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2012 IL App (4th) 110299-U

Filed 8/27/12

NO. 4-11-0299

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
BELINDA R. ABBEY,	)	No. 10CF573
Defendant-Appellant.	)	
	)	Honorable
	)	Robert K. Adrian,
	)	Judge Presiding.

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JUSTICE STEIGMANN delivered the judgment of the court.  
Justice Appleton concurred in the judgment.  
Justice Cook specially concurred.

**ORDER**

- ¶ 1     *Held:* The appellate court affirmed, rejecting the defendant's request for a new trial because the trial court admitted evidence of the defendant's other, similar crime to show common design, concluding that (1) the court's error was harmless, given that the other-crimes evidence was admissible to show intent and (2) the defendant affirmatively acquiesced to the terminology included in the other-crimes instruction.
- ¶ 2     In September 2010, the State charged defendant, Belinda R. Abbey, with two counts of retail theft (720 ILCS 5/16A-3(a) (West 2010)) in connection with merchandise the State claimed defendant stole from the Quincy, Illinois, Kohl's department store. At defendant's February 2011 trial, the State presented evidence of a similar shoplifting incident that defendant participated in at the Springfield, Illinois, Kohl's. The trial court admitted the evidence of the Springfield incident over defendant's objection, noting that the State was permitted to introduce it

for the limited purpose of showing a "common design." The court instructed the jury that it was to consider the evidence of defendant's other crime for the limited purpose of "design."

Following defendant's trial, the jury convicted her of both counts of retail theft.

¶ 3 Defendant appeals, arguing that she is entitled to a new trial because (1) the trial court erroneously admitted other-crimes evidence of the Springfield Kohl's shoplifting incident, and (2) the jury instruction regarding the admission of the other-crimes evidence failed to define the reason for which the jury could consider the evidence. Because we conclude that defendant received a fair trial, we affirm.

¶ 4 I. BACKGROUND

¶ 5 In September 2010, the State charged defendant with two counts of retail theft (720 ILCS 5/16A-3(a) (West 2010)) in connection with merchandise the State claimed defendant stole from the Quincy Kohl's. In early February 2011, the State filed what it entitled an amended motion to admit, in which the State sought an order from the trial court that would permit it to present evidence of defendant's participation in a similar shoplifting incident that took place at the Springfield Kohl's. Following a hearing on the State's motion, the court entered a written order in which the court found that the evidence of the Springfield Kohl's shoplifting incident was admissible as other-crimes evidence to show a common design. Defendant's trial commenced shortly thereafter.

¶ 6 At defendant's February 2011 jury trial, the State presented evidence from (1) an investigating police officer and (2) Kohl's employees.

¶ 7 Clayton Rabe, a loss-prevention employee from the Quincy Kohl's, testified that he observed defendant and two other women (Selina Crider and Marsha Howard) on the store's

camera surveillance system. Rabe said that his interest was piqued because he suspected the women were shoplifting, given that the women were "quickly selecting multiple items," without concern for price or size.

¶ 8 Based on his observations, Rabe contacted another Kohl's employee, Ingrid Bruns, and asked her to enter the fitting room area and clean out the rooms before the women could go into them. Rabe explained that Kohl's employees used that procedure because thieves often remove price tags and try to hide them in the fitting rooms; apparently, the employees wanted to be sure that the rooms were empty so that if any price tags were left behind, they would know those price tags were left by the last occupant.

¶ 9 After Bruns cleaned the fitting rooms, she kept that area in her "line of sight." Bruns noticed some people—whom she did not identify—exit the fitting room, at which point she entered a fitting room and found two price tags. Via surveillance, Rabe watched defendant and Crider enter the same fitting room area, only to leave a few minutes later.

¶ 10 When defendant left the fitting room, Rabe saw her "manipulating" a pair of jeans at a rack near the fitting room. Rabe then left his office to check the rack of jeans, where he found a price tag from one pair of jeans in the pocket of another pair of jeans. Shortly thereafter, the women left the store without purchasing any merchandise. Rabe then checked the shopping cart that Crider had been pushing and found a pair of jeans and a "wallet case." Inside the wallet case, Rabe found eight more price tags. In total, Rabe recovered 11 price tags, which amounted to \$260 in missing merchandise. The trial court permitted the State to play the surveillance video from the Quincy Kohl's for the jury.

¶ 11 Officer Curtis Werries testified that he investigated the case and, after learning the

identity of the women on the surveillance video, he spoke to and then arrested defendant.

Werries explained that when he asked defendant about "placing tags in the pant pockets," she responded that she often picks up price tags that are laying on the floor and places them in pants pockets.

¶ 12 The State also presented evidence of a similar shoplifting incident that occurred at the Springfield Kohl's seven months earlier. At the outset, the trial court instructed the jury that it was to consider the evidence of the Springfield shoplifting incident for the sole purpose of "design." Jordan Tabb, a loss-prevention employee at the Springfield Kohl's, testified that on the day at issue he surveilled three women—including defendant—because he suspected them of shoplifting. Tabb believed the women were shoplifting because they were quickly selecting merchandise and "looking around," while taking items off hangers. Tabb observed the women attempt to leave the store without purchasing any merchandise, at which point the exit alarms were triggered. Another employee confronted the women, but the women fled. The employees later caught the women and recovered approximately \$450 in stolen merchandise, some of which had the price tags removed.

¶ 13 The trial court thereafter permitted the State to play the surveillance video from the Springfield Kohl's for the jury. After the jury viewed the video, the court again instructed the jury that it was to consider the evidence of the Springfield shoplifting incident for the sole purpose of "design."

¶ 14 Defendant did not present any evidence in her defense.

¶ 15 Prior to deliberations, the trial court instructed the jury, in pertinent part, as follows:

"Evidence has been received that the defendant has been involved in an offense other than that charged in the information.

This evidence has been received on the issue of the defendant's design and may be considered by you only for that limited purpose.

It is for you to determine whether the defendant was involved in that offense and, if so, what weight should be given to this evidence on the issue of design."

¶ 16 The jury later convicted defendant of retail theft.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Defendant argues that she is entitled to a new trial because (1) the trial court erroneously admitted other-crimes evidence of the Springfield Kohl's shoplifting incident, and (2) the jury instruction regarding the admission of the other-crimes evidence failed to define the reason for which the jury could consider the evidence. We address defendant's contentions in turn.

¶ 20 A. Defendant's Claim That the Trial Court Erroneously Admitted Other-Crimes Evidence of the Springfield Kohl's Shoplifting Incident

¶ 21 Defendant contends that she is entitled to a new trial because the trial court erroneously admitted other-crimes evidence of the Springfield Kohl's shoplifting incident. Specifically, defendant asserts that the court erroneously believed that the jury could consider the evidence of her other crime to show a "common design" because that crime was factually similar

but not factually similar enough to qualify as evidence of *modus operandi*. As support for her position, defendant points to the following oral pronouncements the court made at the pretrial hearing:

"[I]t appears to [the court] that doing acts which are common to shoplifting, such as looking around, making sure that someone is not watching, are not \*\*\* distinctive features not common to most offenses of that type.

It appears that what the State must show is a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer.

So, \*\*\* looking at a group of people looking around aisles of clothing is no different than would be in any other shoplifting case.

The similarities between Kohl's of Springfield and Kohl's of Quincy is we have the same chain, the same amount of people, being three, and according to the State, the same people. For that reason, I find that the Kohl's Springfield is admissible."

Although we agree with defendant that the court erred by admitting the other-crimes evidence of the Springfield shoplifting incident to show a common design, for the reasons that follow, we conclude that defendant received a fair trial.

¶ 22

1. *The Standard of Review*

¶ 23

"The admissibility of other-crimes evidence lies in the trial court's sound

discretion, and we will not disturb that court's decision absent a clear abuse of discretion."

*People v. Johnson*, 368 Ill. App. 3d 1146, 1155, 859 N.E.2d 290, 298 (2006). A court abuses its discretion when its ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the court. *People v. Sutherland*, 223 Ill. 2d 187, 272-73, 860 N.E.2d 178, 233 (2006).

¶ 24 *2. Other-Crimes Evidence Generally*

¶ 25 Generally, evidence of other crimes is inadmissible to show a defendant's propensity to engage in criminal conduct. *People v. Vannote*, 2012 IL App (4th) 100798, ¶ 37, 970 N.E.2d 72, 80. However, such evidence is generally admissible to prove motive, intent, identity, absence of mistake, *modus operandi*, or any other relevant fact other than propensity, including common design. *Id.*

¶ 26 As previously stated, the trial court admitted the evidence of defendant's participation in the Springfield Kohl's shoplifting incident for the limited purpose of proving common design. Accordingly, we turn to an examination of what constitutes other-crimes evidence of a common design.

¶ 27 *3. Evidence of a "Common Design"*

¶ 28 In *People v. Spyles*, 359 Ill. App. 3d 1108, 1112-13, 835 N.E.2d 974, 977-78 (2005), this court outlined what constitutes evidence of a common design, as follows:

"Evidence of a common design proves the existence of a larger criminal scheme of which the crime charged is only one element. [Citation.] ' "The several crimes must have some degree of identity between the facts of the crime charged and those of the

other offense in which the defendant was involved." ' [Citations.]"

¶ 29 In *Spyres*, the defendant, Spyres, was engaged in an ongoing effort to bring cannabis into Illinois for distribution. *Spyres*, 359 Ill. App. 3d at 1114, 835 N.E.2d at 978-79. The trial court admitted other-crimes evidence of previous cannabis shipments to show that Spyres was involved in the cannabis trafficking for which he was charged. *Id.* This court affirmed, concluding that the evidence of Spyres' efforts to bring cannabis into Illinois demonstrated how he went about the business of cannabis trafficking. *Id.*

¶ 30 *4. The Evidence of Common Design in This Case*

¶ 31 In this case, the trial court admitted the evidence of defendant's participation in the Springfield Kohl's shoplifting incident for the limited purpose of proving common design. The evidence presented to support that theory, however, was insufficient to prove the existence of a larger criminal scheme of which the crime charged was only one element. Here, the State presented evidence that defendant and her two female accomplices engaged in two separate, very similar, incidents of theft that were perpetrated at two Kohl's stores. It appears that the State, as well as the trial court, erroneously equated the theory of common design with what can be best described as "*modus operandi* light." See *People v. Hansen*, 313 Ill. App. 3d 491, 503, 729 N.E.2d 934, 944 (2000) ("factual similarities between multiple crimes does not, in itself, establish that the crimes were committed as part of a common design").

¶ 32 Accordingly, we conclude that the trial court erred by admitting the evidence of defendant's participation in the Springfield Kohl's shoplifting incident for the limited purpose of proving common design. However, our conclusion in this regard does not end our inquiry, as our review of the record shows that the court's error was harmless.

¶ 33

5. *Other-Crimes Evidence and Harmless Error*

¶ 34

Ordinarily, the erroneous admission of other-crimes evidence calls for reversal.

When, however, the reviewing court determines that the other-crimes evidence was not a material factor in the defendant's conviction, the error is harmless. *People v. Allen*, 335 Ill. App. 3d 773, 782, 780 N.E.2d 1133, 1141 (2002); see also *People v. Adkins*, 239 Ill. 2d 1, 34, 940 N.E.2d 11, 30 (2010) ("If improperly admitted other-crimes evidence was not a material factor in defendant's conviction, reversal is not required "). That situation is present in this case because the evidence at issue here was properly admitted; the trial court erred by admitting it *for the wrong reason*.

¶ 35

6. *Harmless Error and This Case*

¶ 36

The other-crimes evidence of defendant's participation in the Springfield Kohl's shoplifting incident was admissible for a reason other than common design—namely, to show defendant's intent. When, as here, a defendant claims that she has an innocent state of mind, evidence of her similar criminal conduct may be admitted to refute her claim for the limited purpose of showing her intent. See *People v. Young*, 381 Ill. App. 3d 595, 602, 887 N.E.2d 649, 655 (2008) ("While an innocent state of mind might be present in one instance, the more often it occurs with similar results, the less likely that it was without criminal intent").

¶ 37

Here, defendant denied that she engaged in shoplifting at the Quincy Kohl's. The other-crimes evidence of defendant's participation in the Springfield Kohl's shoplifting incident would certainly have assisted the trier of fact in determining whether she had an innocent state of mind. Accordingly, the evidence of the Springfield Kohl's shoplifting incident was not improperly before the jury; instead, it was merely before the jury for the wrong reason.

¶ 38           Moreover, even if the other-crimes evidence had not been admissible for the other limited purpose of intent, we would conclude that the decision to allow it into evidence would not warrant reversal. The record shows that the other evidence against defendant was overwhelming. The State presented evidence that defendant was acting suspiciously with two accomplices, manipulating clothing and entering the fitting room where price tags were later found. Defendant then left the store without purchasing any merchandise. (The jury was shown a video of defendant's actions in this regard.) Shortly after leaving the store, the loss-prevention employee discovered additional price tags, which had been concealed in a wallet inside the cart the women had been using. Defendant's excuse for this discovery—she often picks up price tags that are lying on the floor and places them in pants pockets—was clearly something the jury could reject, especially when considered in light of her behavior at the Springfield Kohl's.

¶ 39           In sum, this other evidence of defendant's guilt was overwhelming.

¶ 40           B. Defendant's Claim Regarding the Other-Crimes Evidence Jury Instruction

¶ 41           Defendant also contends that she is entitled to a new trial because the trial court erroneously provided a jury instruction regarding the admission of the other-crimes evidence that failed to define the reason for which the jury could consider the evidence. Specifically, defendant claims that because the other-crimes jury instruction did not define the term "design," and the jury could have viewed that term as allowing it to consider the other-crimes evidence for propensity, she is entitled to a new trial. Defendant concedes that she has forfeited review of this issue by failing to object to the terminology contained in the jury instruction she now complains about, but she invites this court to review her claim for plain error. We reject defendant's invitation in that regard.

¶ 42 When a defendant procures or invites an error, that defendant may not raise on appeal the error that she invited in the trial court, as plain error or otherwise. *People v. Harvey*, 211 Ill. 2d 368, 386, 813 N.E.2d 181, 192 (2004), see also *People v. Bowens*, 407 Ill. App. 3d 1094, 1101, 943 N.E.2d 1249, 1258 (2011) (rejecting the defendant's attempt to "plant a seed of error" and noting that "where defense counsel affirmatively acquiesces to actions taken by the trial court, a defendant's only challenge may be presented as a claim for ineffective assistance of counsel on collateral attack"). Here, the trial court specifically asked defendant's counsel whether defendant had "any objection" to the instruction on the other-crimes evidence. Counsel responded as follows: "Judge, I'm objecting just because I objected to the whole situation from Kohl[']s in Springfield \*\*\*." In this regard, defendant merely reiterated her objection to the admission of the other-crimes evidence. By failing to object to the terminology or language of that instruction, defendant has affirmatively acquiesced to the inclusion of that terminology. Accordingly, we reject defendant's invitation to review her claim for plain error.

¶ 43 In so concluding, we also note that the overwhelming evidence of defendant's guilt that we mentioned earlier would similarly defeat defendant's plain-error claim. See *People v. Meyer*, 402 Ill. App. 3d 1089, 1096-97, 931 N.E.2d 1274, 1282 (2010) (rejecting the defendant's plain-error argument because it did not affect the fairness of the defendant's trial).

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs.

¶ 46 Affirmed.

¶ 47 JUSTICE COOK, specially concurring:

¶ 48 I concur, but I do not see much difference between the words "design" and "intent" in the facts of this case. Price tags, apparently removed from items, were found in the areas where defendant had been located. Was that an innocent occurrence or did defendant have some purpose in mind? The fact that defendant had previously set off alarms at the Springfield Kohl's suggests she designed a plan to avoid such alarms by removing price tags. I would affirm the decision of the trial court on its merits. I also have difficulty with the argument that the evidence in this case was "overwhelming." There apparently was no evidence that defendant was found to be in possession of any of the items from which price tags had been removed after leaving the store.