

¶ 4 On December 31, 2012, defendant was arrested and charged by information with one count of aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)) and one count of retail theft (720 ILCS 5/16-25(a)(1) (West 2012)). Count I alleged defendant "knowingly and without legal justification made contact of an insulting or provoking nature with Jonathan Kristensen by pushing him while the defendant was in a public place, the area of Walmart." Count II alleged defendant "knowingly took possession of clothing, which was merchandise offered for sale at Walmart *** with the intent to permanently deprive [Walmart] of the possession, use or benefit of said merchandise, without paying the full retail value."

¶ 5 On November 1, 2013, defendant's case proceeded to bench trial. Jonathan Kristensen, Stephen Norton, and Officer Brad Massey testified for the State. Defendant testified for the defense.

¶ 6 Kristensen testified he worked as an asset-protection associate for the Walmart at 2225 West Market Street, Bloomington, Illinois. At approximately 6:50 p.m. on December 29, 2012, he and Norton (also an asset-protection associate) were walking through the store conducting surveillance when they noticed defendant quickly select two compression shorts from a clothing rack in the men's apparel area. Kristensen testified defendant looked suspicious because he did not look at the merchandise or the price before making his selection. Kristensen and Norton followed defendant to a secluded aisle, where they observed him roll up the compression shorts and place them in his front left pants pocket. (Kristensen denied observing defendant remove price tags from the compression shorts although his report reflected he did make such an observation.) According to Kristensen's testimony during the trial, following the concealment, defendant immediately proceeded to a cash register to pay for other merchandise in his possession. (On cross-examination, Kristensen acknowledged his incident report indicates he

observed defendant make several other selections before proceeding to the register.) Although Kristensen could not recall which items defendant purchased at the cash register, he testified defendant never produced the concealed merchandise for payment.

¶ 7 Kristensen and Norton approached defendant in the vestibule, located past the last point of sale, and identified themselves as Walmart security. Kristensen asked defendant to come to the asset-protection office to discuss the unpaid merchandise. Defendant initially attempted to push through Kristensen and Norton, insisting he did not take anything; he also tried to show Kristensen his bag with the merchandise he purchased. Kristensen pointed at defendant's left pocket and asked about the apparel items, but defendant shielded himself. Defendant pushed Kristensen through the exit doors and into a concrete wall outside Walmart, causing a scrape to Kristensen's right elbow. Kristensen and Norton each grabbed one of defendant's arms and told him to stop resisting, but defendant struggled to escape their grasp and eventually broke free. During the struggle, defendant managed to discard the concealed compression shorts in a corner outside the store. Kristensen retrieved the discarded merchandise and called "Bloomington dispatch" to report the shoplifting. Kristensen and Norton followed defendant into the parking lot and saw him get into a semi-tractor trailer with the name "VERO" printed on the side. Kristensen described the vehicle to dispatch and provided the license plate number and direction of travel. Norton testified the police arrived a few minutes later and took him to a nearby traffic stop of the semi-tractor trailer. Norton identified the driver "[a]s the person that shoplifted and had the physical altercation" a few minutes prior.

¶ 8 Kristensen further testified Walmart has a security-surveillance system. Kristensen stated, prior to testifying, he viewed the surveillance video and it accurately depicts the images of what happened during the retail theft and physical altercation. Each portion of

video is imprinted with a time stamp, allowing the viewer to ascertain the exact time of events among multiple cameras.

¶ 9 The first video, captured from a camera inside the vestibule facing the entrance to the store, shows a black male walking through the security towers at 6:49 p.m. He is wearing a black knit hat, black hooded sweater, red shirt, black pants, black shoes, and is carrying a shopping bag in his left hand. Approximately five seconds later, Kristensen and Norton approach the man and stand between him and the exit. Kristensen and Norton say something to the man, who responds by lifting and gesturing toward his shopping bag. The man then attempts to walk around Kristensen toward the exit.

¶ 10 Footage from a camera located above the exit doors shows Kristensen and Norton shuffling backward in an effort to block the man from leaving the store. The man pushes Kristensen and a struggle ensues. After a few seconds, the man pushes his way through the exit doors. (The surveillance videos do not show the events that transpired immediately following the man's exit—a period of approximately 36 seconds.)

¶ 11 The next portion of video, captured from a camera outside the exit doors facing the parking lot, shows the scuffle continuing outside. Kristensen and Norton struggle to hold onto the man's arms, while the man, who is still holding the shopping bag, struggles to escape.

¶ 12 Video from a camera facing the parking lot shows the man walking into the parking lot at 6:51 p.m. Norton follows the man from a close but safe distance. Kristensen, who is carrying compression shorts in one hand and holding a cell phone to his ear with the other hand, follows Norton and the man into the parking lot.

¶ 13 Video footage of a different area of the parking lot shows the man approach a semi-tractor trailer with the word "VERO" printed on the side. Norton takes a picture of the

front of the vehicle, while Kristensen, who is still holding the compression shorts and talking on a cell phone, walks toward the rear of the semi-tractor trailer and looks at the license plate. The semi-tractor trailer drives away at 6:53 p.m.

¶ 14 Kristensen testified the surveillance videos do not show defendant concealing the compression shorts or discarding them outside the building because Walmart does not have security cameras in those locations. The State introduced a photograph of the scrape to Kristensen's arm and a photograph of the compression shorts Kristensen recovered from the ground.

¶ 15 Norton, who did recall defendant selecting additional merchandise prior to proceeding to the checkout, testified and corroborated Kristensen's testimony.

¶ 16 Officer Brad Massey of the Bloomington police department testified he received a call from dispatch regarding a theft at the Walmart on West Market Street. Dispatch provided a description of the suspect, the suspect's vehicle, license plate number, and indicated the vehicle recently left Walmart. Shortly thereafter, Officer Massey located the semi-tractor trailer traveling eastbound on West Market Street. He followed the vehicle onto northbound I-55 and pulled it over. Massey testified another police officer brought a witness to the scene of the traffic stop and the witness positively identified the driver as the person who stole the compression shorts. The State rested.

¶ 17 Defendant made a motion for a directed finding, which was denied by the court.

¶ 18 Defendant testified on December 29, 2012, he was en route to Plymouth, Michigan, "to deliver a load" when he decided to stop at Walmart in Bloomington, Illinois, to purchase men's apparel items. Defense counsel introduced defendant's exhibit Nos. 1 and 2, which defendant identified as photographs of men's "underwear." (The record is not clear as to

whether the items pictured in defendant's exhibit Nos. 1 and 2 are the same items defendant is alleged to have stolen or if they are similar to those items.) The following colloquy occurred:

"Q. [Defense attorney]: And is there a specific name that you know for this underwear?

A. No, I'm not very familiar with it.

B. All right. And did you purchase this item on December 29, 2012?

A. No, I didn't.

Q. Huh?

A. No, I didn't.

Q. You did not purchase these items, this item?

A. No, I didn't.

Q. The item that this—the Defendant's Exhibit Number Two, did you purchase that item?

A. No, I didn't."

Defendant testified he purchased a package of undershirts, a package of undershorts, and a stretch cap by paying with cash. Defendant was confronted by Kristensen and Norton, who identified themselves as loss-prevention officers and accused him of stealing items from the store. Defendant told them he did not take anything but they physically restrained him by grabbing his arms. Defendant denied pushing Kristensen into a wall. Rather, he testified the loss-prevention officers "pushed me in the wall." During the scuffle, defendant tried to access his pockets and turn them inside out to show the security officers he did not take anything. Defendant testified he managed to turn his pockets inside-out and security immediately let him

go when they saw his pockets were empty. Defendant said he did not take or conceal any compression shorts, nor did he discard any items outside Walmart.

¶ 19 Following closing arguments, the trial court found defendant guilty of aggravated battery and retail theft. With respect to aggravated battery, the court noted Walmart is a public place and the State proved "insulting or provoking contact beyond a reasonable doubt" because the video shows "defendant clearly [push] the two gentlemen through the doorway." The trial court addressed the surveillance videos as follows:

"THE COURT: *** I mean the witness has testified there are surveillance cameras. The witness has testified they don't cover every square inch of the store, that there are places that aren't covered. Frankly the court doesn't find that to be unusual or sinister in some way. There is just not enough cameras apparently in there to cover the whole store.

Is it somewhat curious that two of the key events *** occurred in areas that didn't have cameras? Yes, it is. It's very curious, and it certainly is something that I think any trier of fact would need to consider very strongly in this case because it certainly does call into question to some extent at least arguably the credibility of the witnesses who say they saw things occur but conveniently those things didn't occur on camera.

However, *** everything in the video frankly is right in accord with what [Kristensen and Norton] testified to[.]"

The trial court noted "a little bit of inconsistency in" Kristensen's and Norton's testimony, but it nevertheless found their testimony "very credible" and supported by the surveillance video. The trial court also concluded the State proved retail theft beyond a reasonable doubt because "the officers were credible in their testimony about how the defendant chose the items quickly, stuffed them in his pocket and then walked out without paying for them." Upon this evidence, the trial court found defendant guilty on both counts.

¶ 20 In January 2014, the trial court sentenced defendant to 24 months' conditional discharge, with 8 days in jail, toward which defendant was given credit for 4 days previously served.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 A. Sufficiency of the Evidence

¶ 24 Defendant argues the State failed to prove him guilty of retail theft beyond a reasonable doubt because the evidence failed to show he did not purchase the compression shorts. The State argues the evidence proved defendant guilty of retail theft beyond a reasonable doubt.

¶ 25 "When a defendant challenges the sufficiency of the evidence, it is not the function of this court to retry the defendant." *People v. Evans*, 209 Ill. 2d 194, 209, 808 N.E.2d 939, 947 (2004). Rather, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime proved beyond a reasonable doubt. *Id.* The trier of fact's findings are entitled to great weight, given that it is in the best position to judge the credibility and demeanor of the witnesses. *People v. Wheeler*, 226 Ill. 2d 92, 114-15, 871 N.E.2d 728, 740 (2007). As such, a reviewing court will

not substitute its judgment for that of a trier of fact on issues involving the weight of the evidence or the credibility of witnesses. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25, 920 N.E.2d 233, 240 (2009). A reversal is warranted only if the evidence is so improbable or unsatisfactory it leaves a reasonable doubt regarding defendant's guilt. *Evans*, 209 Ill. 2d at 209, 808 N.E.2d at 947.

¶ 26 In this case, to convict defendant of retail theft, the State must prove the following elements: (1) defendant knowingly took possession of, carried away, or transferred merchandise; (2) the merchandise was displayed, held, stored, or offered for sale in a retail mercantile establishment; and (3) defendant intended to retain the merchandise, or intended to permanently deprive the merchant of the possession, use, or benefit of the merchandise, without paying the full retail value of the merchandise. 720 ILCS 5/16-25(a)(1) (West 2012). For purposes of retail theft, the elements of the offense can be proved utilizing circumstantial evidence. *People v. DePaolo*, 317 Ill. App. 3d 301, 307, 739 N.E.2d 1027, 1032 (2000).

¶ 27 Based on our review of the record, we conclude the State presented sufficient evidence for a reasonable trier of fact to have found defendant guilty of retail theft. The testimony at trial established defendant quickly selected two pairs of compression shorts without looking at the price, moved to a secluded aisle, and rolled up the shorts and concealed them in his pants pocket. Defendant purchased some items at a cash register but never produced the compression shorts for payment. He then walked toward the east exit while carrying the concealed merchandise. A reasonable trier of fact could reasonably find that by concealing the merchandise in his pocket and walking past the last point of sale, defendant had carried away or transferred merchandise. Next, there is no dispute as to whether the merchandise was offered for sale in the Walmart store, a retail mercantile establishment. The trier of fact also could have

found that by concealing the merchandise in his pocket, defendant intended to permanently deprive Walmart of the possession, use, or benefit of the merchandise without paying for it. Viewing the evidence in the light most favorable to the State, we conclude the State presented sufficient evidence for the trial court to find defendant guilty of retail theft.

¶ 28 Defendant maintains the State did not prove he committed a retail theft because the video evidence did not show defendant conceal or discard any compression shorts. Defendant cites no authority requiring video evidence of a defendant taking or concealing merchandise to prove retail theft, and we are aware of no such authority. Moreover, defendant's argument ignores the testimony of Kristensen and Norton that they observed defendant conceal the compression shorts and walk past the last point of sale. The trial court explicitly accepted their testimony as positive and credible, which it was entitled to do as the trier of fact. Kristensen and Norton's testimony, which was based on their personal knowledge and observation of defendant, was sufficient to allow the trial court to find defendant guilty of retail theft.

¶ 29 Defendant further asserts the State failed to meet its burden due to inconsistencies in Kristensen's testimony. For instance, Kristensen's incident report indicates he observed defendant remove the price tags from the compression shorts, but Kristensen testified at trial he does not believe defendant removed the tags. "Minor inconsistencies in the testimony of the State's witnesses do not destroy the credibility of these witnesses, and any variations in testimony were for the trier of fact to weigh." *People v. Talach*, 114 Ill. App. 3d 813, 820, 448 N.E.2d 638, 644 (1983). Here, the trial court addressed the inconsistencies as follows:

"THE COURT: A lot has been made of this issue about the removal of price tags, but frankly, I think the record would show

that when questioned about that, Mr. Kristensen was only asked whether or not he remembered putting that in his report. He was never directly asked did that happen or did that not happen, so I don't know what he would have said to that question. It would have been nice to have been asked, but it wasn't asked. So the only thing he testified to was he doesn't remember putting that in his report.

So, frankly, I don't think that's all that impeaching or that big of a deal either. He simply doesn't remember putting that in his report."

On balance, the trial court found Kristensen's testimony "very credible" and corroborated by the surveillance video. As noted above, we will not substitute our judgment for the trier of fact on issues involving the weight of the evidence or the credibility of witnesses. *Siguenza-Brito*, 235 Ill. 2d at 224-25, 920 N.E.2d at 240. Similarly, any discrepancies between Kristensen's testimony defendant immediately proceeded to the cash register after concealing the compression shorts and Norton's testimony defendant continued shopping are credibility issues for the trier of fact to judge.

¶ 30 Moreover, we are not persuaded by defendant's *argumentum ex silentio* that the State failed to provide an accounting of the items defendant purchased, and thus failed to establish defendant did not purchase the compression shorts. The facts do not support defendant's argument because defendant admitted at trial he did not purchase compression shorts. Moreover, the State is not required to produce a receipt of the merchandise for which defendant paid to meet its burden. The testimony of Kristensen and Norton, which the trial court found

both positive and credible, is sufficient to support defendant's retail-theft conviction. See *People v. Connell*, 91 Ill. App. 3d 326, 335, 414 N.E.2d 796, 803 (1980) (store manager's testimony as to items found in defendant's possession was sufficient proof of the items allegedly stolen). Accordingly, the State presented sufficient evidence for a rational trier of fact to find respondent guilty of retail theft.

¶ 31 B. Aggravated Battery

¶ 32 Defendant next contends he was legally justified in using force against Walmart security because he did not commit a retail theft and was merely attempting to exit the store with purchased merchandise. The State argues defendant was not justified in his use of force because Kristensen and Norton had reasonable grounds to believe a retail theft occurred and their use of force was lawful and necessary to detain defendant. We agree with the State.

¶ 33 As a preliminary matter, we strike the portion of defendant's brief which improperly cites to the unpublished decision in *People v. Orozco*, 2014 IL App (1st) 120531-U, because an unpublished order "is not precedential and may not be cited by any party except" under limited circumstances not relevant here. Ill. S. Ct. R. 23(e) (eff. July 1, 2011).

¶ 34 Section 16-26(a) of the Criminal Code of 2012 (720 ILCS 5/16-26(a) (West 2012)) provides as follows:

"(a) Detention. Any merchant who has reasonable grounds to believe that a person has committed retail theft may detain the person, on or off the premises of a retail mercantile establishment, in a reasonable manner and for a reasonable length of time for all or any of the following purposes:

* * *

(3) To make reasonable inquiry as to whether such person has in his possession unpurchased merchandise and to make reasonable investigation of the ownership of such merchandise;

(4) To inform a peace officer of the detention of the person and surrender that person to the custody of a peace officer."

¶ 35 Thus, if Walmart security acted without reasonable grounds to believe a retail theft had occurred, then its use of force was unlawful and the defendant was legally justified in his use of force. *People v. Rickman*, 73 Ill. App. 3d 755, 760, 391 N.E.2d 1114, 1118 (1979). Whether Walmart's asset-protection associates acted "reasonably" in attempting to detain defendant is a question for the trier of fact. *Adams v. Zayre Corp.*, 148 Ill. App. 3d 704, 712, 499 N.E.2d 678, 685 (1986).

¶ 36 In *Rickman*, 73 Ill. App. 3d at 757, 391 N.E.2d at 1116, a retail store security officer confronted the defendant, believing he had taken a pair of jeans without paying for them. The defendant returned the pants and the security officer grabbed him. The defendant escaped and fled, but he stopped running after the officer told him to stop. The defendant struggled with the security officer, resisting his efforts to place the defendant in handcuffs. Another security officer joined them and handcuffed one of the defendant's wrists. During the struggle to attach the handcuffs to the defendant's other wrist, the defendant fell on top of one of the security officers, fracturing his ankle. *Id.* The defendant then stood up and continued to struggle with the other security officer by "shoving, hitting, and kicking" him until he fractured the officer's leg. *Id.* at 758, 391 N.E.2d at 1116. On appeal, the defendant argued the State failed to prove he

acted without legal justification in defending himself because it failed to prove the security officer had reasonable grounds to believe he had committed an offense. *Id.* at 760, N.E.2d at 1118. The court disagreed, reasoning:

"We believe that [the security officer] had reasonable grounds to believe that a retail theft had occurred. We agree that there was no direct testimony that [the security officer] saw the defendant secrete a pair of blue jeans upon his person. However, we believe that there were sufficient suspicious circumstances shown from which it could reasonably be inferred that the defendant intended to steal the blue jeans. The defendant had the blue jeans under his belt, he gave them to [the security officer] and offered to pay for them. These are actions which are inconsistent with the purchase of the blue jeans. We therefore find that [the security officer] had reasonable grounds to believe a retail theft had occurred. He also had reasonable grounds to detain the defendant and use that force necessary to effect that detention. The defendant had no justification in resisting that detention." *Id.* at 760-61, 391 N.E.2d at 1118.

¶ 37 The facts in this case are similar to *Rickman*. Like *Rickman*, we conclude the trier of fact could reasonably find from the evidence that defendant intended to steal the compression shorts. Kristensen and Norton observed defendant conceal two pair of compression shorts in his left pants pocket and watched as he proceeded through the last point of sale without paying the full retail value of the concealed merchandise. These actions are inconsistent with the purchase

of the compression shorts. We therefore find Kristensen and Norton had reasonable grounds to believe a retail theft had occurred and reasonable grounds to detain defendant in the manner in which they did. Therefore, reviewing the evidence in the light most favorable to the prosecution, we find the trial court could have rationally found defendant was not legally justified in making contact of an offensive or provoking nature with Walmart security.

¶ 38

III. CONCLUSION

¶ 39 For the reasons stated, we affirm defendant's convictions for aggravated battery and retail theft. As part of our judgment, we award the state its \$75 statutory assessment against defendant as costs of this appeal.

¶ 40 Affirmed.