2012 IL App (4th) 110625-U

Filed 9/20/12

NO. 4-11-0625

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
DAVINE OLIVER,	)	No. 09CF1049
Defendant-Appellant.	)	
	)	Honorable
	)	John Madonia and
	)	Patrick W. Kelley,
	)	Judges Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Cook and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Where the State presented the testimony of a loss-prevention employee and the surveillance video of the retail theft, the State's evidence was sufficient for the jury to reject defendant's explanation for his actions and find him guilty beyond a reasonable doubt of retail theft on an accountability theory.

¶ 2 In February 2010, the State charged defendant, Davine Oliver, by information with one count of retail theft (720 ILCS 5/16A-3(a) (West 2008)). After an October 2010 trial, a jury found defendant guilty of the charge. In December 2010, the Sangamon County circuit court sentenced defendant to three years' imprisonment.

¶ 3 Defendant appeals, asserting the State's evidence was insufficient to prove him guilty beyond a reasonable doubt. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The State's February 2010 charge asserted defendant committed retail theft on July 22, 2009, by knowingly taking possession of clothing with a value less than $150 with the intent of permanently depriving Sears of possession of the clothes without paying full retail value of the clothes. The charge also noted defendant had a prior retail-theft conviction. See 720 ILCS 5/16A-10(2) (West 2008). On October 1, 2010, the State filed an amended information adding the allegation that defendant or one for whom he is legally accountable committed retail theft on July 22, 2009.

¶ 6 On October 19, 2010, Judge John Madonia held defendant's jury trial. The State presented the testimony of Daniel Benedict, a loss-prevention employee at Sears, and Springfield police officer Bob Kuhn. The State also played the surveillance video for the jury. Defendant testified on his own behalf and recalled Officer Kuhn. The evidence relevant to the issue on appeal is set forth below.

¶ 7 Benedict testified that, on July 22, 2009, he was working at his loss-prevention job at Sears in the mall with two other loss-prevention employees. On the video camera, they observed two men go to the fragrance department. One of the men was later stopped, and two items of cologne were found concealed on the man's person. The other man, later identified as Lynn Gilbert, had left the area. While continuing to watch the video cameras, Benedict again observed Gilbert, and this time he was with defendant. Due to Gilbert's presence with the man in the earlier retail theft, Benedict was suspicious of defendant and Gilbert. Benedict also observed defendant looking at the video camera, which Benedict noted was suspicious activity. At some point, Benedict observed a plastic bag come from either defendant or Gilbert. The pair was standing "[w]ithin arm's length" of each other. The bag had a Sears logo on it. Benedict denied

the bag came from a store clerk because Sears had a policy of not giving people plastic bags unless they purchased an item from the store. The pair opened up the bag and began putting children's clothing into it. After the bag was filled with clothing, they went to the escalator leading to the lower level.

¶ 8 When defendant and Gilbert approached the escalator, Benedict left the camera room and went into the mall. Benedict waited in the mall near Sears's exit with Casey, another Sears loss-prevention employee, and mall security. As Gilbert and defendant approached the exit to the mall, Gilbert was carrying the Sears bag, and defendant was behind him. When the pair exited, Benedict informed them he was with store security and asked them to come with him to the camera room. Defendant and Gilbert complied with Benedict's request. Back at the camera room, the police officer that was already there began processing Gilbert and defendant.

¶ 9 During his testimony, Benedict laid the foundation for the surveillance video. The State was allowed to play the video for the jury until the point defendant and Gilbert were about to head down the escalator to the first floor.

¶ 10 Officer Kuhn testified he was at Sears filling out the paperwork for Jerry Goacher, the man involved in the first retail theft, when the second retail theft occurred. He arrested all three men. When Officer Kuhn searched defendant, defendant had a credit card on his person. When he searched Gilbert, Gilbert had no money. When recalled, Officer Kuhn testified Gilbert complained of a prior broken arm and requested to be cuffed in the front. Officer Kuhn did cuff Gilbert in the front.

¶ 11 Defendant testified that, on July 22, 2009, he had been employed by Tyhurst Construction Company for three to four years and had no children. At that time, Gilbert had a

"couple" of children. Defendant admitted having a prior forgery conviction.

¶ 12 On July 22, 2009, defendant's friend, Brady, drove defendant to the mall so he could meet his aunt Florestine Lacy, who was visiting from Kansas City. She had asked to meet defendant at Sears in the mall. While defendant was at Sears waiting for his aunt, Gilbert appeared out of nowhere and indicated he was looking for some clothes for his children. Defendant helped Gilbert look for the clothes. At some point, Gilbert removed a plastic bag from his pocket. Defendant helped put some children's clothing into the bag because of Gilbert's arm. After defendant put the items in the bag, his aunt called. She was in a different part of Sears, and defendant left to go meet her. Gilbert had the bag and followed defendant. Defendant asked Gilbert why he was following him and told Gilbert to go pay for the items. Gilbert said he was going to pay for the items. When he tried to leave Sears, defendant was detained. Defendant remembered seeing a female loss-prevention employee but did not remember seeing Benedict. Defendant testified he was leaving the store to meet his aunt. Defendant denied having any intention of helping Gilbert steal the children's clothing and only helped Gilbert because of Gilbert's bad arm. Defendant admitted having some concerns Gilbert was not going to pay for the merchandise when Gilbert kept following him.

¶ 13 After hearing all of the parties' evidence and arguments, the jury found defendant guilty of retail theft. The jury had received an accountability instruction. Defendant filed a motion for a new trial, asserting, *inter alia*, the State's evidence was insufficient to prove him guilty beyond a reasonable doubt. On December 21, 2010, Judge Madonia held a joint hearing on defendant's posttrial motion and sentencing, at which he denied defendant's motion and sentenced him to three years' imprisonment. Judge Patrick Kelley signed the written sentencing

judgment.

¶ 14 On January 4, 2011, defendant filed a *pro se* motion to reconsider his sentence. After a July 8, 2011, hearing, Judge Madonia denied defendant's motion to reconsider. On July 18, 2011, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009), and thus this court has jurisdiction under Illinois Supreme Court Rule 603 (eff. Oct. 1, 2010).

¶ 15 II. ANALYSIS

¶ 16 Defendant's sole argument on appeal is the State failed to prove him guilty beyond a reasonable doubt of retail theft on an accountability theory. Defendant does not contest that Gilbert committed the offense of retail theft but, rather, alleges the State's evidence did not show he knew Gilbert intended to steal the children's clothing. The State disagrees.

¶ 17 When presented with a challenge to the sufficiency of the evidence, a reviewing court's function is not to retry the defendant. *People v. Givens*, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010). Rather, we consider " '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.' " (Emphasis in original.) *People v. Davison*, 233 Ill. 2d 30, 43, 906 N.E.2d 545, 553 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under that standard, a reviewing court must draw all reasonable inferences from the record in the prosecution's favor. *Davison*, 233 Ill. 2d at 43, 906 N.E.2d at 553. Additionally, we note a reviewing court will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Givens*, 237 Ill. 2d at 334, 934 N.E.2d at 484.

¶ 18 Under Illinois law, "a person is legally accountable for another's criminal conduct when '[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.' " *People v. Perez*, 189 Ill. 2d 254, 266, 725 N.E.2d 1258, 1264 (2000) (quoting 720 ILCS 5/5-2(c) (West 1994)). To prove the defendant's intent to promote or facilitate the crime, the State must present evidence establishing beyond a reasonable doubt either (1) the defendant shared the principal's criminal intent, or (2) a common criminal design existed. *Perez*, 189 Ill. 2d at 266, 725 N.E.2d at 1264-65. "Intent may be inferred from the character of defendant's acts as well as the circumstances surrounding the commission of the offense." *Perez*, 189 Ill. 2d at 266, 725 N.E.2d at 1265. However, the defendant's mere presence at the crime, even when he or she knows a crime is being committed, is alone insufficient to establish accountability. *People v. Batchelor*, 171 Ill. 2d 367, 375-76, 665 N.E.2d 777, 780 (1996).

¶ 19 Here, Benedict testified he observed defendant looking at the video camera before the Sears bag was produced, which Benedict described as suspicious activity. He also saw defendant and Gilbert open up the Sears bag and place children's clothing into the bag. After filling the bag, defendant and Gilbert went to the down escalator. When they exited the store, Gilbert had the bag, and defendant was behind him. The surveillance video supports Benedict's testimony. It shows defendant glancing at the camera several different times and leading Gilbert around the various departments on the upper level of Sears. When the plastic bag is produced, defendant is looking around and appears to try to shield the bag from the view of the camera and other people in the area. The State's evidence was sufficient for the jury to find beyond a

reasonable doubt defendant intended to assist Gilbert in stealing the children's clothing.

¶ 20 The jury, as the trier of fact, had the responsibility of determining the witnesses' credibility and the weight to be given to their testimony. *People v. Nyberg*, 275 Ill. App. 3d 570, 579, 656 N.E.2d 65, 72 (1995). Moreover, the jury was not obligated to accept all or any part of defendant's testimony. See *Nyberg*, 275 Ill. App. 3d at 579, 656 N.E.2d at 72. It could assess the probabilities, the reasonableness of any defense offered, and reject any or all of defendant's account in favor of the State's circumstantial evidence of guilt. See *Nyberg*, 275 Ill. App. 3d at 579, 656 N.E.2d at 72. Defendant's testimony contradicted itself as he testified he was going to meet his aunt in another part of Sears but then later testified he was exiting Sears to go meet his aunt. The surveillance video also contradicted his testimony as it showed Gilbert using both of his arms and hands. The video also showed defendant being the leader in the clothing department and contradicted his testimony he was merely helping Gilbert while he waited for his aunt. Additionally, defendant's testimony Gilbert was following him and he kept telling Gilbert to pay for the merchandise is inconsistent with Benedict's testimony Gilbert was the first one out of the store. Accordingly, many reasons exist for why the jury rejected defendant's testimony.

¶ 21 Last, we note this case is distinguishable from *People v. Shaw*, 186 Ill. 2d 301, 323-25, 713 N.E.2d 1161, 1173-74 (1998), where the supreme court vacated the defendant's conviction for armed robbery and felony murder predicated on armed robbery, both of which were based on an accountability theory. The supreme court found the State had failed to present any evidence of the defendant's intent to further the robbery. *Shaw*, 186 Ill. 2d at 324, 713 N.E.2d at 1173. There, the State's circumstantial evidence only showed the defendant's presence at and flight from the apartment complex where the robbery occurred. *Shaw*, 186 Ill. 2d at 324,

713 N.E.2d at 1173-74. The supreme court noted the defendant's presence at the crime scene coupled with flight could not alone establish accountability. *Shaw*, 186 Ill. 2d at 324, 713 N.E.2d at 1174. In this case, the State's evidence showed defendant assisted Gilbert in assessing the situation, finding the right time and location to bring out the plastic bag, and then placing the clothing items into the plastic bag. Thus, the State presented evidence of more than defendant's mere presence at the scene and flight.

¶ 22 Accordingly, we find the State's evidence was sufficient to prove defendant's intent to aid Gilbert's commission of the retail theft beyond a reasonable doubt.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we affirm the Sangamon County circuit court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 25 Affirmed.