2014 IL App (2d) 121027-U
No. 2-12-1027
Order filed May 27, 2014

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of Lake County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 11-CF-3251 |
| HARIS R. MATCHALOVAS, | ) | Honorable Raymond D. Collins, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

**ORDER**

¶ 1 *Held*: Defendant's two convictions of retail theft violated the one-act, one-crime rule: both in the charges and at trial, the State treated defendant's taking of five video-game systems as the same, single act; we vacated the less serious, Class 4 felony conviction.

¶ 2 Defendant, Haris R. Matchalovas, appeals from the judgment of the circuit court of Lake County convicting him of two counts of retail theft (720 ILCS 5/16A-3(a) (West 2010)). He contends that, because his two convictions of retail theft were based on the same act, they violated the one-act, one-crime rule and therefore the lesser of them must be vacated. Because

his convictions violated the one-act, one-crime rule, we vacate the conviction of the lesser offense.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by information with one count of burglary based on his entry into a retail store with the intent to commit a theft (720 ILCS 5/19-1(a) (West 2010)) (count I), one count of Class 3 felony retail theft based on his knowingly taking possession of "video game systems" that had a "total value not [sic] in excess of $300" (720 ILCS 5/16A-3(a), 16A-10(3) (West 2010)) (count II), and one count of Class 4 felony retail theft based on "video game systems" having a "total value not in excess of $300.00" and his having been convicted previously of burglary (720 ILCS 5/16A-3(a), 16A-10(2) (West 2010)) (count III). The State nol-prossed the burglary charge in count 1, and a bench trial was conducted on counts II and III.

¶ 5 The evidence established that on September 29, 2011, defendant and an acquaintance, Patrick Talbot, went to a Sears store in Gurnee. While at the store, defendant was observed by store security personnel assisting Talbot in placing five video game systems into a shopping cart. One of the security officers, James Sanato, observed defendant "selecting the video game systems and handing them to [Talbot], who would put them into the shopping cart ***." The game systems consisted of three PlayStation systems and two Xbox 360 systems.

¶ 6 Defendant left the store via a door that had no sales register nearby. Once outside the store, he signaled Talbot by waving to him. Talbot then left the store with the shopping cart and the five game systems by way of the same door. Store security personnel apprehended both men outside the store.

¶ 7 About an hour later, Sanato scanned the five game systems into a cash register and created a mock sales receipt. Sanato testified that the five game systems had a total value of

$1,499.95. The State submitted the mock sales receipt, which showed that the sales price of each game system was $299.99 and that the total price was $1,499.95.

¶ 8 At the conclusion of the State's case, defendant moved for a directed finding. In response, the State contended, in part, that the "value of the items ha[d] been proven ***." The court denied the motion.

¶ 9 During closing argument, the State asked that defendant be found guilty of "retail theft, as well as retail theft over $300.00." The State added that the "value [was] more than proven. It [was] about $1,500.00 worth of stolen merchandise."

¶ 10 Defendant, during his closing argument, referred to the element of the value of the merchandise. In that regard, he stated that "according to [the information] [it] had a total value not in excess. I don't think that is correct."

¶ 11 The trial court found defendant guilty of both counts of retail theft. In doing so, it did not specifically mention the value of the game systems.

¶ 12 Defendant filed a motion for a new trial and for judgment notwithstanding the verdict. He did not contend, however, that his convictions violated the one-act, one-crime rule. The trial court, in denying the posttrial motion, stated that defendant was "charged with retail theft over $300" and "with retail theft with a prior conviction."

¶ 13 At sentencing, the State argued that defendant's conduct caused or threatened serious economic harm. It pointed to the "value of the items taken [as being] close to $1,500 ***." It added that a "$1,500 loss" would result in harm to the community.

¶ 14 Defendant was sentenced to concurrent terms of three years' imprisonment. Defendant filed a motion to reconsider his sentence, but he did not raise any challenge based on the one-act, one-crime rule. Following the denial of his motion to reconsider, he filed this timely appeal.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant contends that his conviction of retail theft in count III should be vacated pursuant to the one-act, one-crime rule, because count II and count III treated the theft of the five game systems as a single act and therefore were based on the same act. In raising this issue, defendant concedes that he failed to object in the trial court, but asserts that it is reviewable as plain error.

¶ 17 The State responds that each act of taking a game system was a separate act of theft and that defendant "could have been charged with five counts of retail theft." It further maintains that, if it had not intended to charge defendant with "different takings," it would not have added the phrase " 'value not in excess of $300' " to each count of retail theft. It also points to the mock register receipt, which listed the value of each game system separately. Thus, it contends that it "charged the defendant [based] on separate gaming systems."

¶ 18 We begin with defendant's concession that he failed to raise the one-act, one-crime violation in the trial court. Notwithstanding such a failure, a reviewing court may consider an argument raised for the first time on appeal if plain error occurred. *People v. Carter*, 213 Ill. 2d 295, 299 (2004). The plain-error doctrine allows a reviewing court to address defects that affect substantial rights if: (1) the evidence is closely balanced; or (2) fundamental fairness so requires. *Carter*, 213 Ill. 2d at 299. A violation of the one-act, one-crime rule satisfies the fundamental-fairness prong, because it affects the integrity of the judicial process. *Carter*, 213 Ill. 2d at 299. Therefore, we will address the merits of defendant's one-act, one-crime contention.

¶ 19 The one-act, one-crime rule involves a two-step analysis. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). First, the court must decide whether the defendant's conduct involved multiple acts or a single act. *Miller*, 238 Ill. 2d at 165. Second, if the conduct involved multiple acts, the

court must decide whether any of the offenses are lesser included offenses. *Miller*, 238 Ill. 2d at 165. Multiple convictions are improper if they are either based on a single act or, if based on multiple acts, any of the offenses are lesser included offenses. *Miller*, 238 Ill. 2d at 165.

¶ 20 In this case, we must decide whether count II and count III of the information were based on the same or different acts of theft. The State points to the language in each count that the value was "not in excess of $300.00" and contends that that shows that each count was based on the theft of a single gaming system. Although this argument is murky, it seems that the State is arguing that, because each game system was valued at $299.99, the reference to a value less than $300 meant that each count was necessarily based on the taking of an individual game system and hence on a separate act of theft.

¶ 21 That argument is curious, however, because it is inconsistent with the offense charged in count II. The State charged defendant in count II with the Class 3-felony version of retail theft, which required proof that the property was valued in excess of $300. See 720 ILCS 5/16A-10(3) (West 2010). Further, the State argued in closing that defendant should be found guilty of "retail theft over $300." Defendant pointed out in closing argument, when referring to the value of the property, that the "not in excess" language must have been incorrect. Moreover, the trial court stated that defendant was charged with "retail theft over $300." Obviously, the reference in count II to a value not in excess of $300 was an error. Therefore, the State cannot rely now on that erroneous language to argue that it charged defendant in count II with the taking of an individual game system.

¶ 22 Having said that, even if count II had the correct statutory language regarding theft in excess of $300, it could not be read as alleging the theft of anything other than the five game systems collectively. Of course, the theft of only two of the game systems would have been

sufficient to establish the value element. However, the State did not specify any particular game systems in count II. Instead, it lumped the "video game systems" together. Thus, we read count II to have been based on the theft of all five game systems collectively.

¶ 23 That conclusion is reinforced by the trial-court proceedings. The evidence showed that the State treated the theft of the five game systems as a single act. The State offered the testimony of Sanato, which showed that defendant participated in the theft of all five game systems. He also testified that the collective value of the game systems was $1,499.95. The State also submitted the mock register receipt that showed the total value to be the same. Although the receipt showed the value of each game system, the State never referred to that aspect of the receipt in support of its charges. Instead, in closing, the State argued that the value was established as being "about $1,500." Additionally, at sentencing, the State, in arguing the economic harm, reiterated that the value of the items stolen was "close to $1,500" and that there had been a "$1,500 loss." Based on the evidence and arguments, it is clear that the State charged defendant with the theft of all five game systems as a single act of retail theft in count II.

¶ 24 As for count III, in charging a Class 4 felony, it properly alleged that the value did not exceed $300. See 720 ILCS 5/16A-10(2) (West 2010). To that extent, count III suggested that it was based on the act of taking a single game system. The State, however, did not allege in count III the taking of any specific game system. Rather, it once again referred to the game systems collectively. Thus, it effectively relied on the same theory, the taking of the five game systems as a single act, as that alleged in count II. Thus, defendant's conviction on both counts violated the one-act, one-crime rule.

¶ 25 Our conclusion would be the same were we to read count III as alleging a single act of theft based on only one of the game systems. That is so because count II alleged the theft of all

five game systems. Therefore, an allegation in count III of the theft of any one of those game systems would necessarily duplicate, in part, the act alleged in count II. Because the State charged defendant in such a way that we cannot differentiate between the acts of theft alleged in count II and count III, it violated the one-act, one crime rule. See *People v. Crespo*, 203 Ill. 2d 335, 344 (2001).

¶ 26 Moreover, having treated the theft as a single act at trial and sentencing, the State cannot now shift its position and treat the theft as consisting of multiple acts.[1] Although it could have charged defendant with separate acts in each count and argued the case that way[2] (see *Crespo*, 203 Ill. 2d at 344), it would be "profoundly unfair" to allow it to do so for the first time on

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[1] We point out that section 111-4(c) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-4(c) (West 2010)) provides that, if two or more acts violate the retail theft statute, those acts may be charged as a single offense in a single count if such acts were in furtherance of a single intention and design and the property was taken from the same entity. *People v. Rowell*, 229 Ill. 2d 82, 91 (2008). Although the State does not mention section 111-4(c), it certainly appears, consistent with that provision, to have charged the five individual acts of retail theft as a single offense in count 2. On appeal, the State shifts gears and contends that it actually charged only one act of retail theft in count 2. That argument is disconcerting, as such a change in theory would deny defendant his fundamental right to be informed of the nature of the charge against him. See 725 ILCS 5/111-3 (West 2010); *Rowell*, 229 Ill. 2d at 92-93.

[2] For example, the State could have charged defendant with the theft of the two Xbox360 game systems in count 2 to establish the requisite value for that offense and charged defendant in count 3 with the theft of any one of the PlayStation game systems to satisfy the elements of that offense.

appeal (see *Crespo*, 203 Ill. 2d at 343). Therefore, we conclude that defendant's convictions violated the one-act, one-crime rule. Thus, there was plain error, and we vacate the conviction on count III, the lesser offense. See *People v. Chanthaloth*, 318 Ill. App. 3d 806, 814 (2001).

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we vacate defendant's conviction for retail theft as charged in count III.

¶ 29 Affirmed in part and vacated in part.