2011 IL App (1st) 101920-U
No. 1-10-1920



SECOND DIVISION
July 26, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09 CR 2037 |
| | ) | |
| YOUSEF ABUBAKER, | ) | Honorable |
| | ) | Mary Margaret Brosnahan, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE CONNORS delivered the judgment of the court.
Justices Karnezis and Harris concurred in the judgment.

**O R D E R**

*HELD:* Judgment entered on two counts of theft affirmed over defendant's claim that the State failed to prove the requisite knowledge; issue regarding decision on defendant's motion to quash and suppress forfeited.

¶ 1 Following a bench trial, defendant Yousef Abubaker was found guilty of two counts of theft, and sentenced to 18 months' felony probation. On appeal, he contends that the trial court

erred in denying his pretrial motion to quash the search warrant and suppress evidence, and that the State failed to prove him guilty of theft beyond a reasonable doubt.

¶ 2 Prior to trial, defendant filed a motion to quash the search warrant and suppress evidence alleging that there was insufficient probable cause to issue the warrant. After hearing argument on the motion, the court found that there was more than sufficient probable cause for the search warrant to issue for defendant personally, as well as for his store, and denied the motion.

¶ 3 At trial, Chicago Police Officer Renee Gonzalez testified that she conducted a fencing investigation of the Go Wireless store owned by defendant at 3407 West Armitage Avenue in Chicago, and that Target provided the merchandise for the investigation. On December 4, 2008, Officer Gonzalez went to the store in an undercover capacity to sell two wireless phones as stolen. When she entered the store, there was only one person there, but she later testified that she "believe[d]" there were two people present. The officer told the salesman that she had phones for sale, and he called the owner, who wanted to know where the phones came from. She told him that she "took them from Target." The salesman then told her that the owner would pay $50 for the phones, and she sold them to him for that sum.

¶ 4 On December 11, 2008, Officer Gonzalez returned to the

store in her undercover capacity, and told defendant that she had more phones to sell that she "had taken from Target." He responded, "okay," and paid her $50. The officer then asked if she could come back with more, and defendant responded, "bring as much as you can." She also asked if there was anything else he was interested in, and he stated, "laptops or TVs." The officer told defendant that she can "take" a television set, and asked for at least a hundred dollar bill or two. Defendant stated that would be fine.

¶ 5 On December 18, 2008, the officer returned to the store undercover, and told defendant that she would bring the television set tomorrow. She also told him that she had four phones for sale, that she had "taken the phones from Target," and "probably wouldn't be around any time soon because [she] had almost got caught in taking the items this time." Defendant responded with a nod.

¶ 6 The officer further testified that when she entered the store on December 18, 2008, there was another person present, but not for the conversation she had with defendant. She then testified that she had made a mistake, and explained that when she testified that the other person was not present during her conversation with defendant, she meant that he was in the store, but that the conversation with defendant was private in that she kept the volume of her voice low, and did not think anyone else

could hear them.

¶ 7 The officer returned to the store the following day, and told defendant that she had the television set she "had taken from Target in the store." Defendant paid her $125 for the item. The officer stated that the value of the television set was $550.

¶ 8 On cross-examination, Officer Gonzalez testified that she did not recall testifying at a preliminary hearing that on December 19th, she did not tell defendant how she received the television, and that she was sure she told him how she obtained it. The officer also testified that she used quotes in her reports to indicate what was said verbatim, that her December 11th report only quoted her request for "at least a bill or two," and contained in summary form some of what was said between her and defendant, and that she did not use quotes in her December 19th arrest report. On redirect, the officer explained that she writes summaries in her reports, and not every single detail of what happened.

¶ 9 Bob Lawson testified that he conducts retail crime investigations for Target, and supplied the merchandise for Office Gonzalez' investigation. Lawson stated that the four phones sold to defendant on December 18th were worth $399, and that the television set sold to him on December 19th was worth $549.99. Lawson further stated that the television had a "pic label" on it which indicated that it came from Target. When

Lawson was shown a photograph of the box containing the television, he observed that a portion of the photograph where the Target label was located was covered. Lawson further testified that he believed the officer informed him on December 11th that the subject knew the merchandise was stolen, and that she told him she worked at Target.

¶ 10 Mohammed Bouabdallaoui testified that he has known defendant for over 10 years, and grew up with him. In 2008, Mohammed owned a cell phone store, and would occasionally work at defendant's store. On December 4, 2008, he was working at defendant's store with two other people when a well-dressed woman, later identified as Officer Gonzalez, entered the store, and offered to sell him two phones for $50. Mohammed called defendant, who told him to buy the phones. The officer did not tell him the phones were stolen or from Target, and he did not ask her where she got them. Mohammed explained that it was not uncommon to buy phones from people who walked into his store, and that the phones come from wholesalers. Mohammed stated that phones purchased from wholesalers are cheaper than phones bought at retail.

¶ 11 Mohammed further testified that on December 18, 2008, he was visiting defendant at Go Wireless when the officer walked in. He was a couple of feet away from the officer when she spoke to defendant, and could hear the entire conversation. She told

defendant that she had more phones for sale, and he bought several of them from her. She also told him that she had some televisions, but did not indicate that any of the items were stolen, or taken from Target, or that she had almost gotten caught.

¶ 12 Defendant testified that in 2008, he purchased cell phones for resale from wholesalers who came to his store, and from other people. On December 4th, when defendant's brother and Mohammed were watching his store, Mohammed called him and told him that someone was there to sell him phones. Defendant testified that he did not ask where the phones came from, but that he does care about their origin.

¶ 13 On December 11th, a pretty, professional woman, later identified as Officer Gonzalez, came to his store to sell phones. Defendant bought the phones from the officer, who looked like a wholesaler representative, not like someone who would sell stolen goods. He stated that the people who have tried to sell him stolen phones are not dressed well, and have no money. Defendant did not believe the phones were stolen because he regularly had wholesalers coming in to sell phones that they had purchased in bulk or as damaged. Defendant stated that when he buys items from wholesalers, he does not issue a receipt or receive one because wholesale items cannot be returned.

¶ 14 Defendant further testified that when the officer came

back on December 18th, and sold him more phones, Mohammed was present, and three feet away from him while he spoke to the officer who talked in a normal tone of voice. The officer told him that she also had televisions, and, when defendant told her he would like one for personal use, she said that she had one for one or two hundred dollars. Defendant told her that was fine, and she returned the next day with the television set.

¶ 15 Defendant further testified that during his meetings with the officer, she never mentioned Target, or stated that she had "taken" or stolen the items, or that she had almost gotten caught. Defendant stated that there was no indication that the items he bought from the officer were stolen.

¶ 16 At the close of evidence, the court found defendant guilty of two counts of theft. In doing so, the court noted that the case was about knowledge and credibility, and that this was not a one-time deal as there were four separate dates. The court further noted that the officer indicated that she told defendant she had almost gotten caught, and he would not be seeing her for a while. The court found that the officer's testimony was "more credible" than that of defendant and his friend, and that she testified "truthfully." The court also found that the quotation marks in the officer's reports were not significant where the officer testified that she did not place every single statement in quotes, and that it was a summary. The court concluded on the

totality of the evidence, that the State had met its burden of proof.

¶ 17 Defendant filed a motion for a new trial in which he attacked the sufficiency of the evidence, and raised several other alleged trial errors. The court denied defendant's motion noting that it found the officer "very credible," and that it would defy common sense to find otherwise. The court also noted that the officer told defendant on three separate dates that she had taken the items from Target, and although she did not use the word stole, "[w]hat else could it possibly mean?" The court observed that the officer also told defendant that she almost got caught, and "there's not anybody in their right mind that wouldn't know that [the items] were stolen." The court concluded that this was not a "close call" case.

¶ 18 On appeal, defendant first contends that the trial court erred in denying his motion to quash the search warrant and suppress the evidence acquired as a result. The State responds that defendant waived this issue for review by failing to raise it in his post-trial motion. Defendant replies that a fair reading of his post-trial motion shows that he preserved this claim, and, in the alternative, that it was plain error.

¶ 19 In order to preserve an issue for review, defendant must object at trial and raise the matter in a written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here,

defendant did not raise the matter in his post-trial motion, but attacked the sufficiency of the evidence, and alleged other trial errors. It is thus clear that defendant failed to preserve the issue for review. *Enoch*, 122 Ill. 2d at 186.

¶ 20 As a consequence, we may review this claim of error only if *defendant has established* plain error. (Emphasis added.) *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Defendant, however, has only claimed in a single sentence in his reply brief that there was plain error. Since he failed to present argument on how either of the two prongs of the plain error doctrine is satisfied, he has forfeited plain error review. *Hillier*, 237 Ill. 2d at 545-46.

¶ 21 Defendant next contends that the State failed to prove him guilty of theft beyond a reasonable doubt. He maintains that there was insufficient evidence that he knew that the merchandise the officer sold to him was stolen.

¶ 22 When defendant challenges the sufficiency of the evidence to sustain his conviction, our duty is to determine whether all of the evidence, direct and circumstantial, when viewed in the light most favorable to the prosecution, would cause a rational trier of fact to conclude that the essential elements of the offense have been proven beyond a reasonable doubt. *People v. Wiley*, 165 Ill. 2d 259, 297 (1995). A criminal conviction will be reversed only if the evidence is so

unsatisfactory or improbable that it leaves a reasonable doubt of defendant's guilt. *Wiley*, 165 Ill. 2d at 297. For the reasons that follow, we do not find this to be such a case.

¶ 23 To sustain defendant's theft conviction, the State was required to prove, in relevant part, that he knowingly obtained property which was explicitly represented to him as being stolen. 720 ILCS 5/16-1(a)(5)(A) (West 2008). Knowledge of the theft is sufficient if the circumstances accompanying the transaction were such as to make defendant believe the goods had been stolen. *People v. Garmon*, 394 Ill. App. 3d 977, 982 (2009). Here, defendant does not dispute that he obtained control over the property, but maintains that the State failed to prove that he had the requisite knowledge to sustain his conviction.

¶ 24 Viewed in the light most favorable to the prosecution (*People v. Campbell*, 146 Ill. 2d 363, 374 (1992)), the record shows that Officer Gonzalez described four occasions where she went to defendant's store undercover to sell stolen merchandise. On her initial visit, Officer Gonzalez told defendant that she had phones for sale which she "had taken from Target," and defendant agreed to purchase them for $50. When she asked defendant if she could come back with more phones, defendant responded, "bring as much as you can," and later indicated that he was also interested in "laptops or TVs." She told him she could "take" a television set, and on December 18, 2008, she

returned to the store, and told defendant that she would come back with the television set tomorrow, that she had four phones which she had "taken [] from Target," and "probably wouldn't be around any time soon because [she] had almost got caught in taking the items this time." Defendant responded with a nod. The next day, she told defendant she had the television set which she "had taken from Target in the store," and defendant paid her $125 for the televison which was worth $550. This testimony, if believed by the trial court, was sufficient to prove defendant guilty of theft beyond a reasonable doubt. *People v. Loferski*, 235 Ill. App. 3d 675, 682 (1992).

¶ 25 Defendant contends that the officer's testimony was incredible, impeached, and inconsistent, and that his and Mohammed's testimony should be given more weight. He points to his belief that the officer was a wholesaler, and that other innocent explanations exist for her to sell him the items, such as, she could have been a Target employee using her employee discount to purchase and resell electronics.

¶ 26 The argument raised by defendant concerns the credibility of the witnesses, a matter within the purview of the trier of fact. *People v. Berland*, 74 Ill. 2d 286, 305-06 (1978). The trial court here specifically found the officer more credible than defendant and his friend, and the record before us provides no reason to second-guess that determination. *People v.*

*Hernandez*, 278 Ill. App. 3d 545, 551, 553 (1996).

¶ 27 We remind, that, in weighing the evidence, the trial court was not required to disregard the inferences which naturally flowed from the evidence, or to search out all possible explanations consistent with innocence and raise them to the level of a reasonable doubt. *People v. Moore*, 394 Ill. App. 3d 361, 364-65 (2009). In addition, the trial court was not required to accept defendant's self-serving testimony (*People v. Moreira*, 378 Ill. App. 3d 120, 130 (2007)), or that of his friend (*People v. Young*, 269 Ill. App. 3d 120, 123-24 (1994)), over the testimony of Officer Gonzalez. The comments made by the court show that the court was aware of the deficiencies in the officer's reports and certain discrepancies in her testimony, but considered them in light of the totality of the evidence (*People v. Scott*, 152 Ill. App. 3d 868, 872 (1987)), and concluded that they did not call into question her testimony on the transactions with defendant which proved him guilty of theft (*Rodriguez*, 187 Ill. App. 3d 484, 491 (1989); *People v. Reed*, 80 Ill. App. 3d 771, 781 (1980)).

¶ 28 Defendant, nonetheless, contends that the officer's communications to him did not satisfy the statutory requirement that she "explicitly represent" that the items were "stolen." We disagree, and find the case analogous to *Garmon*, 394 Ill. App. 3d 977.

¶ 29 In *Garmon*, defendant was convicted of theft, and asserted on appeal that the evidence was insufficient to establish that he knew the phones he bought from the undercover officer were stolen where much of the merchandise he bought was from distributors who sold items to him for much less than their retail value, and he had verified that the phones were not stolen. *Garmon*, 394 Ill. App. 3d at 979-80. This court found that the undercover officer's veiled references to stealing, namely, that he "almost got caught twice taking" the phones, could be inferred by the trier of fact as an explicit representation that the items were stolen, and also observed that the defendant noted during the last of the five undercover transactions that the officer had been back to Target and that he must tell his son who works there to watch out for him. *Garmon*, 394 Ill. App. 3d at 984. This court further observed that the evidence of an explicit representation may be gleaned from the totality of the circumstances, which included the officer's statement that he almost got caught, the packaging of the phones which were sealed with serial numbers and security tags attached, and the disparity between the purchase price and the retail value. *Garmon*, 394 Ill. App. 3d at 985.

¶ 30 Here, as in *Garmon*, 394 Ill. App. 3d at 984, the officer's veiled references to stealing, namely, that she had taken the phones from Target and almost got caught, could be

inferred as an explicit representation that the items were stolen. Further, representations were evident from the fact that the television box had a Target label on it, and there was a huge disparity between defendant's purchase price and the retail value of the items. We thus find that this evidence satisfied the knowledge requirement beyond a reasonable doubt.

¶ 31 In reaching this conclusion, we have considered, *People v. Thompson*, 35 Ill. App. 3d 105 (1975), *People v. Mills*, 356 Ill. App. 3d 438 (2005), *People v. Kostatinovich*, 98 Ill. App. 3d 611 (1981), and *People v. Phuong*, 287 Ill. App. 3d 988 (1997), cited by defendant, and find them factually inapposite to this case. Two of those cases were based on accountability, and there was insufficient evidence that defendants knew the goods/services were stolen, an infirmity that does not exist in this case, and where defendant was directly involved in the transactions.

¶ 32 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.