No. 3–09–0897

Order filed April 21, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois
Plaintiff-Appellee,	)	
v.	)	No. 07–CF–2151
DENISE S. GORDON,	)	Honorable Edward A. Burmila, Jr., Judge, Presiding.
Defendant-Appellant.	)	

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice McDade concurred in part and dissented in part of the judgment.

ORDER

Held: When the State presented sufficient evidence that the defendant stole a bank deposit consisting of $7,835 in cash and a $2,480.64 check, the appellate court held that the circuit court properly convicted the defendant of Class 2 felony theft. In addition, the appellate court modified the mittimus to clarify the statutory section under which a particular fine was imposed and to reflect that the defendant was entitled to a monetary credit against her fines. The appellate court also remanded the case for the circuit court to determine whether that monetary credit entitled the defendant to a refund for overpayment.

The defendant, Denise S. Gordon, was convicted of theft of property valued between $10,000 and $100,000 (720 ILCS 5/16–1(a)(1)(A), (b)(5) (West 2006)) and was sentenced to 48

months of probation and 14 days in jail. The circuit court also imposed numerous costs, including a $200 deoxyribonucleic acid (DNA) analysis fine and a $20 Violent Crime Victims Assistance Fund fine. On appeal, the defendant argues that: (1) the State failed to prove beyond a reasonable doubt that the value of the stolen property exceeded $10,000; and (2) she is entitled to a $35 credit against her $200 DNA analysis fee for time spent in presentence custody. We affirm as modified and remand with directions.

FACTS

The indictment in this case charged the defendant with Class 2 felony theft (720 ILCS 5/16–1(a)(1)(A), (b)(5) (West 2006)) and alleged that the "defendant knowingly obtained unauthorized control over property of Gas City *** to wit: United States currency, having a value exceeding $10,000.00 but not exceeding $100,000.00, intending to deprive Gas City permanently of the use or benefit of said property[.]"

Trial evidence established that the defendant worked at a bank when the incident occurred. The defendant stole a bank deposit made by an employee of the gas station in the amount of $10,315.64, which consisted of $7,835 in cash and a check for $2,480.64. The check was a settlement check issued by Comdata. A gas station employee testified that truck drivers would use Comdata cards to pay for their gas. The card would be swiped and Comdata would authorize the amount of the gas. At the end of the business day, Comdata would authorize and issue a settlement check to compensate the gas station for the day's Comdata card transactions.

The bank investigated the matter after the gas station alleged that it was never credited with the $10,315.64 deposit. Another bank employee testified that she witnessed the gas station employee give the deposit to the defendant. The bank's fraud investigator testified that the gas

station was able to provide specific details about the check portion of the deposit. Further, the fraud investigator discussed the matter with the defendant and she stated that the gas station employee in fact gave her a deposit for $10,315.64. She claimed she processed the transaction, although an issue with the computer forced her to re-enter the transaction. She claimed that she also processed deposit slips with regard to the transaction. However, other bank employee testimony revealed that the deposit was never entered into the bank system and no deposit slips were found. Neither the cash nor the check were ever located.

After the bench trial, the circuit court found the defendant guilty. She was later sentenced to 48 months of probation and 14 days in jail, with 7 days of credit against her jail term. The court also ordered the defendant to pay certain costs, including a $200 DNA analysis fine and a $20 Violent Crime Victims Assistance Fund fine. The court also ordered the defendant to pay $7,835 in restitution to the bank from which she stole the deposit. The defendant appealed.

ANALYSIS

The defendant's first argument on appeal is that the State failed to prove beyond a reasonable doubt that the value of the stolen property exceeded $10,000. The defendant requests this court to reduce her conviction to Class 3 felony theft and adjust her sentence accordingly.

Initially, the defendant alleges that she is not making a fatal variance argument, even though her argument is premised on a belief that the "United States currency" language contained in the indictment locked the State into having to prove that the stolen property consisted of only "United States currency."

Section 16–1(a)(1)(A) of the Criminal Code of 1961 (Code) provides that an individual commits theft when she obtains or exerts control over property of an owner with the intent to

permanently deprive the owner of that property. 720 ILCS 5/16–1(a)(1)(A) (West 2006). Theft is a Class 2 felony when the value of the stolen property was between $10,000 and $100,000. 720 ILCS 5/16–1(b)(5) (West 2006). For purposes of the theft statute, "property" includes money and commercial instruments. 720 ILCS 5/15–1 (West 2006).

"Where an indictment charges all essential elements of an offense, other matters unnecessarily added may be regarded as surplusage." *People v. Collins*, 214 Ill. 2d 206, 219 (2005). In accord with the theft statute's use of the term "property," the indictment in this case charged the defendant with obtaining control over the property of a gas station with the intent to permanently deprive the gas station of that property. The indictment also alleged that the value of the stolen property was between $10,000 and $100,000. The indictment contained the necessary elements of theft and was sufficiently specific to apprise the defendant of the charge such that she could prepare a defense. See, *e.g.*, *People v. Winford*, 383 Ill. App. 3d 1, 4 (2008). The phrase "United States currency" in the indictment was mere surplusage (see *Collins*, 214 Ill. 2d at 219) and did not require the State to prove, as the defendant believes, "that the $2,480.64 check had been deposited, cashed, or otherwise exchanged for 'United States currency.' "

The defendant also alleges that the State failed to prove that the check's value was actually $2,480.64.

When the defendant challenges the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

As previously noted, section 15–1 of the Code includes "commercial instruments" in its

definition of property for purposes of the theft statute. 720 ILCS 5/15–1 (West 2006). In relevant part, section 15–9 of the Code provides that the value of a commercial instrument is its market value. 720 ILCS 5/15–9 (West 2006). See also *People v. Perry*, 224 Ill. 2d 312, 336 (2007) ("[i]t is well-settled law that the value of stolen property is the fair cash market value at the time and place of the theft").

In this case, the State presented evidence sufficient to establish that the deposit was for $10,315.64, and that $7,835 of the deposit was cash and $2,480.64 of the deposit was a check. The defendant admitted receiving a $10,315.64 deposit from the gas station employee. While she claimed she processed the transaction, the bank confirmed that the deposit was never recorded and credited to the gas station. Other testimony indicated that the face value of the check at the time it was stolen was $2,480.64. The check was authorized by Comdata in that specific amount to compensate the gas station for the day's Comdata card transactions. In light of the standard of review, we hold that a rational trier of fact could indeed find that the State proved beyond a reasonable doubt that the check's value was in fact $2,480.64.[1]

---

[1] We likewise reject the defendant's argument that "[t]he unmistakable inference from the trial court's [$7,385 restitution] order is that the State failed to establish that the uncashed check had a value of $2,480.64." In direct contrast to the defendant's argument, the court specifically stated at sentencing that "the evidence in this case showed the amount that was stolen in total in this case exceeds the jurisdiction amount and it is a Class 2 felony." The specific reasons why the court decided to fix restitution at $7,385–and why the court ordered it to be paid to the bank, rather than the gas station–do not appear in the record. Moreover, the court's restitution order is not at issue on appeal.

Second, the defendant argues that she is entitled to a $35 credit against her $200 DNA analysis fee for time spent in presentence custody. The State agrees the defendant is entitled to the credit.

Section 110–14(a) of the Code of Criminal Procedure of 1963 provides that "[a]ny person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated." 725 ILCS 5/110–14(a) (West 2006). In this case, the defendant was convicted of Class 2 felony theft (720 ILCS 5/16–1(a)(1)(A), (b)(5) (West 2006)), which is a bailable offense (725 ILCS 5/110–4(a) (West 2006)). The defendant did not supply bail and spent seven days in presentence custody, which entitles her to a monetary credit of $35. 725 ILCS 5/110–14(a) (West 2006). Pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we modify the mittimus to reflect a $35 credit against the defendant's fines. Further, we remand the case for the circuit court to determine whether that credit entitles the defendant to any refund for overpayment. See *People v. Speed*, 315 Ill. App. 3d 511, 518 (2000).

Lastly, we note that the defendant requests this court to modify the mittimus to reflect that her $20 Violent Crime Victims Assistance Fund fine was imposed pursuant to section 10(b) of the Code of Criminal Procedure of 1963 (725 ILCS 240/10(b) (West 2006)).

The circuit court's fill-in-the-blank form used to impose costs is not entirely clear with regard to the section under which a Violent Crime Victims Assistance Fund fine was assessed in this case. To the extent that the source of the defendant's $20 Violent Crime Victims Assistance Fund fine is unclear, we modify the mittimus to reflect that it was assessed under section 10(b) of the Code of Criminal Procedure of 1963 (725 ILCS 240/10(b) (West 2006)).

CONCLUSION

For the foregoing reasons, we affirm the defendant's conviction for Class 2 felony theft. Further, we modify the mittimus to reflect a $35 credit against the defendant's $200 DNA analysis fee and to reflect that the defendant's $20 Violent Crimes Assistance Fund fee was imposed pursuant to section 10(b) of the Code (725 ILCS 240/10(b) (West 2008)). In addition, we remand the case for the circuit court to determine whether the $35 credit entitles the defendant to any refund for overpayment.

The judgment of the circuit court of Will County is affirmed as modified and the cause is remanded with directions.

Affirmed as modified and remanded with directions.

JUSTICE McDADE, concurring in part and dissenting in part:

The majority has found that "[t]he phrase 'United States currency' in the indictment *** did not require the State to prove *** 'that the *** check had been deposited, cashed, or otherwise exchanged for "United States currency" ' " (slip order at 4) and has affirmed the defendant's conviction for Class 2 felony theft (slip order at 7). The majority has also found that defendant is entitled to a monetary credit of $35 against her fines, and remanded the case for a determination of whether that credit entitles her to any refund. Slip order at 6. Finally, the majority has modified the mittimus to reflect that the Violent Crime Victims Assistance Fund fine was assessed under section 10(b) of the Code of Criminal Procedure of 1963 (725 ILCS 240/10(b) (West 2006)). Slip order at 6. I concur in the majority's judgment with regard to defendant's fines. I would reverse defendant's conviction for Class 2 felony theft, enter a

judgment of conviction for Class 3 felony theft, and remand for defendant to be resentenced accordingly.

Actually, my dissent is not based on agreement with defendant that the State had to prove that she converted the check to United States currency. Rather, I believe, contrary to the majority's *sub silencio* holding, that the "United States currency" language contained in the indictment *did* lock the State into having to prove that the stolen property consisted of only "United States currency." Slip order at 3. The majority relies on *People v. Collins*, 214 Ill. 2d 206, 219 (2005), for the proposition that " '[w]here an indictment charges all essential elements of an offense, other matters unnecessarily added may be regarded as surplusage.' " Slip order at 4 (quoting *Collins*, 214 Ill. 2d at 219). The majority then concludes that "[t]he phrase 'United States currency' in the indictment was mere surplusage." Slip order at 4.

The majority's reliance on *Collins* overreaches is true holding. In *Collins*, the State charged the defendant with, *inter alia*, reckless discharge of a weapon. *Collins*, 214 Ill. 2d at 211. The defendant argued that "there was a fatal variance between the evidence presented at trial and the indictment." *Collins*, 214 Ill. 2d at 219. The indictment named two police officers "as the individuals who were endangered when defendant recklessly discharged his weapon into the air." *Id.* At trial, the defendant moved for acquittal on the basis that the State failed to offer evidence that one of the named officer's bodily safety was endangered. *Id.* The trial court denied the motion, concluding that all the State had to prove was that the "defendant endangered the bodily safety of 'anybody *** in that general area' " and that the naming of that particular officer was surplusage. *Id.*

The *Collins* court held as follows:

> "To vitiate a trial, a variance between allegations in a complaint and proof at trial ' "must be material and be of such character as may mislead the accused in making his defense." ' [Citations.] Where an indictment charges all essential elements of an offense, other matters unnecessarily added may be regarded as surplusage. [Citations.] 'More particularly, each complaint [must] *** set forth in the language of the statute the nature and elements of the offense charged.' [Citations.]" *Collins*, 214 Ill. 2d at 219-220.

Applying those rules to the case before it, the *Collins* court found that the naming of both officers was surplusage and did not affect the validity of the complaints. The court held that "any variance was neither material nor prejudicial to defendant." *Collins*, 214 Ill. 2d at 219-220. However, the court's judgment makes clear that the language in the indictment in that case was surplusage because:

> "[i]n the offense of reckless discharge of a firearm, it is not necessary that the State include the specific identity of the 'individual' in the indictment. The specific identity of the individual is not necessary to apprise a defendant of the nature of the offense and, thus, the inclusion of a named individual in the indictment is mere surplusage." *Collins*, 214 Ill. 2d at 221.

Collins does not stand for the proposition embodied in the majority's order that an indictment that contains the necessary elements of *any* theft is sufficiently specific to apprise a

defendant charged with a *particular* theft of the allegations against her. See slip order at 4. See also *People v. Gray*, 396 Ill. App. 3d 216, 225 (2009) (" '[T]he purpose of requiring specificity [in the charging instrument] is to provide notice to the defendant of precisely what the State will attempt to prove (and therefore to allow the defendant an opportunity to prepare a defense) ***.' [Citation.]"). The *Collins* court held that "[t]he specific identity of the victim is not an essential element of the offense of reckless discharge of a firearm" (*Collins*, 214 Ill. 2d at 219-220), therefore including that information in the indictment was mere surplusage. Here, on the contrary, the description of the property allegedly stolen is an essential element of the offense of Class 2 felony theft and, therefore, the inclusion of the description of the property in the indictment is not mere surplusage.

> "It is well established that a person accused of a crime should be fully informed by the indictment of all the material facts relied upon to establish the offense with which he is charged. The property over which unauthorized control is alleged to have been obtained or exerted should be described with a degree of certainty that will enable the court to determine whether the evidence offered in support of the charge relates to the property on which the indictment is founded, thus preventing a person from being tried for an offense other than that for which he was indicted." *People v. Panagiotis*, 162 Ill. App. 3d 866, 870-871 (1987) (citing *People v. Gilmorey*, 63 Ill. 2d 23 (1976); *People v. Graves*, 331 Ill. 268 (1928)).

See also *People v. Hoffman,* 381 Ill. 460, 464 (1942) ("where larceny of certain chattels [is] charged in the indictment, *** in such cases it is necessary to name definitely the articles stolen and that the proof should sustain the charge in the indictment"). Accord *People v. Tolentino*, 68 Ill. App. 2d 480, 485 (1966) ("a description *** would be necessary in a charge of theft").

It is indicative of the materiality of this difference and the fact that "United States currency" was not "mere surplusage" that most of the discussion during oral argument was focused on how to translate the face amount of the check to proof that the defendant actually stole the money represented by the check. If, as seems likely, the defendant kept the currency and disposed of the check, no one was deprived of the $2,480.64. The State presented no evidence that the check was ever negotiated or in any other way converted. The trial court's implicit recognition of this failure of proof is suggested by the fact that he only ordered restitution in the amount of $7,835.00 and not the full $10, 315.64 alleged by the State to have been stolen.

The indictment only informed defendant that she was charged with taking more than $10,000 in United States currency. It is indisputable that a check is not currency. The State admitted that defendant's conviction for Class 2 felony theft rests on a finding that defendant stole the check, but the State never charged defendant with taking a check valued at $2,480.64. Therefore, her conviction for Class 2 felony theft, on that basis, cannot stand. *People v. Knaff*, 196 Ill. 2d 460, 472 (2001) ("[A] person cannot be convicted of an offense he has not been charged with committing").

Absent the value of the check, the undisputed evidence adduced at trial is insufficient to sustain a conviction for Class 2 felony theft. The State failed to prove that defendant "knowingly

obtained unauthorized control over property of Gas City *** to wit: United States currency, having a value exceeding $10,000 ***." The undisputed evidence proved, at most, that defendant obtained unauthorized control over $7,835 in United States currency. That evidence is sufficient to convict defendant of Class 3 felony theft. However, the State did not charge defendant with Class 3 felony theft. Nonetheless, Class 3 felony theft is a lesser included offense of the crime charged for purposes of convicting defendant of the uncharged crime of Class 3 felony theft. We use the charging instrument approach to determine " 'whether a particular crime is a lesser-included offense for purposes of *** convicting one of uncharged crimes.' [Citation.]" *People v. Miller*, 238 Ill. 2d 161, 173 (2010).

> "Under the charging instrument approach, the court looks to the charging instrument to see whether the description of the greater offense contains a 'broad foundation' or 'main outline' of the lesser offense. [Citation.] The indictment need not explicitly state all of the elements of the lesser offense as long as any missing element can be reasonably inferred from the indictment allegations." *Miller*, 238 Ill. 2d at 167.

Under the charging instrument approach, the indictment against defendant contains a broad foundation of Class 3 felony theft. I would, pursuant to this court's authority under Supreme Court Rule 615(b)(3) (134 Ill. 2d 615(b)(3)), modify the judgment to reflect a conviction for Class 3 felony theft and remand the matter to the trial court for resentencing. See *People v. Rowell*, 229 Ill. 2d 82, 103 (2008) (reducing defendant's conviction from felony retail theft to misdemeanor retail theft and remanding to the circuit court with directions to resentence

defendant on the lesser charge). Accordingly, I dissent only from that portion of the majority's judgment affirming defendant's conviction for Class 2 felony theft and refusing to reduce the conviction to Class 3 felony theft.