reason to move this thing three times?

*** I think she was thinking quite possibility at the time what she should do. I do not know what was going on in her mind. But it is obvious to me that this package was moved around unnecessarily by her. It is clear to me that she did not make a mistake and thought this was perhaps an item of mail that is hers that had to be taken back.

It is clear that the UPS delivery guy came in front of her, delivered this package. I don't think that the time spent is so great that she could have mistaken it as one of her packages and mistakenly taken it back.

I find that she intended to take this package and deprive the owner of the right, to the property rights of such package."

The trial court found that the fact that the intended recipient of the package did not testify was not of "great detriment to the [S]tate's case."

¶ 14 The trial court then sentenced defendant to six months of supervision and ordered her to pay various fines and fees. Defendant did not file a posttrial motion or a postsentencing motion but timely appealed.

¶ 15 On appeal, defendant asserts the evidence was insufficient to sustain the finding of guilt. Specifically, defendant argues that the surveillance video does not prove she took the package because the surveillance video does not clearly show whether she placed the package into a mailbox or into her mailbag; Marianne Romito did not testify to ordering, requesting delivery, or not receiving a package from HSN; and defendant, who had a reputation for honesty and had worked for the USPS for over a decade without any complaints, had denied to the police that she

stole the package. We agree and find the evidence was not sufficient to sustain the finding of guilt.

¶ 16 To prove defendant guilty of theft, the State was required to show she knowingly obtained or exerted unauthorized control over property of the owner and that she intended to deprive the owner permanently of the use or benefit of the property. 720 ILCS 5/16-1(a)(1)(A) (West 2012). " 'A defendant's intent to permanently deprive the owner of property may be deduced by the trier of fact from the facts and circumstances surrounding the alleged criminal act.' " *People v. Haissig*, 2012 IL App (2d) 110726, ¶ 31 (quoting *People v. Veasey*, 251 Ill. App. 3d 589, 591 (1993)). Specifically, in this case, the State was required to prove beyond a reasonable doubt that defendant took a package owned by UPS with the intent to deprive UPS permanently of the use or benefit of that package.

¶ 16 Initially, we must determine the proper standard of review to be applied as to defendant's sufficiency of the evidence claim. Defendant maintains that a *de novo* standard of review should apply because the material facts of her case are not in dispute. However, defendant disputes the inferences drawn by the trial court as to the evidence and, under such circumstances, we do not apply the *de novo* standard of review. See *People v. Lattimore*, 2011 IL App (1st) 093238, ¶¶ 35-36 (declining to apply a *de novo* standard of review because the defendant's argument challenged the inferences the trial court drew from the evidence). Accordingly, we will employ the standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 319. It is not this court's duty to retry a defendant and the trier of fact remains responsible for making determinations regarding witness credibility, the weight to be given

witnesses' testimony, and reasonable inferences to be drawn from the evidence. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). The same standard applies regardless of whether the evidence is direct or circumstantial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). We will reverse only where " 'the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt.' " *People v. Lloyd*, 2013 IL 113510, ¶ 42 (quoting *People v. Collins*, 214 Ill. 2d 206, 217 (2005)).

¶ 17 Having determined the proper standard of review, we do note that the principle evidence in this case was the surveillance video. This surveillance video was admitted without authentication and none of the witnesses at trial had personal knowledge of its content. However, under the silent witness theory, a surveillance recording may be admissible in the absence of authentication by an eyewitness with personal knowledge of the content if there is sufficient proof of the reliability of the process that produced the recording. *People v. Taylor*, 2011 IL 110067, ¶ 35. This type of evidence is admitted " 'as a so-called silent witness or as a witness which "speaks for itself." ' " *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 34 (quoting Jordan S. Gruber, *Foundation for Contemporaneous Videotape Evidence*, in 16 Am. Jur. Proof of Facts 3d 493, § 4, at 507 (1992)). This court has noted that although we must give deference to the trial court's determinations as to credibility and the inferences to be drawn from evidence, "[W]here certain evidence does not involve credibility determinations or observations of demeanor, the deference afforded is logically less." *People v. Rivera*, 409 Ill. App. 3d 122, 139 (2011) (reversed on other grounds, 2013 IL 112467).

¶ 18 Detective Devries' testimony was that a person named Marianne Romito made a complaint to the Harwood Heights police department that a package from HSN was missing.

However, this evidence was admitted for the sole purpose of explaining the steps taken by Detective Devries in his investigation. When the State remarked during closing arguments that Detective Devries had spoken with HSN and "USPS" to confirm that Marianne Romito's package was missing, the Court stated, "None of that is in evidence. All of that is hearsay." The court subsequently found there was no "detriment" to the State's case because it failed to prove that Marianne Romito did not receive the package. The State's theory in this case was that UPS would be liable for the loss of the package as long as it was not received by Marianne Romito. We believe the State was required to show, by clear, substantive evidence, that Marianne Romito did not receive the package.

¶ 19 Furthermore, even viewing the surveillance video in the light most favorable to the prosecution, we conclude it is insufficient to prove the elements of theft as charged here. While defendant is sorting the mail, the surveillance video shows an unknown man entering the building's lobby, walk behind defendant and place a package on the ledge in front of the mailboxes. The man's clothing does not identify him as a UPS employee. The time stamp on the surveillance video at the time the man places the package on the ledge is 2:39:10 a.m. on June 4, 2012. However, the documentary evidence was that the package from HSN to Marianne Romito was delivered by UPS at 3:36 p.m. on June 4, 2012. No witness identified the man as the UPS employee who delivered a package from HSN addressed to Marianne Romito. Defendant does move this package from its original place on the ledge after delivery. We do not find defendant's act of moving the package on the ledge determinatively proves an intent to take the package. The surveillance video also shows defendant moved around other items (pieces of mail) which were on the ledge. Additionally, at the point where she moved the package in front of her, there is no way to see what is ultimately done with it—put in a mailbox or taken by defendant.

Defendant later gathers the remaining items from the ledge, closes the doors to the mailboxes, and leaves the building lobby; the UPS package is no longer on the ledge. However, the surveillance video does not show that the package was placed in defendant's mailbag and taken from the lobby.

¶ 20 Detective Devries did not have personal knowledge of the events shown in the surveillance video. He however, did testify as to his *opinion* of what he saw in the surveillance video. From his viewing of the surveillance video, he thought the package was too big to go into a mailbox. This testimony was highly speculative because Detective Devries had never seen the actual package and did not know the measurements of the package, nor of an individual mailbox. Additionally, as the trial court found, the package was "soft," not a box. Such a finding does not support the detective's conclusion that the package could not physically be placed in a mailbox. The detective's "deduction" that defendant took the package was based on his erroneous belief that the outer doors to the mailboxes were closed at the time defendant was placing the remaining mail on the ledge in her mailbag. The deduction was contradictory to Detective Devries' acknowledgment that the video does not demonstrate defendant placed the package in her mailbag.

¶ 21 The State failed to establish, beyond a reasonable doubt, that defendant took a package sent by HSN to Marianne Romito and delivered by UPS on June 4, 2012.

¶ 22 Because we have found the evidence was insufficient to support defendant's finding of guilt, we need not address the other issues raised by defendant.

¶ 23 For the reasons stated, we reverse the finding of guilt and defendant's sentence of supervision.

¶ 24 Reversed.