FIFTH DIVISION
August 9, 2013

No. 1-12-1656

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. 11 MC2 3396
	)	
EFREN RESENDEZ,	)	Honorable
	)	Timothy J. Chambers,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

O R D E R

¶ 1 *Held*: The evidence established defendant's guilt of theft beyond a reasonable doubt; defendant was estopped from challenging the admission of his written confession where the defense elicited the initial testimony about the confession.

¶ 2 Following a bench trial, defendant Efren Resendez was convicted of misdemeanor theft and sentenced to one year of supervision. On appeal, defendant contends that the evidence failed

to prove him guilty beyond a reasonable doubt and that the written confession he gave to his employers was inadmissible as the product of coercion. We affirm.

¶ 3 The State presented evidence at trial that in 2011, the management of Klein Tools (Klein) became aware of a theft scheme that had been operated on its premises in Skokie, Illinois, by defendant and two other Klein employees, Victor Ardon and Alexander Abraham. Among its activities, Klein's Skokie facility handled both scrap metal that it produced and incoming scrap metal from its other sites. The theft scheme involved the unauthorized removal and sale of the scrap metal. Defendant, Ardon and Abraham were fired from Klein on August 10, 2011.

¶ 4 Two State witnesses, Sean Kurtz and Russell Winnie, testified about the handling and disposal of scrap metal from Klein's Skokie facility. In July 2011, Kurtz was operations manager for Klein's Skokie facility and Russell Winnie was Klein's director of loss prevention. At that time Alexander Abraham was the sole shipping and receiving clerk at Klein's Skokie facility, and defendant was a maintenance utility helper. Victor Ardon was a truck driver for Klein who would transport scrap metal from another Klein facility in Roselle. The authorized procedure was for Ardon to bring the incoming scrap metal in green metal bins in a Klein box truck to the shipping and receiving dock at the Skokie facility, but he would not remove the scrap metal from the truck. The duty and responsibility for unloading the green scrap bins at the dock fell on Abraham, the shipping and receiving clerk, who would remove the bins to a staging area on the dock inside the building.

¶ 5 Defendant had been hired by Klein in 1988 as a janitor and, as of July 2011, he had held the position of maintenance utility helper for over 15 years. His duties entailed driving a forklift truck to the staging area, removing the green bins, and taking them through the main manufacturing area to the back of the building where he would dump the scrap metal outside the building into a scrap dumpster provided by United Scrap. The reception of the metal in the green

bins from the truck was always initiated at the shipping and receiving dock. In addition to that dock, there was another area known as the old steel room door where flatbed trucks formerly backed into it to unload steel bars. Under proper Klein procedure, Ardon's truck would never be loaded with green bins full of scrap metal at that old steel room door or at any other door.

¶ 6 Shortly before July 2011, Ardon was assigned to drive a new Klein box truck that was equipped with a GPS tracking device. Through that device, Klein became aware that Ardon was making unauthorized stops to General Iron Industries. Klein did not do business with General Iron; Klein had an exclusive arrangement with United Scrap, which would come to Klein's facility, remove the scrap metal, and compensate Klein. Based on Ardon's unauthorized stops, a private investigation firm was hired to investigate the activities of Ardon and other individuals. General Iron provided Klein with documentation that Ardon had been delivering scrap to it as far back as January 2010.

¶ 7 Prior to the theft investigation, a Klein security camera had only the shipping and receiving dock under video surveillance. On the morning of July 29, 2011, a security camera was moved to capture the activity at the old steel room door. Winnie, Klein's director of loss prevention, observed Ardon drive his Klein box truck from the shipping and receiving dock. The truck was loaded with materials other than scrap metal that were to be delivered to other facilities. Ardon pulled away in the loaded truck as if to leave the property. However, as the truck rounded the building, Ardon stopped it by the old steel room door, got out, and opened the overhead door of the truck. Winnie saw defendant drive a forklift out of the building. It was filled with a full tote of scrap metal in a green bin, which defendant loaded onto the back of the truck. Then Ardon drove the truck off Klein's property. His progress was tracked by GPS. A private investigator followed the truck to the General Iron scrap yard in Chicago.

¶ 8 The parties stipulated that the truck was weighed after its arrival at General Iron, the scrap metal was removed, the truck was reweighed, and Ardon was paid an amount less than $300 for the scrap metal he sold. Ardon left the scrap yard without the scrap, and the green bin on his truck was then empty. Klein's investigation revealed that the theft ring activities were large and that the value of scrap metal sold to General Iron since January 2010 was in excess of $30,000.

¶ 9 In early August 2011, Kurtz viewed the videotape showing defendant loading the scrap onto Ardon's truck. Kurtz testified that it was against company policy for the box truck to be loaded with full green bins at the old steel room door. Moreover, defendant should not have been loading any trucks with full green bins of scrap at any location without supervisor authority; he was authorized only to take the full green bins of scrap with his forklift from the loading dock to the United Scrap bin.

¶ 10 On cross-examination of Russell Winnie, the State's second witness, defense counsel asked Winnie about the extent of his personal knowledge of defendant's involvement in the theft:

> "Q So the only thing that you show involving Mr. Resendez is that he had the forklift. He brought it to the big steel door. And he put it on the back of Mr. Ardon's truck?
>
> A Other than his admission of doing so."

¶ 11 Defense counsel then elicited from Winnie extensive testimony that a disciplinary and investigatory meeting was held at Klein on August 10, 2011, at which time defendant signed an inculpatory written statement. No evidence about the meeting or the statement had been presented prior to that testimony. Winnie testified that those in attendance at the meeting for Klein included Winnie, Kurtz, Bill Mercer, David Corey, and Brad Kunis. Defendant was also present, as were Robert Ayree, the president of his union, and Oscar Orellana, a former union president who attended the meeting to interpret for defendant. At the outset of the meeting,

defendant spoke privately with the two union men. Later, with everyone present, defendant admitted he had loaded Ardon's truck with full bins of scrap metal. When defendant was asked if he knew what he was doing was wrong, he said he knew it was wrong and should not have listened to Alex Abraham. Defendant was asked specifically whether he had received any money from the theft and he responded, in English, that he had received $30 only one time.

¶ 12 Defendant was shown a document which was read to him in English and in Spanish, and then he signed it. At trial, defense counsel showed Winnie the document, marked as a defense exhibit, which Winnie identified as the document defendant had signed at the August 10 meeting. The document stated *in toto*: "Alex, Victor and I have been stealing scrap steel and pallets from Klein Tools." It was signed by defendant, by Robert Ayree, the union president, and by David Corey, the maintenance supervisor. Winnie testified that defendant was not told in English that he must sign the document or he was going to jail. Defendant was not told that if he did sign it, he could go back to work or otherwise the police were coming and he was going to jail. No one was yelling at defendant or threatening him during the meeting.

¶ 13 David Corey testified that in July 2011, he was the maintenance supervisor at Klein and he supervised defendant's work. Corey had no knowledge on the morning of July 29, 2011, that defendant was loading full green bins of scrap metal onto Ardon's truck. Defendant was not authorized to do so and that activity was not within the scope of defendant's employment. Defendant would get his instructions from Corey, not from the shipping and receiving clerk. It was not defendant's job to help people if they asked him to do something on the premises. Corey had never known Alex Abraham to ask defendant to do anything for Abraham.

¶ 14 Robert Aryee testified that he was an inspector for Klein. He attended the August 10 meeting in his capacity as the president of the local lodge of the Boilermakers Union. He brought in Oscar Orellana, a former union president, to translate for defendant, who spoke

Spanish. Ayree knew defendant also spoke "a lot" of English, but he wanted defendant to know exactly what was going on at the meeting. Ayree was present when defendant was given the statement written by Bill Mercer, Klein's human resources manager. Ayree heard the statement read to defendant in English, then in Spanish, and saw defendant sign it. At the meeting, no one yelled at defendant or told him that he was to sign the paper or go to jail. He was told, either you sign the statement or you talk to the police.

¶ 15 Oscar Orellana testified he worked at Klein for 38 years and at one point was the union president. He attended the August 10 disciplinary meeting and translated what was being said in English into Spanish for defendant. He also translated the statement into Spanish, word for word. No one threatened defendant. At first, defendant did not want to sign the statement. Bill Mercer told defendant that if he did not sign the statement, they would call the police.

¶ 16 The State offered in evidence a copy of defendant's written statement, and it was admitted.

¶ 17 Defendant testified in his own behalf. He had worked at Klein for over 23 years and had always received his orders from David Corey or other supervisors. If someone from Klein would ask him to load or unload something, he would do it. His previous supervisor and the plant manager and other workers told him that as part of his job he was to help whomever he could. At various times Alex Abraham, a shipping and receiving clerk, asked defendant to perform various tasks for him. On July 29, 2011, Abraham asked defendant to load scrap metal into Ardon's truck, which was outside of the dock. Defendant did not know where the scrap came from or where it was going to be delivered. He did only what Abraham asked him to do and did not know that Ardon and Abraham were stealing scrap from Klein.

¶ 18 When defendant walked into the August 10 meeting, Bill Mercer did not tell him that he would be losing his job. Defendant felt frightened during the meeting because Mercer was

yelling at him and told him that he was going to jail. Mercer did not ask him if he knew that loading the bins on the truck was wrong. Defendant knew that the scrap was to be disposed of in the United Scrap dumpster. He did not know whether it was "correct or incorrect" to put the full green bins onto the truck. He just did it because Alex asked him to do it. A supervisor never told him to do it, and he never asked a supervisor if he was allowed to do it. He did it at the wrong loading facility because Alex told him the dock was busy. Defendant denied he had a private meeting with his union representative and the translator. Mercer showed him a paper at the meeting, but defendant did not know exactly what it said. Oscar Orellana did not read the statement to him in Spanish, but told defendant only that he should sign it for his own good. Mercer told Oscar to tell defendant that if he did not sign the document, they were going to call the police, and he had a minute to sign. Defendant signed it "because they told me I was not going to lose my job[,] that I would continue working." He was paid well by the company, so he did not have to steal. Defendant did not remember being asked whether he received money from the theft. They asked him if he received money and he told them he received money from Alex because he owed defendant. He remembered that at the August 10 meeting, he made the oral statement, "$30 one time only." Defendant testified that that was a reference to a $30 repayment of a loan he had made to Abraham in 2009. Defendant never received money from Ardon or Abraham from their proceeds from stealing from the company.

¶ 19 On cross-examination, defendant testified that if someone from another department asked him to help, he first needed to ask his supervisor, Corey, but on July 29 he did not ask Corey if he could help Alex. On redirect, defendant testified that he would do things that people asked him to do without going to his supervisor for permission.

¶ 20 After the defense rested, the State called William Mercer as a rebuttal witness. Mercer had informed defendant at the beginning of the August 10 meeting that his employment with

Klein had already been terminated. At some point in the meeting, everyone left the room except defendant, the union representative, and the translator, who were left to speak in private. At the meeting, Mercer asked defendant whether he knew what he was doing was wrong. Defendant put his head down and said yes. Mercer asked defendant whether he had received any money for the theft. The question was put to defendant in English and in Spanish. Defendant said, "$30, I can't believe it." His answer was in English. Mercer wrote out the statement for defendant to sign, and defendant signed it in his presence. Mercer never yelled at defendant and never told him that he was going to jail.

¶ 21 In closing argument, defense counsel argued that defendant did not know at the time he loaded the truck that he was doing something wrong, that Klein had failed to discover the theft scheme for over one and a half years, and that the State's witnesses were "all covering their own derrieres embarrassed by what happened." Counsel asserted, "You see that brilliant confession that they had him sign. It's like a fifth grader wrote it."

¶ 22 The court found defendant guilty of misdemeanor theft after making the following factual findings. On July 29, defendant "did what he wasn't supposed to do," he was paid $30, and he acknowledged his actions were wrong. Prior to the August 10 meeting, defendant had been told that his employment had been terminated. At the meeting, the other people left the room when defendant spoke in private with the union representative and the translator. Defendant signed a confession, "[a]s poor as it was." The court sentenced defendant to one year of non-reporting supervision.

¶ 23 On appeal, defendant asserts that the trial evidence did not establish his guilt of theft beyond a reasonable doubt. He contends that the trial court erred in rejecting his "credible evidence" and accepting the "half-truths" presented by the testimony of State witnesses.

¶ 24 When presented with a claim of insufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v. Leonard*, 377 Ill. App. 3d 399, 403 (2007). On review, we will not set aside a conviction on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there remains a reasonable doubt as to the defendant's guilt. *People v. Lee*, 376 Ill. App. 3d 951, 955 (2007).

¶ 25 In support of his argument, defendant repeats his trial testimony while ignoring much of the testimony of the State witnesses. Defendant contends that he was not required to get permission from his supervisor to load or unload something for Abraham. His assertion was contradicted by David Corey, defendant's supervisor, who testified that he, and not a shipping clerk, gave defendant his job instructions. It was not defendant's job to help people who asked him to do something. Moreover, defendant contradicted himself at trial when, on cross-examination, he admitted that he needed to ask his supervisor for permission to assist someone from another department asking for his help.

¶ 26 Defendant claims that no documentation or witnesses were presented to show that he actually received $30 for his part in the theft. However, Russell Winnie testified that at the August 10 meeting, defendant was asked whether he had received any money from the theft and he responded, in English, that he had received $30. Defendant maintains that his signature on the written confession was coerced because Mercer yelled at him and told him the police would be called if he did not sign, but that he would not lose his job if he did sign. In contrast, Mercer testified that he did not yell at defendant and told defendant at the beginning of the meeting that his employment was terminated. Defendant also asserts that because he received an inadequate interpreter at the disciplinary hearing, he did not understand the charges against him or the content of the written confession which was never read to him. This assertion was contradicted

by Winnie and Aryee, who testified the statement was read to him in English and in Spanish, and by Oscar Orellana who testified he translated the written confession into Spanish, word for word.

¶ 27 Defendant's claims amount to no more than an attack on the credibility of the witnesses and the weight to be given to their testimony. In considering a challenge to the sufficiency of the evidence, it is not the function of this court to substitute its judgment for that of the trier of fact on questions involving the weight of the evidence or the credibility of the witnesses. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). Rather, the trier of fact, in this case the court, was responsible for determining the weight to be given to witnesses' testimony, resolving conflicts and inconsistencies in the evidence, and drawing reasonable inferences from the testimony. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). The trial court was in a superior position to resolve conflicts in the testimony, and its factual findings were not contrary to the evidence presented at trial. Consequently, we decline to disturb the trial court's judgment.

¶ 28 Next. defendant asserts that the trial court committed plain error in admitting and considering his confession, which he asserts was involuntary as the product of coercion. Defendant notes that the plain error doctrine bypasses normal forfeiture principles and argues that the evidence was closely balanced to invoke such review.

¶ 29 The State agrees that defendant has forfeited this issue by failing to either interject a prompt objection at trial or raise the alleged error in a written posttrial motion. The State also contends, *inter alia*, that plain error review is not available here because any alleged error was invited by defendant.

¶ 30 Here, defendant is precluded from claiming the admission of the confession at trial was error where evidence of the confession was first interjected by defense counsel in his cross-examination of State witness Winnie. "A defendant forfeits any issue as to the impropriety of the evidence if he procures, invites, or acquiesces in the admission that evidence." *People v. Woods*,

214 Ill. 2d 455, 475 (2005), citing *People v. Caffey*, 205 Ill. 2d 52, 114 (2001). A defendant's invitation to the procedure later challenged on appeal "goes beyond mere waiver," and the issue is sometimes referred to as estoppel or addressed under the invited error doctrine. *People v. Harvey*, 211 Ill. 2d 368, 385-86 (2004).

¶ 31 In procuring the initial testimony about the written confession, the defense utilized the document in an attempt to show Klein's ineptness in dealing with the theft scheme and its resort to allegedly coercive tactics in eliciting an inculpatory statement from defendant. Defense counsel's closing argument fixed on the failure of Klein to discover the theft for over one and a half years and utilized the written statement in arguing, "You see that brilliant confession that they had him sign. It's like a fifth grader wrote it." Having procured the admission of the initial testimony concerning both the content and the surrounding circumstances of the written confession, defendant may not challenge its voluntariness for the first time on appeal where to do so "would offend all notions of fair play." *People v. Villareal*, 198 Ill. 2d 209, 227 (2001). Defendant invited the alleged error, and he is estopped from raising the issue on appeal. *People v. Sanders*, 2012 IL App (1st) 102040, ¶ 30 ("[i]nvited errors are not subject to plain-error review").

¶ 32 For the reasons stated above, we affirm the judgment of the trial court.

¶ 33 Affirmed.