2011 IL App (1st) 093213-U
No. 1-09-3213

FOURTH DIVISION
August 11, 2011

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. 09 CR 6184
	)	
HAROLD ALEXANDER,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE Salone delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

O R D E R

HELD: Defendant charged with theft was not prejudiced by the State's failure to disclose a second uncharged act of theft where he was prosecuted and convicted by overwhelming evidence of only one count of theft; conviction affirmed.

¶ 1 Following a jury trial, defendant Harold Alexander was convicted of theft and sentenced to four years in prison. On appeal, defendant contends that where the indictment charged him with only one count of theft and the State did not inform his counsel until the State's eyewitness

was testifying that defendant had committed a second theft, defendant was prejudiced and entitled to a new trial. We affirm.

¶ 2 Defendant was charged by indictment with one count of theft in that he, previously having been convicted of retail theft, knowingly obtained or exerted unauthorized control over "property, to wit: construction material," of a value not exceeding $300, intending to deprive the owner permanently of the property. Prior to trial, the defense filed a discovery motion which contained, *inter alia*, a request for a bill of particulars asking for the exact time, date, and location of the occurrence, and for a continuing update of information by the State.

¶ 3 At defendant's jury trial, Vyacheslav Yakonsky testified that he is the owner of a warehouse building which was under construction at 217 North Mozart in Chicago on March 18, 2009. On that date, various construction materials, including 24-foot rebars for reinforcing concrete foundations and walls, were located at that site. He gave no one permission to remove any construction materials from the construction site on that date.

¶ 4 Officer Frank Astudillo testified that at about 1:40 p.m. on March 18, 2009, he and his partners, Canto and Romero, responded to a call at 217 North Mozart, which was a construction site at that time. Astudillo saw a chain link fence that had been knocked down at the entrance to the site. Someone from the roof of a nearby building was yelling and pointing to the alley next to the construction site. Astudillo's partners drove over to where the man, Walter Castro, was pointing. Castro came down from the roof and spoke to Astudillo, and both men walked over toward the alley where a pickup truck was parked about 15 to 20 feet from the site. Six pieces of 24-foot rebar were on top of the truck and defendant was standing next to the truck. Castro identified defendant as the man taking rebar from the construction site. Defendant was placed under arrest and the officers returned the rebars to the construction site.

¶ 5 Defendant was taken to the police station and given his *Miranda* warnings. Defendant told Astudillo he went into the construction site without permission and took six pieces of rebar to sell at a junk yard for $20.

¶ 6 Walter Castro testified that on March 18, 2009, at about 10:30 a.m., he was working on the rooftop of the building at 200 North California in Chicago, four floors up. At that time Castro looked west to the east side of the neighboring building on Mozart Street, which was about 75 feet away. He observed a man push down the chain link fence at the entrance of that building, enter the building, and drag six rebars out of the building, three in each of his gloved hands. Each rebar was about 10 to 12 feet long. Castro identified defendant in court as the man he saw taking the rebars. Defendant placed the rebars on the side of the building, left, returned with his truck, and loaded the rebars onto the truck. The prosecutor then asked the following:

> "Q. And had you ever scene [*sic*] the defendant before you saw him on at [*sic*] 10:30 in the morning on March 18th?
>
> A. No. Prior to this incident, the same incident? This incident.
>
> Q. Yes?
>
> A. He had done it *** before."

¶ 7 Defendant's objection to this testimony was sustained by the trial judge, who ordered a sidebar. Outside the jury's presence, defense counsel requested a mistrial. The State represented that the witness would testify defendant took the rebars at 10:30 a.m. and left, and returned at 1:40 p.m. Concerned that the witness might have been referring to an act that had occurred on a prior date, the court instructed the State to bring the witness into chambers to be questioned outside the jury's presence. During questioning by the State, Castro stated he saw defendant take the rebars at 10:30 a.m. and called the police at that time; he saw defendant return at 1:40 p.m.

and called the police again; he saw defendant take rebars on each of those two occasions; and he had never seen defendant before that date, March 18, 2009.

¶ 8 After Castro returned to the courtroom, defense counsel advised the judge she had gleaned from the police report that Castro had seen defendant steal only six rebars. The prosecutor responded that a discrepancy existed between the one taking of rebars referenced in the police report and what Castro actually observed, and that the discrepancy came to light when she spoke to Castro that morning and asked him whether he had told the officer "that it was the same rebar he had taken before." Castro explained to her that he had told the officer that it was the same, but what he meant by "the same rebar" was that it was the same *kind* of rebar.

¶ 9 Defense counsel complained that the State's theory had changed from one taking of rebars to two takings. In response to a question by the court, defense counsel represented that the indictment charged defendant with the theft of six rebars. She argued that the State's eliciting testimony about a second theft was "not fair at this point" because defense counsel had prepared to argue to the jury, "who would steal rebars and drive around the same neighborhood for three hours with the rebars in the back of the truck?"

¶ 10 The trial court told the State, "It's two separate thefts is what it is. That's the problem. You are offering proof of other crimes as two separate thefts and it's kind of unclear whether or not if the defense had notice that there are two separate thefts." Charging a due process violation, defense counsel stated: "I certainly was misled. You can see that by the police report. We weren't on notice that there were two; otherwise, I would have [cross-examined] the victim differently and the police officer differently." When defense counsel asked whether the victim would be available for further cross-examination, the trial court indicated the witness was to be made available. The court denied the motion for a mistrial, stating that the testimony was going

to turn on the credibility of the eyewitness, Castro, who was subject to cross-examination with regard to his ability and opportunity to observe the offender's identity.

¶ 11 Back before the jury, the court informed the jurors that defense counsel's objection was overruled. The prosecutor resumed her questioning of Castro, who testified that he had never seen defendant prior to March 18, 2009. At 10:30 a.m. on that date, he saw defendant load the rebars onto his truck and drive away. At that time Castro telephoned the police, who responded and searched the area, but defendant had already driven away. At about 1:40 p.m., Castro saw defendant return in his truck, drive around again through the alley, park his truck, and walk toward the building. Castro immediately called the police again. Then Castro observed defendant pull six more rebars out of the building and leave them there, return to his truck, drive through Mozart, park in the alley off Mozart next to the building, and load the six rebars onto his truck. At that time the police arrived. Castro, still on the rooftop, pointed out defendant's truck to a police officer. Castro came down from the rooftop, approached within 20 feet of defendant, and identified him as "the same guy" he had seen pulling rebars out of the building. Defendant was handcuffed and Castro returned to his roof, from where he saw the police return the rebars to the nearby building. Nothing obscured Castro's view of defendant when he saw defendant take the rebars. There was an empty lot between the building he was standing atop at 200 North California and the back of the construction site at 217 North Mozart. Castro did not use binoculars when observing defendant.

¶ 12 Officer Hector Romero testified that at 1:40 p.m. on the date of the incident, he and his partners went to the Mozart construction site where Romero observed Castro on a rooftop, yelling and pointing to the construction site and to a pickup truck adjacent to the site. While the other officers spoke with Castro, Romero went to the Chevy pickup truck and observed six 24-

foot-long pieces of rebar on it. Defendant was seated on the driver's side of the truck. After receiving a signal from Officer Astudillo, Romero placed defendant under arrest.

¶ 13 After the State rested its case in chief, the court conducted a jury instruction conference at which defense counsel did not object to the instructions offered by the State and did not request any specific instructions. The defense rested without calling witnesses and without asking for additional cross-examination of the property owner or Officer Astudillo.

¶ 14 The jury returned a verdict finding defendant guilty of theft. Subsequently, the court sentenced defendant to four years in prison.

¶ 15 On appeal, defendant contends that the defense was unfairly surprised and prejudiced by the State's failure to disclose before Castro's testimony that defendant had committed a second theft, and that the error in failure to disclose requires that defendant be granted a new trial.

¶ 16 Where the facts giving rise to an alleged discovery violation are not in dispute, the question is one of law that is reviewed *de novo*. *People v. Ramsey*, 239 Ill. 2d 342, 424 (2010). A defendant's fundamental right to due process includes timely notice of the charges against him and a meaningful opportunity to defend against the charges. *People v. McDonald*, 401 Ill. App. 3d 54, 63 (2010). Therefore, the charging document "must set out the offense in the language of the statute or specifically describe the facts which constitute the crime, so that the defendant is sufficiently informed of the specific offense and can prepare a defense." *Id.*

¶ 17 Our review is *de novo* because the following facts are not in dispute. On the first day of trial, the jury was impaneled and opening statements were delivered, during which time the State advised the jury the evidence would show the following: that Walter Castro saw defendant take six rebars from the construction site, place them in his truck, and drive away; Castro called the police, but defendant had gone; a few hours later Castro saw defendant's truck pull up again "and he still has the same rebars up on his truck"; and Castro called the police again and identified

defendant to the officers, who placed defendant under arrest. The owner of the rebars and Officer Astudillo also testified that day.

¶ 18 Early on the second day of trial, one of the assistant State's Attorneys interviewed Castro before he was to testify and learned for the first time that Castro saw defendant take six rebars on each of two separate occasions. The police report indicated that only six rebars had been taken, apparently because Castro had told the police that the six pieces of rebar in defendant's truck at 1:40 p.m. were "the same rebar [defendant] had taken before." What Castro meant, however, was that the six pieces were the same kind of rebar that had been taken at 10:30.

¶ 19 However, the prosecutor did not disclose this information to the defense before the trial resumed and Castro took the witness stand. In failing to disclose the existence of the second theft as soon as it became apparent, the State committed a discovery violation. The defense had filed a motion for discovery containing a bill of particulars which had asked for the exact time, date, and location of the occurrence and had requested that the State timely update its response to the discovery request. Defendant had a right to be informed of the specific offense or offenses with which he was charged. The State had a continuing duty to disclose discoverable information. *People v. Patel*, 366 Ill. App. 3d 255, 272 (2006).

¶ 20 It remains for us to determine whether the infraction so prejudiced defendant as to require a new trial. The failure to comply with discovery rules does not require a new trial in every instance. *People v. Lovejoy*, 235 Ill. 2d 97, 120 (2009). A new trial should be granted only if defendant, who bears the burden of proof, demonstrates that he was prejudiced by the discovery violation and the trial court failed to eliminate the prejudice. *Id*. When determining whether a new trial is warranted, several factors are considered, including the closeness of the evidence, the strength of the undisclosed evidence, the likelihood that prior notice would have helped the defense discredit the evidence, and the willfulness of the State in failing to disclose the evidence.

People v. Sanchez, 388 Ill. App. 3d 467, 473 (2009). In determining whether actual surprise or prejudice existed, we also consider the remedies sought by defendant, such as whether defendant requested a continuance. *Lovejoy*, 235 Ill. 2d at 120.

¶ 21 We note first that the evidence was not close. An eyewitness to the theft of the rebars was tested on cross-examination as to his credibility and his ability from his position on a nearby roof to see defendant take the rebars. The police apprehended defendant at the scene with stolen rebars on his truck. Defendant later admitted the theft to the police. We conclude the evidence of defendant's guilt was overwhelming.

¶ 22 In evaluating the strength of the undisclosed evidence, we note that defendant refers to the theft of the second set of six rebars as improper other-crimes evidence, apparently based on the court's statement to the prosecutors: "You are offering proof of other crimes as two separate thefts ***." The court's statement, however, came after the court asked defense counsel, "Does it say specifically in the charging document six rebars?" Defense counsel misrepresented that it did. In fact, the indictment charged defendant in one count with "property, to wit: construction material." The undisclosed evidence was not represented as a separate crime. During jury selection, the prospective jurors had been advised that defendant was charged with one count of theft. The evidence was presented to the jury as if defendant had committed only one theft of rebars. After the parties rested, the jury was instructed as to only one count of theft and returned a verdict as to only the one count. Judgment (sentence) was entered on only one count.

¶ 23 Defendant also complains that there was no limiting jury instruction as to "other crimes" evidence. We note that no such instruction was requested by the defense.

¶ 24 In deciding whether defendant is entitled to a new trial, another factor to consider is the likelihood that prior notice would have helped the defense discredit the evidence. Defense counsel argued that she would have cross-examined the State's first two witnesses differently if

she had known about the theft of the other six rebars. However, she did not request that they return to the witness stand for further cross-examination, although the trial court indicated that was an option.

¶ 25 Defendant also argues that the failure of the State to timely disclose the second theft altered his trial counsel's defense strategy. Counsel told the trial court that she had planned to ask the jury, "Who would drive around with a truckload of rebars and return to the scene?" In fact, defendant's trial counsel did effectively employ that very strategy in closing argument. She suggested that the police found only six rebars in defendant's truck and that defendant admitted to the police that he took six rebars to sell at a junk yard for $20, implying that Castro had lied about witnessing the theft of the six additional rebars. Defense counsel argued to the jury:

> "And you think to yourself this is just Mr. Castro's testimony. This [is] just one eye witness. Mr. Castro also said the defendant came back twice. Well, why would he do that? Really. If you are going to steal those rebars, why not make it all in one trip?
>
> Why would you want[] to hang around the scene of the crime for almost three hours. Go there and get one set of rebars. Why don't you load up? If you are so strong to carry six at one time, why would you want to expose yourself being caught at the scene of the crime if that's in fact what you were doing."

¶ 26 We note defense counsel could have made the same argument even if the State had disclosed to the defense before Castro testified he saw defendant take six rebars on each of two trips.

¶ 27 As to whether the State's failure to disclose was willful, this was not a situation where the State knew of the second theft at the outset of the prosecution but suppressed that fact. While the State should have informed the defense immediately of Castro's witnessing two separate thefts, the information did not come to the State until after trial began and the State did not attempt to offer it as other-crimes evidence. We also note defendant sought no remedy for the discovery violation, such as asking the court to preclude Castro from testifying about the second theft of six rebars, or asking that the previous witnesses (Yakonsky and Astudillo) be recalled for further cross-examination. As defendant has not fulfilled his burden of demonstrating how he was prejudiced by the State's discovery violation, we reject his request for a new trial and affirm his conviction.

¶ 28 Affirmed.