

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 by Rule 23(e)(1).

2012 IL App (3d) 100960-U

Order filed January 30, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2012

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 10 th Judicial Circuit
)	Tazewell County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-10-0960
v.)	Circuit No. 09-CF-620
)	
YUSUF A. MANNING,)	The Honorable
)	Paul Gilfillan and
)	Richard Grawey,
Defendant-Appellant.)	Judges, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices O'Brien and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* Section 16A-3(a) of the Criminal Code does not violate the defendant's constitutional right to equal protection by mandating that a prior theft conviction enhances the instant offense from a misdemeanor to a felony. Also, the language used in the indictment and the evidence adduced at trial did not vary such that it rendered the indictment void. Finally, the State's evidence was sufficient to sustain the defendant's conviction beyond a reasonable doubt even though it did not present one piece of merchandise that the defendant allegedly stole, nor a photograph of it.

¶ 2 A jury convicted the defendant, Yusuf Manning, of retail theft (720 ILCS 5/16A-3(a) (West 2008)), and the court imposed a one-year term of imprisonment. The defendant appeals, contending that: (1) the public act that mandated the instant offense as a felony is an unconstitutional violation of the defendant's right to equal protection; (2) the State improperly charged him with stealing certain merchandise because it did not preserve this merchandise or introduce a photograph of it at trial, thus rendering this item as alleged in the indictment "void"; (3) the indictment failed to state an offense because it omitted "the words and elements playstation 3 wireless keypad and or playstation 3 webeye[.]" and therefore, his conviction must be reversed because the State's evidence did not conform to the allegations in the indictment; and (4) the State's evidence failed to establish his guilt beyond a reasonable doubt because it did not show that he took possession of merchandise that was offered for sale . We affirm.

¶ 3 **FACTS**

¶ 4 The State charged defendant with one count of retail theft, a Class 4 felony. 720 ILCS 5/16A-3(a) (West 2008). The State specifically alleged that the defendant, who had previously been convicted of theft in a 1989 case, knowingly took possession of a hair cutting kit and a "PS3 wireless controller," which had a value of less than \$150, with the intent to permanently deprive the merchant, namely Walmart, of the use or benefit of the merchandise, and without paying the full retail value of the items. After the trial court informed the defendant of his right to counsel, the defendant waived this right and elected to proceed pro se.

¶ 5 The defendant filed a motion to reduce the classification of the instant offense to a misdemeanor. In this motion, the defendant alleged that since his prior theft conviction occurred more than 10 years prior to the time of the instant offense, the State could not now charge him

with the felony offense of retail theft, and requested that the court reduce the instant offense to a misdemeanor. The court denied this motion. The defendant subsequently filed a motion to reconsider, alleging that the public act that permitted the State to charge the defendant with a felony offense for the instant retail theft based on his prior theft conviction violated his constitutional right to equal protection. The court denied the defendant's motion to reconsider.

¶ 6 Thereafter, the defendant filed a motion for a bill of particulars, to which the State responded that it was charging him with the theft of a hair cutting kit and a "PS3 wireless controller." The defendant also filed a motion requesting to test the hair cutting kit for hair and other fibers, which the court granted. However, the State subsequently disclosed that the hair cutting kit had been returned to Walmart and was therefore unavailable for testing.

¶ 7 The cause proceeded to a jury trial. At trial, Scott Young, an asset protection officer for the East Peoria, Illinois, Wal-Mart, testified that around 6 p.m. on the day of the incident, he was walking the sales floor at the store in an effort to observe shoplifting activity. Young stated that around that time, he saw the defendant walk towards him with a shopping cart, the main part of which contained a large tote. Young further explained that the front part of the cart contained two packaged electronic items that appeared to be video game controllers. Young continued to watch the defendant, and he observed the defendant walk into the paper goods aisle and rip open or "possibly cut[]" open the packages containing the electronic items. Young stated that the defendant then placed the items in his pockets and left the empty packaging on a bottom shelf in box that was holding some paper towels.

¶ 8 Young testified that the defendant then entered the bathroom, but left his shopping cart and his backpack outside of the bathroom. The defendant emerged after a couple of seconds, so

Young entered the bathroom to check for any packaging, but did not find any. Young then followed the defendant, who wheeled his cart to the pets department of the store and left it there. Young then saw the defendant pay for a loaf of bread and a pack of gum in two separate transactions. Young did not see the defendant pay for any item in his pockets or in his backpack during either transaction.

¶ 9 According to Young, the defendant then passed all points of purchase and sat on a bench near the entrance of the store. Young explained that by that time, he had already notified the store's assistant manager, who in turn had notified the police, about the potential theft, and the police were waiting in the parking lot for the defendant to exit. Twenty or thirty minutes after the defendant first sat on the bench near the store entrance, the defendant ultimately proceeded to exit the store by walking through the inner set of doors, but he left his backpack on the bench. As the defendant exited the inner doors and approached the outer set of doors, police officers approached him while he was still in the foyer.

¶ 10 An officer searched the defendant, and this search revealed a Playstation 3 controller in the defendant's pocket, and a Playstation 3 Eye device and a hair cutting kit in the defendant's backpack. During his testimony, Young referred to the Playstation 3 controller as a "keypad," and the prosecutor clarified that when Young stated "keypad" he was speaking about the "controller."

¶ 11 Young further testified that he did not see the defendant with a hair cutting kit while he was in the store, so he reviewed the store's security footage. From the footage, Young saw the defendant in the aisle that contained the hair cutting kits. The footage also showed the defendant take a box containing a hair cutting kit from a shelf, and place the box on the shelf. Young

acknowledged that the footage did not show the defendant removing the hair cutting kit from the box.

¶ 12 After watching the security video, Young walked to this aisle that contained the hair cutting kits, picked up the box that the defendant had also handled, and discovered that the box was empty. Young stated that the kit recovered from the defendant's backpack matched the kit that belonged in the empty box. Young further testified that the hair cutting kit found in the defendant's backpack was brand new and had no hair on it. After Young recovered the hair cutting kit, he sent it to the "claims department," who determined that the item was not damaged. They repackaged it and placed it on the shelf for sale. On cross-examination, Young acknowledged that he had described the case that held the hair cutting kit found in the defendant's back pack as a plastic case, but that the empty box he found stated that it "include[d a] soft zippered storage case."

¶ 13 Young testified that he photographed the Playstation items, their packaging, and the empty hair cutting kit box, but forgot to take a picture of the recovered hair cutting kit. He also stated that Walmart was a retail establishment that sold items at retail, and that the hair cutting kit had a retail price of \$48.48 and the Playstation 3 controller had a retail price of \$49.46. He further explained that he occasionally found opened merchandise on the sales floor, and that this merchandise would be sent to the claims department to see if it could be resold or if it was damaged. Young stated that the Playstation items taken by the defendant were shipped to the returns department as damaged.

¶ 14 East Peoria police officer Steven Agee testified that he was dispatched to the scene of the incident pursuant to a report of a male who had concealed merchandise. According to Agee, he

was the officer who searched the defendant as he attempted to exit Walmart and at that time, he discovered a Playstation 3 "keypad controller." Agee, who had already placed the defendant in handcuffs, walked the defendant to the store's asset protection office where Young was waiting. Agee testified that he read the defendant his Miranda warnings, and the defendant subsequently stated to him, "I'm not going to lie, you guys got me." A subsequent search of the defendant's backpack revealed a hair cutting kit, another Playstation electronic device, and a box cutter. The defendant informed Agee that he used the box cutter to open the packages.

¶ 15 Agee also stated when he initially transported the defendant to the police station, he also took the defendant's backpack with the hair cutting kit still in it. Agee explained that at that time, Young was still reviewing the security footage of the defendant in the store. At some point thereafter, Young requested that Agee return the hair cutting kit to Walmart because after viewing the security footage, he concluded that the kit was also taken during the instant incident.

¶ 16 During the testimony of the State's witnesses, the defendant offered objections to various testimony that described the Playstation 3 controller as a "keypad." During one objection, the court noted that it was "abundantly clear [the parties] had a difference in terminology with regard" to the controller.

¶ 17 The defendant's friend, Armelia Nelson, testified that she purchased a hair cutting kit and a television for the defendant on October 2, 2009. She identified the kit that she purchased for the defendant from a photograph that the defendant had taken of it. Nelson did not have a receipt for this item.

¶ 18 The defendant testified that he took pictures of the items that Nelson purchased for him in early October 2009 because he had experienced problems with someone stealing his belongings

from his home. According to the defendant, he visited Walmart two or three weeks after Nelson gave him the items to check the prices of the items that Nelson had purchased for him. He acknowledged that he picked up a box containing a hair cutting kit during this visit, but he did not know if the box was empty. He also stated that the hair cutting kit that Agee found in his back pack was the same one that Nelson had purchased. The defendant further asserted that if the kit had been examined, hair would have been discovered on it.

¶ 19 The defendant acknowledged that while he was at Walmart, he went into the electronics department. According to him, he saw two or three Playstation items that were already cut open, so he opened the packages in the paper goods aisle to see if they were compatible with his portable Playstation device. The defendant stated that the devices were not compatible, so he left the items in that aisle and did not place them into his pockets. On cross-examination, however, the defendant acknowledged that he placed the items into the front part of his cart after he opened them. He further acknowledged that he told Agee "I ain't gonna lie, you guys got me." However, the defendant testified that Agee did not find the Playstation 3 eye in his backpack, that Agee had "lied" when he testified that he discovered this item in the defendant's backpack, and that Young was also lying.

¶ 20 The parties each offered a closing argument. During his closing argument, the defendant asserted, among other things, that the hair cutting kit found in his backpack was his own, and that Young did not take a picture of it because it did not match the empty box he found. The jury convicted the defendant as charged. The defendant filed a posttrial motion, which the court denied. The court sentenced the defendant to a one-year term of imprisonment and a one-year term of mandatory supervised release. The defendant appeals.

¶ 21

ANALYSIS

¶ 22 Equal Protection

¶ 23 On appeal, the defendant first contends that the public act that mandated the instant offense as a felony is a violation of his constitutional right to equal protection. The defendant specifically asserts that only a conviction entered within the past 10 years can be used to impose an extended-term sentence, but that a prior conviction from any time can be used to "enhance" a theft charge from a misdemeanor to a felony; thus, his right to equal protection is violated. The State contends, among other things, that those defendants who are subject to a felony sentence for a theft offense because of a prior misdemeanor conviction and those defendants who are subject to an extended-term sentence are not similarly situated and therefore, the legislature need not mandate the same punishment for each group. We agree that the aforementioned groups of people are not similarly situated; thus, these groups of defendants need not be treated similarly and the defendant's right to equal protection was not offended by the different legislative schemes.

¶ 24 Equal protection, both under the state and federal constitutions, requires that the legislature treat similarly situated individuals in a similar manner. *People v. Reed*, 148 Ill. 2d 1 (1992). However, a state may treat dissimilar classes of individuals differently. *Reed*, 148 Ill. 2d 1. Consequently, the guarantee of equal protection does not require that all individuals must be treated equally; rather, it only requires a reasonable and rational basis for the classifications upon which different treatment between the two groups of individuals is predicated. *People v. Pembroke*, 62 Ill. 2d 317 (1976).

¶ 25 The question of equal protection arises only in instances when the law "lays an unequal hand on those who have committed intrinsically the same quality of offense." *People v. Bradley*, 79 Ill. 2d 410 (1980). In instances that do not involve suspect classes, such as the case at bar which concerns persons convicted of felony offenses, we review the legislature's classification to determine whether it rationally relates to a legitimate state interest. See *People v. Esposito*, 121 Ill. 2d 491 (1988). However, if a court determines that the respective groups are not similarly situated, we need not determine whether the classifications between them are rational. See *Pembroke*, 62 Ill. 2d 317.

¶ 26 An individual may receive an extended term sentence under sections 5-5-3.2(b)(1) and 5-8-2(a) of the Code of Criminal Procedure (730 ILCS 5/5-5-3.2(b)(1); 5-8-2 (West 2008)) if the individual has been convicted of a felony offense within the past ten years that is equal to or greater than the class of the offense for which the defendant is on trial. Under section 16A-10(2) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/16A-10(2) (West 2008)), if a person is charged with a current offense of retail theft, and has a prior conviction for any type of theft, robbery, or burglary, the current offense of retail theft constitutes a Class 4 felony.

¶ 27 In this case, we conclude that individuals who receive an extended-term sentence because of a prior felony conviction, and individuals who are deemed to have committed the Class 4 felony offense of retail theft only because of a prior theft conviction are not similarly situated so as to implicate the guarantees of equal protection. Specifically, the extended term sentencing provisions contemplate imposing a harsher sentence on an offender because the offender has recently committed another felony offense. Thus, under this scheme, the legislature is seeking to impose a greater punishment on individuals who commit more than one felony offense of any

type within a relatively short period of time. However, pursuant to section 16A-10(2) of the Criminal Code, the legislature sought to elevate misdemeanor theft to a more serious felony offense if the defendant has committed to same crime before.

¶ 28 Therefore, the extended term sentencing provision seeks to impose a harsher punishment on individuals with recent felony convictions, while the enhancement elevates the nature of the offense from misdemeanor to felony when individuals have a history of committing the same or similar property offenses. Consequently, these two types of individuals are not similar, and thus, this instance is not one where the law has laid "an unequal hand on those who have committed intrinsically the same quality of offense." See Bradley, 79 Ill. 2d at 416. As a result, the legislature did not offend the defendant's constitutional guarantee to equal protection when it enacted section 16A-10 of the Criminal Code.

¶ 29 Preservation of Evidence

¶ 30 The defendant next argues that the State improperly charged him with stealing a set of hair clippers because they did not preserve this merchandise or introduce a photograph of it at trial, thus rendering this item as alleged in the indictment "void." The State contends that it need not present the allegedly stolen item, or a photograph of it, in court to sustain a conviction for retail theft, and that its failure to do so did not constitute a denial of the defendant's due process rights. Because the State did not have to admit the actual stolen hair cutting kit at trial in order to sustain the defendant's conviction, we conclude that its failure to do so did not render the indictment void.

¶ 31 In order to sustain a conviction for felony retail theft, the State must prove that the defendant took possession of merchandise from a retail establishment with the intent of

permanently depriving the merchant of the items, that the merchandise had a full retail value less than \$150, and that the defendant had committed a crime of theft in the past. 720 ILCS 5/16A-3(a); 16A-10(2) (West 2008). Evidence that the stolen items were displayed, held, stored or offered for sale by a store is sufficient to establish that retail theft was committed; thus, the State does not need to present the stolen items in court either physically or through photographs. See *People v. Mikolajewski*, 272 Ill. App. 3d 311 (1995).

¶ 32 Pursuant to section 115-9(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-9(a) (West 2008)), the court is permitted to admit a photograph of the property at issue if the photograph will serve the purpose of demonstrating the nature of the property, and the photograph is otherwise admissible under the rules of evidence. This section further permits the State to return the property to the rightful owner if other conditions are met. 725 ILCS 5/115-9(b) (West 2008). In other instances, however, the State must turn over relevant and important evidence after the defendant makes a discovery request for it, and if the State destroys this evidence, even accidentally, due process may mandate the sanction of dismissal of the charges. See *People v. Newberry*, 166 Ill. 2d 310 (1995).

¶ 33 In this case, we conclude that the State's failure to present at trial the actual hair cutting kit at issue, or a photograph of it, did not constitute a due process violation or otherwise render the indictment void. Specifically, our appellate court has acknowledged that the State need not present the actual stolen item, or a photograph of it, in court to sustain a conviction for retail theft. See *Mikolajewski*, 272 Ill. App. 3d 311. Here, the State presented a photograph of the empty box, and the testimony of Young and Agee, as evidence of the theft of the hair cutting kit. In turn, the defendant argued that the lack of the actual kit or a photograph of it was because the

kit found in his bag did not match the empty box found by Young, thereby presenting a plausible and well-reasoned argument countering the State's evidence. Additionally, there is no evidence that the State destroyed the kit or refused to turn it over even though it was in the State's possession. Rather, the record indicates that Young followed Walmart's policy of shipping the items to the claims department. Consequently, we conclude that the State did not violate the defendant's due process rights by failing to admit the hair cutting kit, or a picture thereof, at trial, and this failure did not render the instant conviction void.

¶34 Charging Instrument

¶ 35 The defendant also contends that the indictment failed to state an offense because it omitted "the words and elements playstation 3 wireless keypad and or playstation 3 webeye[.]" and thus, his conviction must be reversed because the State's evidence did not conform to the language of the indictment. In support of this contention, the defendant argues that "no one believed that the wireless controller and the wireless keypad [were] the same thing except the State[.]" and that the State effectively amended the indictment during trial. The State asserts that the difference in terminology was not a variance between the charging instrument and the evidence adduced at trial, and that any variations in terminology were immaterial. We believe that there was no real difference between the language employed by the State and the evidence adduced at trial, and therefore, the instant indictment was not "void."

¶ 36 In order to invalidate the defendant's trial, the variance between the allegations in a criminal complaint and the evidence presented by the State at trial must be of such a character that it misleads the defendant in preparing and making his defense, or exposes the defendant to double jeopardy. *People v. Maggette*, 195 Ill. 2d 336 (2001). If these requirements are met, any

variance between the charging instrument and the proof presented at trial is not fatal. *People v. Jayne*, 52 Ill. App. 3d 990 (1979). In order to ascertain whether a variance exists, we consider the plain and ordinary meaning of the language employed by the State in the complaint as interpreted by a reasonable person. *People v. Terry*, 342 Ill. App. 3d 863 (2003).

¶ 37 Here, we conclude that the State's evidence at trial sufficiently conformed to the language of the indictment. Specifically, in the indictment, the State alleged that the defendant knowingly took possession of a hair cutting kit and a PS3 wireless controller without paying for them, and the State reiterated this contention in response to the defendant's motion for a bill or particulars. The record indicates that at times during the instant trial, the State's witnesses referred to the "controller" as a "keypad." The record also indicates that the defendant referred to the controller as a keypad when he offered his testimony to the jury. Consequently, the use of differing terminology did not mislead the defendant or expose him to double jeopardy.

¶ 38 Essentially, we believe that a video game "controller" may properly be described as a "keypad" under the plain and ordinary meaning of each term, as they both described a device with buttons used to control the actions of a video game. Here, not only did the State clarify that its witnesses had used the term "controller" and "keypad" interchangeably, the court expressly acknowledged that the parties had a difference in terminology with respect to the controller. While the defendant seems to contend there is a difference between a controller and keypad, we have found no evidence in this record indicating that a material difference exists between a controller and a keypad for purposes of these proceedings. Accordingly, we conclude that there was no real variance between the language the State used in the indictment and the evidence it

presented at trial, and thus, the defendant has not established that the evidence did not conform to the allegations contained in the charging instrument.

¶ 39 Sufficiency of the Evidence

¶ 40 The defendant lastly argues that the State's evidence failed to establish his guilt beyond a reasonable doubt because it did not show that he took possession of merchandise that was offered for sale. The defendant specifically asserts that the State's evidence did not indicate that the Playstation accessories were offered for sale because they were damaged when he found them, and therefore, they could not be sold. The defendant also argues that the State did not prove the he took possession of the hair cutting kit. The State asserts that the evidence at trial sufficiently proved the defendant's guilt beyond a reasonable doubt. We conclude, that after viewing the evidence and inferences therefrom in the light most favorable to the State, it sufficiently proves the defendant's guilt of retail theft beyond a reasonable doubt.

¶ 41 In a challenge to the sufficiency of the evidence, an appellate court must view the evidence in the light most favorable to the State and conclude whether any rational trier of could have found that the State's evidence sufficiently proved each and every element of the offense charged beyond a reasonable doubt. *People v. Hall*, 194 Ill. 2d 305 (2000). Under this standard, we may not reweigh the evidence or reassess the credibility of the witness, nor may we retry the defendant. *People v. Patterson*, 314 Ill. App. 3d 962 (2000). This standard applies when a reviewing court considers a challenge to the sufficiency of the evidence in all criminal cases, regardless of whether the evidence is direct or circumstantial. *People v. Herrett*, 137 Ill. 2d 195 (1990). This court will not reverse a criminal conviction unless the evidence is so unreasonable,

improbable, or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Fields*, 135 Ill. 2d 18 (1990).

¶ 42 A reviewing court may sustain a conviction based "upon circumstantial evidence as well as upon direct, and to prove guilt beyond a reasonable doubt does not mean that the jury must disregard the inferences that flow normally from the evidence before it." *People v. Williams*, 40 Ill. 2d 522, 526 (1968). To sustain a conviction for retail theft, the State must prove that the defendant knowingly took possession of merchandise held, displayed, stored, or offered for sale in a retail mercantile establishment with the intention of permanently depriving the merchant of the use or benefit of the merchandise, and without paying the full retail value of the merchandise. 720 ILCS 5/16A-3(a) (West 2008).

¶ 43 We conclude that the State's evidence was sufficient to sustain the defendant's conviction for retail theft beyond a reasonable doubt. Specifically, when we view the evidence in the light most favorable to the State, it indicates that the defendant entered Walmart and opened the packages containing the Playstation controller and the Playstation eye device. The defendant specifically acknowledged that he opened the packages. Thereafter, Young stated that he saw the defendant place these items in his pockets, and police subsequently recovered the controller from the defendant's pocket and the Playstation 3 eye device from his bookbag.

¶ 44 The evidence further shows that the police also discovered a hair cutting kit in the defendant's backpack. After Young reviewed the security footage from that day, he saw the defendant pick up a box containing a hair cutting kit, and subsequently discovered that the box was empty. Young also testified that the kit was brand new and had never been used.

¶ 45 After Agee took the defendant into custody, the defendant acknowledged that he could not lie, and that the police "got [him,]" which the jury could reasonably construe as an acknowledgment that the defendant had been caught committing a crime. Furthermore, the record also established that the Playstation controller was priced at \$49.96, and the hair cutting kit was priced at \$48.48. Thus, in sum, the State's evidence sufficiently proved the essential elements of the offense, including that the defendant took possession of the hair cutting kit.

¶ 46 In so concluding, we comment on the defendant's contention that the Playstation accessories were not for sale because, at the time he found these items, the packages were already open and thus, the merchandise was damaged and could not be offered for sale. Here, the record indicates that after Young recovered the Playstation accessories from the defendant, they were shipped out as damaged. There is no evidence in the record that these items were damaged prior to the time that the defendant opened the packages. In fact, when we view the evidence in the light most favorable to the State, it indicates that Young saw the defendant rip open or cut open these packages. Thus, pursuant to these facts, at the time the defendant took possession of this merchandise, it was unopened, undamaged, and offered for sale by Walmart. Accordingly, the State's evidence sufficiently proved the elements of the offense, and we affirm the defendant's conviction for retail theft.

¶ 47 CONCLUSION

¶ 48 For the foregoing reasons, we affirm the judgment of the trial court of Tazewell County.

¶ 49 Affirmed.