2014 IL App (3d) 120774-U

Order filed June 27, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0774 Circuit No. 12-CF-311
CLAUDIOUS PAYNE,	)	
Defendant-Appellant.	)	Honorable Scott A. Shore Judge Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice Schmidt specially concurred.

ORDER

¶ 1 *Held*: Evidence was sufficient to support defendant's conviction of felony retail theft, but defendant was entitled to instruct the jury on the lesser-included offense of misdemeanor retail theft where the value of the stolen phones was at issue.

¶ 2 On appeal, defendant contends the State's evidence failed to prove beyond a reasonable doubt the retail value of the stolen merchandise was more than $300 and requests a reduction of his conviction from a felony to misdemeanor offense. Alternatively, defendant contends his

request for an instruction on a lesser-included offense of misdemeanor retail theft should have been allowed by the trial court and requests a new trial. We reverse defendant's conviction and remand for a new trial.

¶ 3 I. BACKGROUND

¶ 4 On June 14, 2012, the State charged defendant by superseding indictment with one count of retail theft (720 ILCS 5/16A-3(b) (West 2010)),[1] a class 3 felony. The indictment alleged:

¶ 5 "defendant knowingly took possession of certain merchandise offered for sale in a retail mercantile establishment, Radioshack, being two (2) cell phones, having a total retail value in excess of $300.00, with the intention of depriving the merchant permanently of the possession of said merchandise without paying the full retail value of said merchandise[.]"

¶ 6 Defendant's jury trial began on July 30, 2012. East Peoria police officer Ryan Billingsley testified that on May 19, 2012, he responded to a report of a theft of two phones from Radio Shack. Officer Billingsley spoke with Michael McCauley, a store employee, who provided paperwork the suspect completed while at Radio Shack that evening. Based on this information, McCauley identified defendant as the person who stole the phones. Officer Billingsley searched the area for defendant, who fled on foot, but was unable to locate him.

¶ 7 Michael McCauley testified he worked as a retail salesman at Radio Shack on May 19, 2012. According to McCauley, defendant entered the store around 7 p.m. and informed McCauley he was interested in a contract-based cellular phone. McCauley observed defendant's tattoo of the word "Payne" on his left arm and identified defendant in open court. McCauley

[1] Now 720 ILCS 5/16-25(a)(1), (f)(3) (West 2012).

entered defendant's information into the computer to run a credit check. Since defendant did not qualify for a contract-based cell phone, defendant expressed an interest in a prepaid phone.

¶ 8 According to McCauley, defendant indicated he needed additional information about some phones that was not available in the cell phone display. McCauley went to the back storage room and returned with two phones. When the prosecutor asked McCauley to name the first phones defendant showed an interest in, McCauley testified that he and defendant "looked at four different ones [phones], and the "very first" phone defendant showed an interest in was a "Boost Mobile" phone, and that "[o]ne of them [the phones] was a – it was by ZTE called a Warp, and I do not recall the name of the second one." McCauley reviewed the features on the phones with defendant before defendant told McCauley he was interested in two other phones with different features.

¶ 9 McCauley returned to the storage room, placed the first two phones on a desk, and retrieved two different phones from the storage room to present to defendant. After reviewing the second set of phones, defendant indicated he preferred a feature available on one of the first two phones, causing McCauley to place the second set of phones on the counter while he left the counter area to retrieve the first two phones from the storage room. Once McCauley returned from the storage room with the first two phones, he observed defendant running out of the store with the second set of phones that McCauley left on the counter.

¶ 10 The prosecutor asked McCauley what type of phones defendant "ran out the door with" and McCauley responded, "Again, it was the ZTE Warp, and I don't recall the name of the second one." McCauley explained to the court he provided Officer Billingsley with a description of the second phone to police, and testified, "I want to say it was the Marquee, but my memory is failing me." After the State asked for clarification about the second stolen phone, McCauley

testified he could not recall the manufacturer, "but the model was Marquee." McCauley testified the value of the retail phones as "One I believe was $280 and the other $170."

¶ 11 On cross-examination, McCauley testified he "didn't recall the model name, but I do recall the first one, but I didn't recall the name of the second one[.]" McCauley responded, "No. I had the name and number or model number of the phones that were on the counter and the retail price of those two. I forgot the name of the second phone while I was up here [on the stand,]" after defense counsel asked if the values of the phones he previously testified about may have included a phone that was not taken. McCauley indicated he was "positive" about the two stolen phones. Once defense counsel asked McCauley to repeat the names of "the two phones" McCauley stated, "ZTE Warp and the Marquee." McCauley testified he was sure about the value of the stolen phones and that approximately half of the phones for sale in the store were priced at less than $150.

¶ 12 Defendant's jury trial continued the next day, July 31, 2012, with the testimony of East Peoria police officer Tyler Swearingen, who testified he searched the area for the suspect on May 19, 2012, after receiving a dispatch regarding a theft. Unable to locate the suspect, Officer Swearingen entered the Radio Shack and spoke with Michael McCauley. After the State rested, the trial court denied defendant's request for a motion for a directed verdict.

¶ 13 Defendant, testifying on his own behalf, stated he went to Radio Shack on May 19, 2012, because he was interested in obtaining a contract-based cell phone. While at Radio Shack, defendant spoke with McCauley about purchasing a cell phone. According to defendant, he looked at five different phones. Defendant testified McCauley did not retrieve any phones from the storage room for defendant to consider. Defendant stated he did not purchase a phone, but denied stealing any phones from Radio Shack that evening. According to defendant, there were

other customers in the store after defendant left the store. During cross-examination, defendant testified he had "Claudious" tattooed on his right arm and "Payne" tattooed on his left arm.

¶ 14 During the conference on jury instructions the court determined, over "strenuous" defense objection, there was "no evidence in the record that if the property was taken, that it had a value less than $300 and accordingly, there is no evidence that would support a jury verdict for this lesser included offense." Consequently, the court denied defendant's request to instruct the jury as to the lesser-included offense of misdemeanor retail theft. After deliberating for an hour and a half, the jury found defendant guilty of felony retail theft.

¶ 15 On August 3, 2012, defendant filed a posttrial motion asserting, among other things, the evidence did not prove defendant guilty of felony theft beyond a reasonable doubt and the court erred when it refused Defendant's Instructions Nos. 2 through 6 for misdemeanor theft. The trial court denied defendant's motion for a new trial and sentenced defendant to five years' incarceration. On September 13, 2012, defendant filed a motion to reconsider his sentence, which the trial court denied on September 18, 2012. Defendant appeals.

¶ 16 ANALYSIS

¶ 17 On appeal, defendant first argues the State failed to prove the retail value of the stolen merchandise exceeded $300, and therefore, this court should reduce the felony conviction to a misdemeanor theft. Alternatively, defendant contends the trial court erred when it refused to instruct the jury on misdemeanor retail theft and, since defendant concedes he is guilty of an offense, defendant requests a new trial on this basis.

¶ 18 The State responds the evidence established beyond a reasonable doubt the retail value of the stolen merchandise exceeded $300. Similarly, the State contends an instruction for misdemeanor retail theft was not justified based on the evidence.

¶ 19 When a defendant challenges the sufficiency of the evidence, it is not the function of the reviewing court to retry defendant. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Instead, this court must determine whether, after viewing the evidence in the 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. Collins*, 106 Ill. 2d 237, 261 (1985). "The weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact." *People v. Owens*, 386 Ill. App. 3d 765, 770 (2008). We will reverse or reduce defendant's conviction only if the evidence is so improbable or unsatisfactory that it creates reasonable doubt of his guilt. *People v. Lamon*, 346 Ill. App. 3d 1082, 1089 (2004).

¶ 20 Our careful review of the record reveals that at first McCauley could not recall the model of one of the two stolen phones. However, McCauley's subsequent testimony seemed more certain. McCauley testified one of the stolen phones was a Marquee phone. With some further reflection, McCauley testified he was "positive" defendant stole a ZTE Warp phone and a Marquee phone. Thereafter, McCauley testified one of the stolen phones had a value of $280 and the other had a value of $170, without assigning the model corresponding to either value.

¶ 21 Based on this testimony, we conclude a reasonable jury could have resolved those inconsistencies in McCauley's testimony, if any, in favor of the State. Thus, viewing the evidence in the light most favorable to the State, we conclude the evidence was sufficient to establish the combined value of both stolen phones exceeded $300 beyond a reasonable doubt. For this reason, we decline defendant's request to reduce his felony conviction to misdemeanor theft.

¶ 22 Defendant next argues the trial court improperly refused his request to instruct the jury regarding misdemeanor retail theft because there was "slight" evidence that the stolen phones had a value of less than $300. The case law provides that a lesser-included offense instruction should be given if there is evidence adduced at trial to support defendant's theory of the case, even if that evidence is slight. *People v. Scott*, 256 Ill. App. 3d 844, 850 (1993). A trial court's refusal to issue a specific jury instruction is reviewed for an abuse of discretion. *People v. Douglas*, 362 Ill. App. 3d 65, 76 (2005). Where some credible evidence exists to support an instruction for a lesser offense, it is an abuse of discretion to fail to give that instruction. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998).

¶ 23 An instruction on a lesser-included instruction provides an important third option to a jury which, believing defendant is guilty of something but uncertain whether the charged offense has been proven, might otherwise convict rather than acquit defendant of the greater offense. *People v. Kidd*, 2014 IL App (1st) 112854, ¶ 44. Whether a defendant has met the evidentiary minimum for a certain jury instruction is a matter of law reviewed *de novo*. *People v. Tijerina*, 381 Ill. App. 3d 1024, 1030 (2008).

¶ 24 As Justice Schmidt points out in his separate decision, it is unclear from McCauley's testimony whether the set of phones removed from the store actually included a ZTE Warp. For example, McCauley testified the ZTE Warp was one of the first two phones he showed defendant. Yet, McCauley testified he returned that particular ZTE Warp phone to the storage room, where that phone remained as defendant stood alone at the counter with a second set of phones that included a Marquee. Based on this testimony, it would be reasonable to conclude a ZTE Warp was not one of the stolen phones.

¶ 25 Although McCauley told the jury half of the phones in the store had a retail value less than $150, McCauley did not tell the jury the retail price for the least expensive phone defendant viewed. Based on the evidence, the jury could find the Marquee was worth either $280 or $170, but they had no information to conclude a phone *other than* the ZTE Warp was worth enough to prove the combined value exceeded $300. Under the scenario presented by McCauley's conflicting testimony, the State actually proved beyond a reasonable doubt that the merchandise had a value of either $280 or $170, but not more than $300. Consequently, the trial court improperly refused defendant's request to instruct the jury on misdemeanor retail theft and a new trial is in order.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court of Tazewell County is reversed and the matter is remanded for a new trial.

¶ 28 Reversed and remanded.

¶ 29 JUSTICE SCHMIDT, specially concurring.

¶ 30 I concur in the majority's order, but write separately to further explain why I agree that the evidence supported an instruction on the lesser-included offense of misdemeanor theft.

¶ 31 McCauley testified that one of the first two phones he showed defendant was a ZTE Warp. Before retrieving the second set of phones for defendant to examine, McCauley took the first two phones back to the storage room and placed them on a desk. He then retrieved two different phones from the storage room. After viewing the second set of phones, which presumably did not include a ZTE Warp, the witness stated he returned to the storage room to retrieve the first two set of phones. Again, McCauley testified that the ZTE Warp was in the first two set of phones. It was as he was returning from the storage room with those phones that he

observed defendant running out of the store. If one accepts this testimony from McCauley, then the ZTE Warp was in McCauley's hand when defendant ran out of the store with the second set of phones. Coupling that with McCauley's testimony that at least half of the phones in the store had a value of less than $150 and that the second set of phones that he showed defendant and, which defendant allegedly stole, had fewer features and, therefore, presumably less expensive than the ZTE Warp phone.

¶ 32 There was more than enough evidence to support a finding by a jury that the State did not prove that the value of the phones stolen exceeded $300.