

SIXTH DIVISION
February 17, 2012

No. 1-10-1503

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 C6 61524
)	
DAVID NELSON,)	Honorable
)	Luciano Panici,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. E. Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's identification was proven beyond a reasonable doubt, as was the value of the merchandise taken, in this retail theft case. Counsel's failure to object to the price of the merchandise based on the scanning information provided by the register did not constitute ineffective assistance of counsel.

¶ 2 In a bench trial, defendant David Nelson was convicted of the retail theft of items valued at more than \$150 and was sentenced to three years in prison. On appeal, defendant contends that his identification was not sufficiently established at trial and that the value of the merchandise taken was only proved by inadmissible evidence, which defense counsel failed to object to at trial, rendering counsel's assistance ineffective.

¶ 3 At trial, Yolanda Jackson testified that on August 14, 2009, she was a manager at a Dollar General store in Sauk Village, Illinois. At about 5:21 p.m. she saw defendant placing some men's underwear in the "rim" of his pants. This underwear was for sale in her store. Jackson described defendant as a tall African American man, with a bald head, wearing a blue sweatshirt and blue jeans. Jackson identified defendant in court as the man she had seen that day. According to Jackson, she lost sight of defendant for "a brief second" and then saw him again with two plastic multicolored Aldi bags in his hands. She could see that the bags contained merchandise from her store. She told defendant to stop and announced she was calling the police. Defendant turned, made eye contact with her, and then continued to walk out the door without paying for the merchandise. Jackson could see defendant walk in the direction of a McDonald's restaurant across the street. When the police arrived, she told them what had happened. One of the officers pointed to a man across the street, who Jackson identified as defendant. Jackson noted, however, that the defendant was now wearing a white shirt instead of a sweatshirt.

¶ 4 According to Jackson, the police returned with two Aldi bags containing the merchandise taken from her store. Each item of merchandise still had the Dollar General bar

No. 1-10-1503

code on it. She ran the bar codes of all the merchandise through a cash register, generating a receipt for \$246.07. The police also showed her a sweatshirt which she identified as the one worn by defendant when he walked out of her store. Jackson identified in court the Aldi bags, the receipt, and the sweatshirt.

¶ 5 On cross-examination, Jackson testified that she did not notice defendant in the store until she saw him putting the underwear in his pants. When defendant left the store she saw him walk toward the McDonald's with the Aldi bags; she did not see him enter the restaurant or go inside a carwash. She was certain of the direction he traveled. She admitted the description she gave the police did not include defendant's age, any facial markings, or hair. The police arrived about four to five minutes after she called them. Jackson testified there was a store surveillance video of this crime, which she viewed but did not give to the police.

¶ 6 The only other witness at trial was Sauk Village police officer Blair Morris. He testified he responded to the call of a retail theft at the Dollar General store on the day in question. The alleged perpetrator was described as a tall, black, bald male. Morris could not recall the clothing description he was given, except that at some point he was told the person was wearing a dark blue sweatshirt and was carrying two multicolored Aldi bags containing merchandise from the Dollar General store. According to Morris, Yolanda Jackson told the dispatcher the man had gone northbound toward McDonald's. There was a carwash just west of McDonald's. Because Morris was already in the area, he arrived at the scene within 20 seconds of the police transmission. When he arrived he saw a man matching the description he had been given, walking from the carwash to McDonald's. Morris identified defendant in court as the man

No. 1-10-1503

he saw that day. After Morris saw defendant, he joined Jackson in front of the Dollar General store and pointed defendant out to her. Jackson said defendant looked like the man but was wearing a different shirt. Morris then escorted Jackson to the carwash, where defendant had been apprehended by other police officers. Jackson positively identified defendant, saying she was "absolutely sure or something to that effect" according to Morris.

¶ 7 The police searched the car wash area and found two Aldi bags filled with Dollar General merchandise, along with a sweatshirt. Morris brought these items back to the Dollar General store, where Jackson identified the bags as the ones she had seen defendant carrying. She then scanned each item in the bags on her cash register and printed an itemized list. Morris identified the list in court as the same one previously identified by Jackson. Morris also testified that Jackson identified the sweatshirt as the one defendant had been wearing. However he admitted that the sweatshirt had cut-off sleeves and "Illinois" written in orange, two details which Jackson never mentioned.

¶ 8 Defendant first contends that the State failed to prove his identification as the offender beyond a reasonable doubt. In evaluating the strength of an identification there are six factors which are ordinarily considered: the witness' opportunity to view the offender when the crime occurred; the witness' degree of attention; the accuracy of the witness' prior description of the offender; how certain the witness was at the identification confrontation; how much time passed between the crime and identification; and whether the witness knew the offender before the crime occurred. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *People v. McTush*, 81 Ill. 2d 513, 521 (1980).

¶ 9 Here, the witness, Yolanda Jackson, had several opportunities to view the offender while the crime occurred: when she first saw the offender attempting to hide some underwear from the store in his pants; when she saw the offender begin to leave the store with two Aldi bags of store merchandise in his hands; and when the offender turned and looked at her when she told him to stop. She also watched him walk toward the McDonald's restaurant. Certainly Jackson's attention was focused on the offender as he was attempting to steal her merchandise. She was able to describe the offender as a tall African American man with a bald head, wearing blue jeans and a blue sweatshirt. When the police directed her attention to a man across the street, she identified that person as the offender but noticed he was no longer wearing the sweatshirt, which the police found with the Aldi bags hidden in the carwash. Defendant correctly notes that Jackson failed to describe the cut-off sleeves of the sweatshirt or the orange "Illinois" written on it. Such omissions in a witness' description, however, do not create reasonable doubt so long as the witness is able to make a positive identification based on her observations of the defendant. *People v. Slim*, 127 Ill. 2d 302, 309 (1989). The police described Jackson as certain of her identification of defendant as the offender when she viewed him in a show-up shortly after the crime occurred. They quoted her as saying something to the effect of being "absolutely sure." That a show-up occurred did nothing to undermine her identification. The show-up was necessary because the police, having arrived within minutes of the crime, had reason to believe the perpetrator was still in the vicinity. See *People v. Thorne*, 352 Ill. App. 3d 1062, 1077 (2004). The time factor also independently supports this identification, as only a few minutes elapsed between when the police were summoned and when the apprehended defendant

No. 1-10-1503

was presented to Jackson. The only completely negative factor in this identification is that Jackson did not previously know defendant, a circumstance which is certainly not uncommon when crimes are committed. We find that the other factors strongly support Jackson's identification of defendant as the offender. Defendant's identification was proven beyond a reasonable doubt.

¶ 10 Defendant contends that the State failed to prove beyond a reasonable doubt that the merchandise taken was worth more than \$150 and therefore his conviction should be reduced from a Class 3 felony of retail theft of goods worth over \$150 (720 ILCS 5/16A-10(3) (West 2008)) to a Class 4 felony of retail theft of goods worth \$150 or less (720 ILCS 5/16A-10(2) (West 2008)).

¶ 11 The State's evidence of the value of the stolen merchandise came from the testimony of Yolanda Jackson. She testified that she recognized the bar codes on the merchandise retrieved from the Aldi bags as being Dollar General bar codes and each item of merchandise as being Dollar General merchandise. She also testified that she ran these bar codes on the store's cash register, generating a receipt, which she identified in court, for \$246.07. Neither the merchandise nor the bar codes were introduced into evidence, nor did Jackson testify to the worth of individual items of merchandise retrieved from defendant.

¶ 12 We disagree with the State's contention that *People v. DePaolo*, 317 Ill. App. 3d 301 (2000), supports admission of the value evidence in this case. There, the store manager was shown two items which were identical to those thrown over a garden wall of the store by the defendant, as well as the actual box which had contained a third item thrown over the wall.

No. 1-10-1503

DePaolo, 317 Ill. App. 3d at 303. The manager testified that he was familiar with the value of the items in his store and the value of these three items was \$99 each. *DePaolo*, 317 Ill. App. 3d at 304.

¶ 13 In this case the store manager, Yolanda Jackson, testified that she had recognized the Dollar General bar codes on the items defendant had taken, but she failed to testify that she knew the prices of the items. Neither the bar codes, nor the items stolen, nor photographs of those items were introduced at trial. Instead, Jackson testified that she ran the bar codes through a cash register, generating a total price of \$246.07 and she identified that total on the receipt she had generated. We find that the actions of scanning the bar codes through a cash register were analogous to using a magnetic card strip reader to read the account numbers contained on credit card strips, which has been held to not be hearsay. *People v. Cazacu*, 373 Ill. App. 3d 465, 472 (2007). Thus, Jackson's actions in scanning the bar codes on what she testified was Dollar General merchandise did not produce hearsay and her testimony would not have been barred based on such an objection. This is important not only because it provided evidence of the necessary value of the items stolen, but because defendant contends that trial counsel's failure to object to this evidence constituted ineffective assistance of counsel. That argument is negated by our finding that this evidence was not hearsay and was admissible evidence of the value of the stolen items. An objection to this evidence as hearsay would have been unavailing. Defense counsel did not render ineffective assistance. See *Strickland v. Washington*, 466 U.S. 668, 687-94, (1984); *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007).

¶ 14 For all these reasons, we affirm defendant's conviction and sentence.

No. 1-10-1503

¶ 15 Affirmed.