2019 IL App (1st) 172083-U

No. 1-17-2083

SIXTH DIVISION
MAY 24, 2019

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 16 MC4 006319
	)	
PHASHUN DAVIS,	)	Honorable
	)	Kristyna C. Ryan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for retail theft over his contention that the State failed to prove him guilty beyond a reasonable doubt. Fines and fees order corrected.

¶ 2 Following a bench trial, defendant Phashun Davis was convicted of retail theft and sentenced to 12 months' supervision. On appeal, defendant argues that the evidence was insufficient to prove him guilty beyond a reasonable doubt because he denied making incriminating statements, and one of the State's witnesses omitted and misremembered key facts.

Defendant further maintains that a $35 Traffic Court Supervision fee should be vacated. We affirm defendant's conviction, vacate the $35 Traffic Court Supervision fee, and amend the fines and fees order.

¶ 3 Defendant was charged by complaint with one count of retail theft under section 16-25(a)(1) of the Criminal Code of 2012 (Criminal Code) (720 ILCS 5/16-25(a)(1) (West 2016)).

¶ 4 At trial, Maximiliano Puente testified that, on December 27, 2016, he was employed as an asset protection team member at Meijer in Melrose Park, Illinois. Since he had been hired in November, he was being trained as an intern and working alongside store detective Adriana Guzman. At approximately 2:15 p.m., he was conducting surveillance in the monitor room located on the second floor of the store. While monitoring the store's cameras, Puente noticed defendant, whom he identified in court, walk into the liquor aisle and glance at the camera for a "split second," which is considered a "red flag." Defendant exited the liquor aisle, but returned with a red basket and selected a bottle of Hennessy and two bottles of "expensive wine."

¶ 5 After placing the items inside the basket, defendant left the liquor aisle and walked towards the paper towel aisle, an area of the store where there is no surveillance camera coverage. Puente and Guzman left the monitor room and headed towards the first floor, a process that took 30 seconds, and located defendant in the paper towel aisle. Puente positioned himself behind a shelf made of aluminum grates, spaced an inch or two apart, in the clothing department, which is located directly in front of the paper towel aisle. Puente could see through the grates, and noticed defendant remove the product protection caps from the bottles of alcohol with a bottle opener that he had retrieved from his pocket. Puente later recovered the caps from the paper towel shelves. Defendant gave the bottles to an older man, who concealed them in his

pants. Puente stated that he and Guzman maintained surveillance on both individuals "the whole time," and saw them head towards the front of the store, where they passed the final point of purchase without paying for the alcohol. The older man exited the store first, followed by Guzman, who was on the phone with law enforcement. Puente subsequently exited the store and saw defendant leave the store shortly thereafter. Once outside, Puente saw both individuals enter a car, and after three or four minutes, the police arrived and searched the vehicle. Defendant and the older man were arrested, and Puente identified them to the police.

¶ 6 The State introduced surveillance video from the store, consisting of three clips, which is included in the record on appeal. Puente narrated the video as it played. The first clip showed defendant, identified by Puente, pace through the liquor aisle, glance over a few bottles of alcohol, and briefly look up towards the camera before exiting the aisle. Moments later, a bald man, identified by Puente as the older man who concealed the bottles of alcohol in his pants, is seen walking through the liquor aisle. Defendant returned to the aisle with a red basket, and grabbed an item before placing it back on the shelf. Defendant retrieved a different bottle, which Puente described as a bottle of Hennessy, placed it in the basket, and walked to the next aisle, which had a different selection of alcohol. Defendant subsequently placed another bottle of alcohol, described by Puente as expensive wine, into the basket, and headed towards the paper towel aisle. The second clip depicted the bald man, Guzman, Puente, and defendant exiting the store. Defendant exited the store with something in his hand approximately 31 seconds after the older man. The third clip showed defendant following the older man into a car in the parking lot. A police vehicle then entered the parking lot, activated its lights, and parked nearby.

¶ 7 On cross-examination, Puente acknowledged that he had been working at Meijer for a little over a month when the incident occurred and that he required the assistance of a trainer. Puente did not know what defendant was doing during the 30 seconds that it took him to reach the first floor of the store. However, Puente was 20 feet from defendant when defendant removed the sensors from the bottles of alcohol, which is against store policy. Puente admitted that he was unaware that defendant had purchased lottery tickets because he did not see defendant at all times while he was in the store.

¶ 8 On re-direct examination, Puente stated that he never lost sight of defendant as he left the paper towel aisle and walked past the last point of purchase, and did not see him make any purchases. Puente also noted that the lottery ticket booth was located by the service desk.

¶ 9 Chicago police officer Jose Velazquez testified that, on December 27, 2016, at approximately 2:30 p.m., he received a call about a theft at Meijer. When he arrived in the parking lot, he saw an employee pointing to two men by a vehicle who matched a description Velazquez had received. Velazquez identified defendant as one of them, and described the other as an older bald male. Both individuals stated that they were coming from Meijer, and were searched by Velazquez and another officer. Velazquez asked defendant "where was the alcohol" that was "stolen" from the store, and defendant stated that the bottles were underneath the driver's and passenger's seats. Velazquez searched the vehicle and discovered two bottles of Remy Martin, one bottle of Hennessy, and one bottle of champagne underneath the driver's and passenger's seats. The officers arrested both men, and took them to the police station.

¶ 10 Defendant was given the *Miranda* warnings prior to questioning. Defendant stated that he drove to Meijer and stole the alcohol for the purpose of celebrating New Year's Eve. While on

his way to Meijer, defendant spoke to his cousin who informed him about the presence of drugs inside the vehicle. Defendant assured his cousin that he would return soon because he was "just going to go pull this lick." According to Velazquez, pulling a "lick" is a statement meaning that someone is "going to go steal something" or "[g]o do a job."

¶ 11 On cross-examination, Velazquez acknowledged that he never asked defendant if he had taken the alcohol outside of the store.

¶ 12 The State rested and defendant moved for a directed finding, which was denied.

¶ 13 Defendant testified that he purchased $100 worth of lottery tickets at Meijer on December 27, 2016, at approximately 2:15 p.m. Defendant denied possessing a bottle opener, removing the sensors from the bottles of alcohol, or stealing the alcohol from the store.

¶ 14 On cross-examination, defendant stated that he drove to Meijer with his uncle, and upon entering the store, he went to get alcohol while his uncle went to the bathroom. Although they both had money, defendant located his uncle and gave him a basket of alcohol to purchase. Defendant saw his uncle in the purchasing line, but did not actually see him buy the alcohol. Defendant bought lottery tickets in an area "right by the door" as his uncle waited in line. After purchasing the lottery tickets, defendant walked to his car, and as he was getting inside the vehicle, the police arrived and instructed him to put his hands up. Defendant denied that he told the police there was alcohol underneath the seats of the vehicle, and stated that he was only questioned about drugs at the Melrose Park Police Department. Defendant also denied that he told his cousin that he was going to pull a "lick."

¶ 15 On re-direct examination, defendant stated that he knew which type of alcohol to get because his mother had instructed him to purchase Hennessy for New Year's Day.

¶ 16 The trial court found defendant guilty of retail theft. The trial court stated that it had listened to the testimony of all the witnesses and judged their credibility. In particular, the trial court noted that, even if defendant's testimony that Velazquez did not question him about alcohol were true, "[w]e all saw the video of the defendant going and getting certain bottles of alcohol and then going off screen." The trial court observed that Puente testified that he saw defendant remove the sensors from the bottles of alcohol, and that another person with him "concealed the bottles in his pants immediately." The trial court also emphasized that, although defendant went to the service desk, he testified that he went to that part of the store to purchase lottery tickets, not alcohol. In finding defendant guilty, the trial court stated that it did not matter whether defendant purchased the lottery tickets or that he "did not walk out of that store" with the alcohol because he "caused them to be transferred or carried away."

¶ 17 Following a hearing, defendant was sentenced to 12 months' supervision. The trial court assessed various fines and fees totaling $309. Defendant filed a timely notice of appeal. Accordingly, we have jurisdiction to hear this case.

¶ 18 On appeal, defendant first argues that the State's evidence was insufficient to establish that he committed retail theft due to infirmities in Puente and Velazquez's testimony. Specifically, defendant argues that Puente did not know that he purchased lottery tickets, despite claiming that he never lost sight of him. Given this discrepancy, defendant claims that Puente's testimony, including his observation that he saw defendant take the caps off the bottles, was not credible, especially considering that the caps and bottle opener were not produced at trial. Defendant also argues that he denied making incriminating statements to Velazquez, and claims that the statements that Velazquez attributed to him were not incriminatory or credible.

¶ 19 The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). When a defendant challenges the sufficiency of the evidence presented at trial, it is not the function of a reviewing court to retry the defendant. *Id.* "The trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court *** that saw and heard the witnesses." *Id.* at 114-15. Hence, a defendant's conviction will not be set aside unless "the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 20 Relevant here, Section 16-25(a)(1) of the Criminal Code provides that a person commits retail theft when he or she knowingly:

> "Takes possession of, carries away, transfers or causes to be carried away or transferred any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise[.]" 720 ILCS 5/16-25(a)(1) (West 2016).

¶ 21 To sustain a conviction for retail theft under a theory of accountability, the State must show beyond a reasonable doubt that either before or during the commission of the offense, and with the intent to promote or facilitate that commission, defendant solicited, aided, abetted,

agreed, or attempted to aid in the planning or commission of the offense. 720 ILCS 5/5-2(c) (West 2016). Defendant does not challenge the elements of the offense, but rather, the reliability of Puente and Velazquez's testimony, and maintains that his own account of events was more credible.

¶ 22 Here, Puente, a Meijer store security employee, testified that he was monitoring surveillance cameras and observed defendant glance at the cameras as he was walking through the liquor aisle. The surveillance video showed defendant walk up and down the aisle before leaving and returning with a red basket. While defendant grabbed the basket, a bald man could be seen on the video walking through the liquor aisle. After collecting the bottles of alcohol, defendant walked into the paper towel aisle, an area of the store where there was limited surveillance coverage. Puente followed defendant and positioned himself approximately 20 feet away, behind a shelf consisting of grates spaced an inch or two apart. Puente saw defendant remove the product protection caps from the bottles of alcohol with a bottle opener that he retrieved from his pocket. The caps were later recovered from the paper towel shelves. After defendant removed the caps, Puente saw defendant tender the bottles to the bald man, who placed them in his pants. Puente stated that he never lost sight of defendant as defendant left the paper towel aisle and walked past the last point of purchase.

¶ 23 Velazquez testified that he encountered defendant and his uncle near a vehicle in the parking lot, and asked defendant for the location of the "stolen alcohol." Defendant responded that there were bottles of alcohol underneath the seats of the vehicle, and Velazquez recovered two bottles of Remy Martin, one bottle of Hennessey, and one bottle of champagne from underneath the driver's and passenger's seats. According to Velazquez, defendant admitted that

he drove to the store and stole the alcohol, and that he had informed his cousin that he intended to "pull this lick." Viewing this evidence in the light most favorable to the State, we find it sufficient to prove that defendant entered the store, collected the bottles of alcohol and removed the protection caps, and tendered them to another individual before exiting the last point of purchase. Therefore, defendant was proven guilty beyond a reasonable doubt of retail theft.

¶ 24 Nonetheless, defendant maintains that the evidence was insufficient because the protection caps and bottle opener were not produced at trial, and therefore, Puente's testimony that he observed defendant remove the caps from the bottles of alcohol with a bottle opener was unreliable. Defendant also challenges Puente's credibility because Puente admitted that he did not see defendant purchase lottery tickets, contrary to testimony that Puente never lost sight of defendant. Although the caps and bottle opener were never produced at trial, Puente's description of defendant's conduct, including his observation of defendant, was not implausible on its face as to render the a finding of guilt improbable. See *People v. Gray*, 2017 IL 120958, ¶ 36 (noting that a "conviction will not be reversed simply because the evidence is contradictory or because the defendant claims that a witness was not credible"). Here, the trial court noted that it had listened to all the witnesses' testimony and judged their credibility. Thus, the trial court could reject defendant's testimony that he gave his uncle the bottles of alcohol to purchase while he bought lottery tickets near the service desk area. Although Puente acknowledged that he did not see defendant at all times, he clarified on re-direct examination that he never lost sight of defendant after he left the paper towel aisle and walked past the last point of purchase. Hence, the trial court assessed Puente's credibility, and his testimony was sufficient to sustain defendant's conviction. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) ("the

testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant").

¶ 25 Additionally, defendant maintains that he was a more credible witness than Velazquez, and therefore, the trier of fact erred in finding him guilty. At trial, defendant testified that he never told Velazquez that the bottles of alcohol were underneath the seats of the vehicle, and even if he did make this statement, mere acknowledgement of the alcohol was not incriminating. Furthermore, defendant testified that, after being arrested, he was only questioned about drugs, and denied informing Velazquez that he had told his cousin that he was going to pull a "lick" while on his way to the store. Although defendant contradicted Velazquez's testimony, the trier of fact was not obligated to accept defendant's version of events. See *People v. Barney*, 176 Ill. 2d 69, 74 (1997) (noting that the testimony of a defendant does not carry a presumption of veracity and is not entitled to greater deference than the testimony of any other witness); *People v. Crouch*, 77 Ill. App. 2d 304, 306 (1966) ("[t]he trial court, sitting as the trier of the fact, is free to judge the credibility of witnesses and to accept the testimony of the officer to the complete exclusion of the testimony of the defendant"). Thus, the trial court could accept Velazquez's testimony that defendant acknowledged the alcohol within the vehicle and admitted to stealing the alcohol while being questioned at the police station. To the extent that defendant characterizes his statement to Velazquez regarding the alcohol in the vehicle as non-incriminating, we note that the trial court could infer that his statement was inculpatory given that defendant's statement was in response to Velazquez's question about the "stolen" liquor. As such, we will not reweigh the trial court's credibility determinations or substitute our judgment for that of the trier of fact on those issues. *Collins*, 214 Ill. 2d at 217.

¶ 26 Based on the evidence presented at trial, when viewed in the light most favorable to the State, it was sufficient for any rational trier of fact to find defendant guilty beyond a reasonable doubt of retail theft. Therefore, defendant's conviction is affirmed.

¶ 27 Defendant next contends that the trial court improperly assessed a $35 Traffic Court Supervision fee (625 ILCS 5/16-104c (West 2016)).

¶ 28 Defendant did not object to the trial court's order imposing monetary assessments, and therefore forfeited the issue. See *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (generally, to preserve an error for appeal, a defendant must both object at trial and raise the specific issue again in a posttrial motion). The State agrees that the fines and fees order should be modified. Since the State has waived any argument regarding defendant's forfeiture, we will consider defendant's claims. See *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46 (the rules of waiver and forfeiture apply to the State).

¶ 29 We note that, on February 26, 2019, after this appeal was fully briefed, our Supreme Court adopted new Illinois Supreme Court Rule 472, which sets forth the procedure in criminal cases for correcting sentencing errors in, as relevant here, the "imposition or calculation of fines, fees, and assessments or costs." Ill. S. Ct. R. 472 (a)(1) (eff. Mar. 1, 2019). Rule 472 provides that, effective March 1, 2019, the circuit court retains jurisdiction to correct these errors at any time following judgment in a criminal case, even during the pendency of an appeal. *People v. Barr*, 2019 IL App (1st) 163035, ¶¶ 5-6 (citing Ill. S. Ct. R. 472(a) (eff. Mar. 1, 2019)). "No appeal may be taken" on the ground of any of the sentencing errors enumerated in the rule unless that alleged error "has first been raised in the circuit court." Ill. S. Ct. R. 472(c) (eff. Mar. 1, 2019).

¶ 30 Defendant here did not raise his challenges to the fines and fees order in the circuit court and, instead, raises them for the first time on appeal. However, as defendant filed his notice of appeal prior to the effective date of Rule 472 and this court has found the rule applies prospectively, we will address the merits of his claims. *Barr*, 2019 IL App (1st) 163035, ¶¶ 6, 8, 15.

¶ 31 Whether fines and fees were properly assessed is a question of statutory interpretation, subject to *de novo* review. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 32 Defendant contends, and the State concedes, that the $35 Traffic Court Supervision fee should be vacated. We agree because defendant did not receive supervision for a violation of the Illinois Vehicle Code (625 ILCS 5/1-100 *et seq.* (West 2016)), or a similar county or municipal ordinance. Here, defendant was convicted of retail theft in violation of the Criminal Code. See *People v. Gomez*, 2018 IL App (1st) 150605, ¶ 41 (noting that the Traffic Court Supervision fee applies when "a defendant is convicted of violating the Illinois Vehicle Code or other similar municipal ordinance").

¶ 33 Based on the foregoing, we affirm defendant's conviction, vacate the $35 Traffic Court Supervision fee, and modify the fines and fees order to reflect a total owed of $274.

¶ 34 Affirmed in part and vacated in part; fines and fees order corrected.