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2015 IL App (3d) 140478-U

Order filed July 20, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

| | | |
|----------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE OF |) | Appeal from the Circuit Court |
| ILLINOIS, |) | of the 10th Judicial Circuit, |
| |) | Peoria County, Illinois, |
| Plaintiff-Appellee, |) | |
| |) | Appeal No. 3-14-0478 |
| v. |) | Circuit No. 12-CF-531 |
| |) | |
| RAYMOND McCLASKEY, |) | Honorable |
| |) | Kevin W. Lyons, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The variance between the allegations in the indictment and the evidence presented at trial was fatal to defendant's conviction.

¶ 2 Defendant, Raymond McClaskey, was indicted for theft (720 ILCS 5/16-1(a)(1) (West 2010)). The indictment alleged that on or about the dates of May 16 through November 2, 2011, defendant exerted unauthorized control over fuel and United States currency belonging to his former employers. Prior to trial, defendant moved to exclude any evidence of alleged thefts that

occurred prior to May 16, 2011. The court denied that motion, and the cause proceeded to a jury trial.

¶ 3 At trial, witnesses testified to potential acts of theft committed by defendant both before and after May 16, 2011. The jury returned a verdict of guilty, and the court sentenced defendant to 30 months' probation, in addition to fines and court costs. Defendant appeals, arguing that there was a fatal variance between the acts alleged by the indictment and the evidence presented at trial. We reverse defendant's conviction and remand for a new trial.

¶ 4 FACTS

¶ 5 A grand jury returned an indictment alleging that on or about the dates of May 16 through November 2, 2011, defendant committed theft (720 ILCS 5/16-1(a)(1), (b)(4) (West 2010)). Specifically, the indictment alleged that defendant:

"did knowingly exert unauthorized control over the property of John and Nanette Rudd d/b/a Rudd Trucking, said property being fuel and United States currency having a value in excess of \$500.00, with the intent to permanently deprive said owner of the use or benefit of said property and said acts were performed in furtherance of a single intention and design."

¶ 6 After receiving discovery materials, defendant filed a motion to exclude testimony. The motion alleged that certain State witnesses planned to testify to potentially criminal conduct committed by defendant prior to May 16, 2014~~the~~ the earliest date listed in the indictment. Defendant argued that the testimony in question would be prejudicial and irrelevant to the allegations in the indictment. The record on appeal contains no evidence of a hearing on the motion. In a written order, the court denied the motion without explanation. The cause proceeded to a jury trial.

¶ 7 In its opening statement, the State explained that from December 2010 through May 2011, defendant worked as a manager for a trucking company, Rudd Trucking, Inc. (Rudd Trucking), owned by John and Nanette Rudd. When defendant left his employment with Rudd Trucking, he took with him a company fuel card, which he used to purchase approximately \$10,000 in fuel at his new job with a different trucking company. The State alleged that the Rudds did not authorize defendant to continue using the fuel card after his employment with them ended. The State continued:

"After [the Rudds] discovered what had happened with the fuel card, they told [defendant] he needed to make good on it and pay them back. Of course, he never did. They also uncovered substantial other thefts he had committed while he was actually working for them, and you'll hear about that as well."

¶ 8 John testified that he and his wife Nanette owned a trucking company called Rudd Trucking. In late 2010, the Rudds hired defendant to manage the company's operations. Defendant worked for the company until May 2011. During defendant's employment, the Rudds issued defendant a fuel card to purchase fuel for the company trucks. In June 2011, after defendant had left his employment with Rudd Trucking, John was contacted by his bank to inform him that the fuel account had insufficient funds. When John investigated the account, he discovered that defendant's card had been used to purchase fuel after defendant's employment with Rudd Trucking had ended. John testified that he had not given defendant permission to continue using the fuel card. When John found out about the unauthorized fuel charges, he sent a letter to defendant, demanding payment for the fuel charges. Defendant told John that he would pay him back, but John never received any payment. The State introduced an exhibit that purported to show \$10,224.51 in fuel charges made between May 16 and June 27, 2011.

¶ 9 John also testified about events that occurred prior to May 16, 2011. The State introduced a copy of a check dated January 25, 2011, made payable to Central Illinois Loan (CIL) and drawn on an account controlled by the Rudds. John testified that he did not have any loans with CIL at that time and did not authorize defendant to make a payment to CIL. In addition, John testified that, while employed with Rudd Trucking, defendant opened a credit account through a company called Comdata. John was aware that defendant had opened the account but was unaware that defendant was issued a debit card that he could use to withdraw cash. According to John, the billing information for the debit card was sent directly to defendant, without John seeing it. The State introduced billing records that showed several cash withdrawals made using the debit card during the period of defendant's employment. John also testified that, when defendant left his employment with Rudd Trucking, he took laptops owned by the Rudds that contained the company's financial information.

¶ 10 Nanette testified that she and John owned and operated Rudd Trucking. Nanette was aware that defendant opened the Comdata account but was unaware that the account included a debit card that could be used to withdraw cash. The State introduced two exhibits, which purported to show cash withdrawals totaling \$9,898.50, made from the Comdata account prior to May 16, 2011. Nanette further testified that she was unaware that defendant retained a fuel card after leaving his employment with Rudd Trucking. She did not give defendant permission to use the fuel card after his employment ended with Rudd Trucking.

¶ 11 John Eppers testified for the defense that he was a friend of defendant and lived with him in late 2010. In May 2011, defendant told Eppers that the Rudds owed him money and that defendant planned to use the fuel card to recoup the debt.

¶ 12 Defendant testified that he opened a "factoring" account for the Rudds through Comdata, which included the use of a debit card. John authorized him to open the account and use the debit card for work-related transactions. Defendant brought John the billing records for the account daily. Seven different drivers, including defendant, used the Comdata debit card. As to the fuel card, defendant testified that John gave him permission to continue using it after defendant stopped working for Rudd Trucking, to pay back a debt that John owed to defendant.

¶ 13 In its closing argument, the State argued that the jury could return a guilty verdict if it found that, at any time, defendant committed a theft. The State explained:

"The Court will also instruct you that the indictment states that the offense was committed between May 16, 2011, and November 2, 2011, but if the offense was committed, the State is not required to prove that it was committed on a particular date. So it's not, again, an issue as far as what dates this occurred or when it occurred. As long as you find it occurred, that is sufficient evidence in the case to justify a conviction."

The State reiterated that defendant had written a \$1,000 check and, between December 2010 and March 2011, made \$9,898.50 in withdrawals using the Comdata debit card. The State also reviewed the fuel charges that defendant allegedly made after May 16, 2011.

¶ 14 In his closing argument, defendant also addressed the indictment:

"The indictment, that's the charging instrument. It's what they have to prove beyond a reasonable doubt. On or about the dates of 5/16/2011 through 11/02/2011, now, [the State] says they don't have to prove a specific date within that time frame, but that's the time frame that he's alleged to have committed these crimes as alleged here. And as alleged, he committed theft during those time frames—according to them at various dates, we saw it on the last exhibit—by exerting unauthorized control over the property of

the Rudds' fuel and currency in excess of 500 with the intent to permanently deprive pursuant to a single intention and design."

Defendant argued that John authorized him to use the fuel card after his employment ended with Rudd Trucking, and that defendant's acts therefore did not constitute theft.

¶ 15 In rebuttal, the State argued:

"Now, the law in the state of Illinois is that the State does not have to prove the defendant committed the offense on any particular date or time frame. [Defense counsel] is totally inaccurate when he tells you that we have, we're limited by what was alleged to have happened between May and November. It's not true. The judge will tell you it's not true. If the defendant is shown to have committed"

Defendant objected. The court responded that it would give a jury instruction on the issue. The State continued its rebuttal and argued that the writing of the CIL check could support a guilty verdict.

¶ 16 The court gave the following jury instruction, among others:

"The indictment states that the offense charged was committed on or about May 16, 2011, through November 2, 2011. If you find the offense charged was committed, the State is not required to prove that it was committed on the particular date charged."

The jury returned a verdict of guilty.

¶ 17 Defendant filed a motion for a new trial. The motion argued, *inter alia*, that the court erred by allowing the evidence of thefts committed prior to May 16, 2011, and by allowing the State to argue that those alleged thefts could support a guilty verdict. The State responded that the date of the offense was not an essential element, and therefore any variance was acceptable.

Defendant clarified that he accepted the court's ruling that evidence of the other alleged crimes could be admitted for a limited evidentiary purpose but not as substantive evidence of defendant's guilt. The court denied the motion, finding that the given jury instruction accurately described the law. The court saw no issue with the dates of the indictment being correct, so long as the acts for which defendant was found guilty occurred within the statute of limitations. The court found that defendant was properly notified that the acts committed during defendant's employment would be presented at trial. The court sentenced defendant to pay restitution and serve 30 months' probation.

¶ 18

ANALYSIS

¶ 19

On appeal, defendant requests a new trial, arguing that there was a fatal variance between the allegations in the indictment and the evidence presented at trial. The State argues that any variance between the indictment and the proof at trial was innocuous and not prejudicial to defendant's defense. We agree with defendant and remand for a new trial.

¶ 20

Due process requires that an indictment must apprise a defendant of the precise offense with which he is charged. *People v. Alexander*, 93 Ill. 2d 73, 79 (1982). However, a variance between the allegations of the indictment and the proof at trial is not fatal to a conviction unless the variance is both material and prejudicial. *People v. Arndt*, 351 Ill. App. 3d 505, 518 (2004). A variance is prejudicial if it misleads the accused in making his defense or exposes him to double jeopardy. *Id.*

¶ 21

Generally, an error in the date of the indictment does not constitute a fatal variance. *Alexander*, 93 Ill. 2d at 77. So long as the date is not an essential element of the offense, and the date proved is within the statute of limitations period, a variance between the date listed in the

charging instrument and the date of the offense proved at trial will not result in a fatal variance. *Id.* at 77-78.

¶ 22 For example, in *People v. Pecoraro*, 144 Ill. 2d 1 (1991), the indictment alleged that the defendant committed a murder on December 8, 1982. The defendant was found guilty although the proof at trial established that the murder occurred on December 6, 1982, and that the body was discovered on December 8, 1982. On appeal, the court held that the discrepancy in the dates of the offense was not error because "[d]efendant was sufficiently apprised of the precise offense charged in the indictment and has not shown to have been prejudiced in the preparation of his defense." *Id.* at 19.

¶ 23 In the present case, the variance was not merely a typographical error in the date listed in the indictment. Rather, the beginning date in the indictment, May 16, 2011, was significant because it represented the date of the first alleged unauthorized use of the fuel card, as outlined in the State's exhibit. The date therefore signified that the indictment was charging defendant with a theft based on unauthorized control of fuel purchased with the fuel card. In contrast, the proof at trial included evidence of alleged *distinct offenses*: the deposit of the CIL check, the use of the Comdata debit card, and the retention of the laptops. Thus, the problem with the indictment in the present case is not merely that it alleged an incorrect date, but that the proof at trial described distinct offenses that were not charged by the indictment. As a result, defendant was not "sufficiently apprised of the precise offense charged." *Pecoraro*, 144 Ill. 2d at 19.

¶ 24 The variance between the indictment and the proof at trial in the present case was prejudicial, as it misled defendant in making his defense and may expose him to double jeopardy. Although defendant's pretrial motion shows that he was aware of the State's intention to admit evidence of thefts that occurred during his employment, defendant was under the

impression that those acts would be admitted for a limited purpose and not as substantive evidence of his guilt. There is nothing in the record on appeal to suggest that the State notified defendant before trial that it intended to admit the prior thefts as substantive evidence. It was not until the State's closing argument that defendant became aware that he might be found guilty based upon the thefts that occurred during his employment. Had defendant been aware that those prior thefts could support a guilty verdict, he may well have pursued a different defense.

¶ 25 It is also unclear which act by defendant supported the jury's verdict. The State explicitly argued in rebuttal closing argument that the CIL check could support a guilty verdict. In addition, during closing arguments, the State argued to the jury that it was not bound by the dates of the indictment. The court's later jury instruction essentially supported the State's argument. Therefore, we cannot know whether the jury found defendant guilty for using the fuel card, using the Comdata card, cashing the CIL check, or taking the laptops. As a result, the conviction might not serve as a bar against potential future prosecution of defendant for those alleged thefts.

¶ 26 The State's contention that defendant forfeited or waived the variance argument is unpersuasive. First, a challenge to the sufficiency of the charging instrument may be raised for the first time on appeal. *People v. Jones*, 245 Ill. App. 3d 674, 676 (1993). In addition, we fail to see how defendant forfeited his argument. Defendant filed a pretrial motion, challenging the introduction of evidence of the thefts that occurred prior to the dates listed in the indictment; he objected during the State's rebuttal closing argument when the State argued that the jury was not bound by the dates of the indictment; and he filed a posttrial motion arguing that there was a fatal variance between the indictment and the evidence admitted at trial. We find no bar to reaching defendant's claim on appeal.

¶ 27 As there was a fatal variance between the allegations of the indictment and the evidence presented at trial, we reverse the judgment and grant defendant's request for a new trial.

¶ 28 CONCLUSION

¶ 29 The judgment of the circuit court of Peoria County is reversed and the cause is remanded for further proceedings, including a new trial.

¶ 30 Reversed and remanded.