2017 IL App (1st) 151260-U

No. 1-15-1260

Order filed December 11, 2017

FIRST DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 7678
	)	
BRET JOHNSON,	)	Honorable
	)	James Michael Obbish,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment entered on defendant's conviction for felony retail theft is affirmed over his claims that the evidence was insufficient to prove beyond a reasonable doubt that he passed the last point of purchase and that the value of the merchandise taken was more than $300.

¶ 2 Following a bench trail, defendant Bret Johnson was found guilty of felony retail theft and sentenced to one year of probation. On appeal, he contends that he was not proven guilty

beyond a reasonable doubt because the State failed to establish that he passed the store's last point of purchase and the value of the item allegedly taken. We affirm.

¶ 3 At trial, Mario Rico testified that on April 19, 2014, he was working as a security officer at the Macy's department store on State Street in Chicago. As part of his duties, he was "on" the surveillance cameras. At one point, he saw defendant enter the store. Defendant subsequently selected a boxed Dyson vacuum. Ultimately, Rico watched as defendant went through "a glass door that leads out to the Washington [Street] side of the store." He explained that if a person went through the glass door into a vestibule, as one continued through the vestibule, there was "another glass door that leads out to the street." Defendant was detained after he passed through the "first set" of glass doors. Rico did not observe defendant purchase the vacuum.

¶ 4 After defendant was detained, Rico scanned the vacuum using a "Macy's retail computer" and learned that the item was for sale and that it was valued at "600." The State then asked whether the vacuum was more than $600 and Rico responded, "Yeah, over 600." Rico next identified a CD that contained a video from the day of the incident and testified that it truly and accurately depicted the way the video surveillance looked. He finally identified the receipt that he generated by scanning the vacuum. The receipt was marked as the State's exhibit number two. The State later entered this exhibit into evidence.

¶ 5 Rico testified that there were cash registers in the women's fragrance department approximately 15 feet from the glass door through which defendant exited. He further testified that vacuums are found in the basement housewares department and that registers are located there. Defendant did not produce a receipt for the vacuum and the box did not have "a Macy's

return sticker on it." Rico explained that if the vacuum "had been purchased, it would have [a return sticker] on it." The following exchange took place:

Q. "So, when the [d]efendant was within that vestibule, was he past the last point-of-purchase?

A. Correct, he was."

¶ 6 During cross-examination, Rico testified that there were over 10 exits on the first floor. On the first floor, most of the exits are doors that lead into a small vestibule. Those vestibules have another set of doors that lead to the outside. Only one vestibule contains an elevator. Rico could not recall whether the exits were marked with exit signs. He also could not recall whether the specific vestibule that defendant entered was marked with an exit sign. Rico acknowledged that he never saw defendant exit the second set of doors that lead to the street. There was a valet station on the other side of the second set of doors. However the valets do not work for Macy's; rather, they work for a hotel across the street. Rico watched as a coworker approached defendant and defendant dropped the vacuum and tried to run back into the store. He acknowledged that defendant was trying to get from the elevator area to the store area. Rico then testified that the vacuum was in a large box. He finally testified that if no sales associate was at the closest point of purchase, a customer may continue to shop and can pay for an item at any point of purchase.

¶ 7 The video was then played for the court. The video shows defendant walking around the housewares department then walking off camera. Defendant then reappears on camera, looks around and picks up a box and walks off camera. He then walks back on camera and through housewares. No one else is on the video at that time. He then walks off camera. Defendant then appears on camera, holding the box, walking through various departments. At one point,

defendant, who is not holding the box, presses an elevator button. He then walks away, grabs the box and gets on the elevator with the box. Defendant later walks through the women's department, takes an escalator down and walks though the men's department. Ultimately, defendant ends up in the juniors' department and walks down a flight of stairs. Once on the ground floor, defendant walks through the fragrance department. He passes a counter with a person standing behind it and walks through a door. The door does not have an exit sign above it. A man then grabs defendant. At this time, defendant's body is not facing the elevator bank. Defendant drops the box and turns back toward the store. He is pushed into the glass.

¶ 8 Defendant testified that he went to Macy's to buy a vacuum. He had other shopping to do, and had cash and credit cards. After he located a vacuum in the basement, he could not find a salesperson. He did not try to exit the store via the underground pedway system; rather, he stayed in the store because he was "going to make a further purchase up in the store," and planned to purchase everything together. Defendant believed that he could pay for the vacuum on a different floor. No one told him that he could not travel from floor to floor with the vacuum. Defendant testified that the vestibule that he entered was not marked as an exit.

¶ 9 Defendant recalled that the exits were "clearly marked on every—on every possible way out of the store." He went through a glass door that was not marked as an exit because he planned to take the elevator. However, he did not have the chance to push the button. At that point, a person ran into defendant and pushed his "head up against the glass." Defendant denied that he ever touched the second set of doors in the vestibule, that is, the ones that lead out of the vestibule. He testified that one could not go through the second door onto the street. Rather, after the second door, there was a curve in vestibule with a valet "sitting there" and that after "30

more feet, there's another door exit into Washington." Defendant intended to pay for the vacuum and had not finished shopping.

¶ 10 During cross-examination, defendant testified that he planned to use the elevator even though he had just walked down a flight of stairs because he did not know where the other elevator was located. He explained that the stairs brought him to the first floor and he planned to go to housewares to pay for the vacuum. He had earlier taken an elevator. He did not know why he initially went to an elevator bank without the vacuum. During redirect, defendant testified that the vacuum weighed approximately 25 pounds and he put the box down because it was heavy.

¶ 11 In closing argument, the defense argued that there was no way for defendant to have known that he passed the last point of purchase, and, as he never exited the store, a not guilty finding was warranted. The State responded that based upon defendant's behavior in the store, *i.e.*, defendant would not carry a 25-pound vacuum around the store if he intended to purchase it and the fact that if one looked at the video closely, one could see that defendant's "direction of travel is not turned toward the elevators, but through that second set of doors in order to get outside" a guilty verdict was warranted.

¶ 12 In finding defendant guilty, the court found that defendant was "not very credible, compared to the hard evidence in the video." The court noted that in the video, defendant "never makes any effort whatsoever, to ever go to any salesperson" and that defendant exhibited "rather suspicious conduct" when he hit an elevator button without the vacuum in his hand, then exited the "view of the camera" before running into the elevator with the vacuum when the elevator doors opened. The court further found that defendant was "not slammed initially, up against any kind of wall when he—when he does exit past the last point of purchase." The court concluded

that defendant was "trying to escape the security guard" and therefore found him guilty of felony retail theft. Defendant was sentenced to one year of probation.

¶ 13 On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt of felony retail theft because the State failed to establish that he passed the last point of sale and that the value of the vacuum was more than $300.

¶ 14 When reviewing a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *People v. Bradford*, 2016 IL 118674, ¶ 12. A reviewing 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. *Id*. This court reverses a defendant's conviction only where the evidence is so unreasonable, improbable or unsatisfactory that a reasonable doubt of his guilt remains. *Id*.

¶ 15 Before reaching the merits of defendant's claims on appeal, this court must address the standard of review. Defendant argues that because the trial court's "review of the [surveillance] video *** was the basis for the conviction," and because this court is able to view the video, this court is "not hobbled" by the same deference that it would given to the trial court's determinations regarding credibility. In other words, this court should review the video *de novo*. The State responds that were this court to draw a different conclusion from the surveillance video, it would be "abandon[ing] the standard of review."

¶ 16 *People v. Shaw*, 2015 IL App (1st) 123157, is instructive. In that case, this court found that a surveillance video, as well as police testimony, directly contradicted the victim's testimony, rendering his testimony not credible as to a central issue. *Id*. ¶ 26. In so doing, the court noted that a trial court does not occupy a position that is superior to the appellate court when evaluating evidence that is not live testimony. *Id*. ¶ 29 (citing *People v. Radojcic*, 2013 IL 114197, ¶ 34). The court therefore concluded that a reviewing court will give great deference to the trial court's factual findings, including its credibility assessments, unless the record shows that those findings are against the manifest weight of the evidence. *Id*. ¶ 30. The court further stated that an appellate court "give[s] less deference to a trial court's determinations of fact when they are based on evidence other than live witness testimony." *Id*. ¶ 29.

¶ 17 Defendant argues that in this case, as in *Shaw*, because this court is able to view the video, we should draw our own conclusions regarding what it shows rather than deferring to the trial court's findings. In the case at bar, however, the trial court considered the testimony of Rico, defendant and the video when finding defendant guilty. As the court stated in *Shaw*, this court is in the same position as the trial court when evaluating video evidence. However, we will defer to the trial court's factual findings, unless the record shows that those findings are against the manifest weight of the evidence.

¶ 18 To convict a defendant of retail theft, the State must prove the defendant knowingly took possession of merchandise offered for sale at a retail mercantile establishment 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. See 720 ILCS 5/16-25(a)(1) (West 2014). Thus, retail theft consists of three elements: (1) a defendant knowingly took possession

of, carried away, transferred, or caused to be carried away or transferred, any merchandise; (2) the merchandise was displayed, held, stored, or offered for sale in a retail mercantile; and (3) defendant intended to retain such merchandise or, intended to deprive the merchant permanently of the possession, use, or benefit of such merchandise without paying the full retail value of such merchandise. See *People. v. Rucker*, 294 Ill. App. 3d 218, 226 (1998) (citing 720 ILCS 5/16A-3(a) (West 1994)). A trier of fact may infer that a defendant intended to deprive a merchant permanently of the possession, use, or benefit of merchandise without paying the full retail value of such merchandise when, *inter alia*, the defendant removed the "merchandise beyond the last known station for receiving payments for that merchandise in that retail mercantile establishment." See 720 ILCS 5/16-25(c)(2) (West 2014).

¶ 19 At trial and before this court, the parties debate whether the vestibule where defendant was apprehended was beyond the "last known station for payment." In *People v. Steele*, 156 Ill. App. 3d 508 (1987), however, the court recognized that the "last known payment station" presumption was simply a response to the practical difficulties of proving intent, finding that:

> "under the literal terms of the statute, one could commit retail theft by merely picking up an item in a retail store with the intention of taking it, even if he changed his mind almost immediately and replaced the item. In practical terms, such an offense could seldom, if ever, be prosecuted because of the impossibility of proving the defendant's intent. Section 16A-4 [now 16-25(c)] attempts to alleviate the difficulty of proof in all retail theft cases by providing a reasonable point beyond which a defendant is presumed to have intended to steal the merchandise." *Id*. at 511-12.

"The element of intent, however, may be established without the presumption [created by passing the last known point of payment], as intent may be inferred by surrounding circumstances and may be proved by circumstantial evidence." *People v. Taylor*, 344 Ill. App. 3d 929, 936 (2003). See also *Rucker*, 294 Ill. App. 3d at 226 (the element of intent may be proved by circumstantial evidence).

¶ 20 In the case before us, the trial court found both that defendant had the requisite intent and that he was beyond the last point of purchase. Admittedly, the facts in this case do leave some room for argument regarding the issue of whether defendant had passed the last point of payment when he was grabbed by a Macy's employee. Here, although defendant had exited through the first set of doors into the vestibule, the elevator would have taken defendant to other parts of the store and customers were free to check out at any register in the store. Fortunately we need not determine precisely where the last point of purchase was because, although that is one way to establish intent, it is by no means the only way. See *People v. DePaolo*, 317 Ill. App. 3d 301, 307 (2000) ("nothing in *Steele* indicated that moving merchandise beyond the last known payment station was the only means of establishing that the offense of retail theft had been completed").

¶ 21 At the time that defendant was grabbed by a Macy's employee, he was holding a boxed vacuum, and had just passed a counter with a cash register and a salesperson. Although the door that defendant passed through was not marked with an exit sign, the second set of doors in that vestibule led to the street. Moreover, although defendant testified that he planned to take the elevator and continue shopping, the surveillance video shows that defendant's body was not facing the elevators at the time that he was grabbed. Thus, the video does not provide this court

with evidence that would permit it to substitute its judgment for that of the trial court on issues involving the weight of the evidence or the credibility of the witnesses. *Bradford*, 2016 IL 118674, ¶ 12. Accordingly, we cannot find, given the totality of the circumstances and considering them in the light most favorable to the State, that no rational trier of fact could find that defendant had the requisite intent for retail theft. *Brown*, 2013 IL 114196, ¶ 48.

¶ 22 Defendant next contends that the State failed to prove an element of the offense, that is, the retail value of the vacuum. He concludes that because of the insufficient evidence of the value of the vacuum, his conviction must be reduced from a felony (720 ILCS 5/16-25(a)(1), (f)(3) (West 2014)), to a misdemeanor (720 ILCS 5/16-25(a)(1), (f)(1) (West 2014)).

¶ 23 In order to convict defendant of the felony version of retail theft, the State had to prove that the "full retail value" of the property that he carried away exceeded $300. 720 ILCS 5/16-25(f)(3) (West 2014); see also *DePaolo*, 317 Ill. App. 3d at 308 ("value is an element of the offense that must be resolved by the trier of fact as either exceeding or not exceeding [$300]"). The "full retail value" of the stolen property means "the merchant's stated or advertised price of the merchandise." See 720 ILCS 5/16-0.1 (West 2014).

¶ 24 Here, the evidence, when viewed in the light most favorable to the State, proved beyond a reasonable doubt that the value of the vacuum cleaner exceeded $300. Rico testified when he scanned the vacuum using a "Macy's retail computer," he learned that the item was for sale at Macy's and that it was valued at "600." The State then submitted that receipt into evidence without an objection from defendant. The receipt, contained in the record on appeal, lists a retail price of $649.99. In light of these facts, there was sufficient evidence to establish that the value

of the vacuum exceeded $300. See *DePaolo*, 317 Ill. App. 3d at 308 (the value of the item is an element of the offense that must be resolved by the trier of fact).

¶ 25 Defendant, however, argues that Rico's testimony regarding the value of the vacuum was insufficient because he merely based the value of the vacuum off of the receipt and did not have independent or personal knowledge regarding its value.

¶ 26 The State responds that defendant invited this alleged error by failing to object when the receipt was admitted into evidence at trial. Although we are not convinced that the mere failure to object rises to the level of invited error, the record reveals that defendant did not object at trial to the admission of the receipt or otherwise challenge the reliability of the process by which it was generated. This was an evidentiary issue that could have been easily cured. Had counsel objected to Rico's testimony regarding how the receipt was generated or what it showed, the State could have easily cured any deficiency that may have existed by presenting a witness to testify regarding vacuum prices at Macy's.

¶ 27 In any event, "[q]uestions regarding the knowledge of a witness in valuing property go toward the weight of the evidence, not its competency" (*DePaolo*, 317 Ill. App. 3d at 309), which is an issue reserved for the trier of fact (*Brown*, 2013 IL 114196, ¶ 48). It was the trial court's prerogative to determine what weight to give to Rico's testimony regarding the vacuum's value and we decline defendant's invitation to substitute our judgment for that of the trial court on this issue. See *Bradford*, 2016 IL 118674, ¶ 12 (it is the responsibility of the trier of fact to weigh the evidence and draw reasonable inferences from the facts).

¶ 28 Defendant relies on *People v. Mikolajewski*, 272 Ill. App. 3d 311 (1995), for the proposition that the State must establish a witness's basis of knowledge regarding the value of

merchandise. However, in that case, the only evidence of the value of the stolen property was a security officer's testimony that she had seen the price tags which had been placed on the items at a distribution center in Wisconsin. *Id*. at 313. The State did not introduce the price tags at trial, and the photographs of the items did not show the prices. *Id*. at 313-14. The court concluded on appeal that the officer "had no real knowledge of how or why the price tags were placed on the packages." *Id*. at 318.

¶ 29 In the case at bar, however, the State introduced a receipt that reflected Macy's price for the vacuum. Unlike *Mikolajewski*, where the State's case rested entirely on an officer's testimony regarding price tags that were not produced at trial, here, the State produced a document, *i.e.*, the receipt generated when Rico scanned the vacuum, which reflected the selling price of the vacuum, and, therefore, established its "full retail value." See 720 ILCS 5/16-0.1 (West 2014).

¶ 30 Defendant further argues that the receipt was not properly admitted into evidence under the business records exception to the hearsay rule because neither the foundational requirements for its admission, nor the additional foundational requirements for computer-generated evidence were met. Defendant did not, however, object to the receipt's admission into evidence at trial, and thus the evidence should be given its proper probative effect. See *People v. Banks*, 378 Ill. App. 3d 856, 861 (2007) ("It is well established that when hearsay evidence is admitted without an objection, it is to be considered and given its natural and probative effect."). Accordingly, defendant's argument must fail.

¶ 31 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 32 Affirmed.