



Department of Corrections. The defendant's posttrial motion was denied and he appeals his conviction, raising two issues for our review: whether he received ineffective assistance of counsel where his counsel relied on an unavailable defense, inadvertently conceding the defendant's guilt of knowingly obtaining possession of stolen property, and whether the State proved him guilty beyond a reasonable doubt where the State presented no evidence that the defendant had obtained the clothing items illegally, and the State was not entitled to an inference that the items were stolen. For reasons which follow, we reverse.

¶ 4 The following evidence was presented at the defendant's bench trial. Illinois State Trooper Keith Gilley testified that at approximately 1 p.m. on September 1, 2008, he was on traffic patrol and observed a vehicle which appeared to be traveling over the speed limit. Gilley's radar instrument indicated that the vehicle was traveling 81 miles per hour in a 65-mile-per-hour zone. Accordingly, Gilley stopped the vehicle, which was being driven by a man identified to be the defendant. This occurred in Johnson County, Illinois.

¶ 5 Gilley's inquiry with respect to the defendant's identification card indicated that the defendant's driver's license was suspended. A check of the vehicle registration indicated it was owned by Avis Rental Agency and had been rented by Erica Jones, who was not present in the vehicle. The defendant was alone in the vehicle.

¶ 6 After learning that the defendant's driver's license was suspended, Gilley placed the defendant under arrest and began an inventory search of the defendant's vehicle prior to its being towed away. Gilley found large amounts of clothing in the interior of the car on the seats and in the trunk. He also found in the trunk a tool used to remove security ink tags from clothing. The ink tags mark the clothing with ink if they are not properly removed using this special tool. Gilley found some receipts from Dillard's relating to some of the articles of clothing in the car. Two of the receipts were from the Dillard's store in Paducah, Kentucky, and one was from the St. Louis Dillard's store.

¶ 7 Gilley found 42 articles of clothing for which there were no receipts and approximately 10 articles of clothing for which there were receipts. The articles for which there were receipts were all found in bags, and the articles for which there were no receipts were not found in bags. The articles for which there were receipts all had yellow proof of purchase stickers on the labels. The articles for which there were no receipts did not have proof of purchase stickers. All of the clothing for which there were no receipts had Dillard's tags, universal product codes, and Dillard's labels. The total value of the clothing for which there were no receipts was \$3,638, as indicated by the stickers and labels on the clothes.

¶ 8 When Gilley asked the defendant about the clothing, the defendant stated that he had purchased the items with receipts that morning from the Paducah Dillard's store. The defendant stated that he had purchased with cash the clothing for which there were no receipts from a flea market in Clarksville, Tennessee. Gilley stated that the defendant had no receipt or other proof that this was true.

¶ 9 The clothing for which there were receipts was deemed to have been legally acquired and remained in the vehicle when it was towed. The clothing for which there were no receipts was deemed to have been obtained illegally and was confiscated by Gilley.

¶ 10 Gilley testified that none of the confiscated clothing had ink tags on them. The clothing which was deemed to have been purchased was all from the big and tall men's clothing department. All of the shirts for which there were no receipts were Polo brand shirts. Gilley subsequently made contact with Danielle Scott, the operations manager at the Paducah Dillard's store.

¶ 11 Danielle Scott testified that she had been the operations manager of the Paducah Dillard's store for the last 13 years. She managed inventory control, budgeting, and staffing. On September 1, 2008, she received a telephone call from an Illinois state trooper who gave her information from the uniform product codes and proof of purchase labels from 42 items

of clothing found in the defendant's vehicle. A Dillard's item cannot be sold without a proof of purchase sticker being placed on its label.

¶ 12 After speaking with the trooper, Scott asked her staff if any of them had seen anyone matching the defendant's description in the store. One of the staff stated she had sold two pairs of jeans to a man matching the description. Scott then checked her inventory management system and also hand-counted the items on hand and compared them to items that the inventory management system indicated were supposed to be on hand. Every item that the trooper had given her the uniform product code for (with the exception of two for which they did not have the complete code) was missing from her inventory but had not been purchased. She had 40 items missing from her inventory that had not been purchased. All of the missing items came from the same section of the store, the big and tall department and the Polo department, which are right across from each other. No security cameras are located in this area of the store. No employees were working in that area of the store on September 1, 2008, because they had called in sick.

¶ 13 Scott identified the two receipts found by Trooper Gilley in the defendant's vehicle and testified that one showed purchases from her store of two pairs of jeans and several items of big and tall sportswear at noon on September 1, 2008. The other receipt showed purchases from her store of three pairs of jeans at 12:25 p.m. on September 1, 2008.

¶ 14 On cross-examination, Scott admitted that she could not tell how long the items had been missing from her inventory. Her store did not use security ink tags.

¶ 15 The State rested and the defense presented no evidence. The State argued that the defendant possessed the items of clothing under circumstances that would reasonably induce him to believe that they were stolen, most likely because he stole them himself from the Paducah Dillard's store. The defendant had receipts for purchases he made from that store just 35 minutes before he was stopped by Trooper Gilley. The store was missing the same

types and number of clothing items that were found in the defendant's vehicle without receipts or proof of purchase stickers proving their purchase.

¶ 16 The defense counsel argued that the defendant could not be found guilty of "receiving stolen property," which he argued was the offense with which the defendant had actually been charged, because it was likely that the defendant himself was the thief and therefore did not receive the stolen property from a third person. Defense counsel stated:

"There is a strong probability, and I'm not conceding the point obviously because I'm representing him on this, there is a strong probability Mr. Morning stole these items. If that is the case, he cannot be convicted of obtaining control over stolen property. \*\*\* So, I think that the facts in this are that Mr. Morning was in his [*sic*] store, or at least there was a strong probability he was in the store. \*\*\* There was a short period of time between when he was in the store, which the store receipts show him somewhere, one store receipt is at noon and one is at 12:25, and he was stopped at about 1:00 basically in Vienna. There was never any mention by any witnesses of anyone else being in the store to which [*sic*] could have stolen these items and given them to Mr. Morning. So although this is sort of a strange argument for a defense counsel to make, I think—I don't think the State can prove beyond a reasonable doubt that he received these items from someone else in order to be found guilty of obtaining control over stolen property."

¶ 17 The court found that the defendant did possess the stolen property under circumstances which would reasonably induce the defendant to believe that it had been stolen and found him guilty as charged.

¶ 18 On appeal the defendant first argues that his trial counsel was ineffective because he was laboring under the mistaken belief that the defendant could not be convicted of theft for having knowingly obtained control over stolen property under section 16-1(a)(4) of the

Criminal Code of 1961 (720 ILCS 5/16-1(a)(4) (West 2010)) where he himself was the actual thief. Accordingly, defense counsel argued that the defendant could not be found guilty because he was most probably the actual thief, thereby effectively conceding the defendant's guilt of the crime charged. Defense counsel also conceded in his argument that the defendant was in fact in the store buying other items at the same time the property was stolen.

¶ 19 As the State points out in its brief, there is no longer any requirement under section 16-1(a)(4) of the Criminal Code of 1961 that the property in question be stolen by a third person. See *People v. Dabrowski*, 162 Ill. App. 3d 684, 690-91 (1987). Our supreme court has clearly stated that the actual thief may be prosecuted under the plain language of the present version of section 16-1(a)(4). *People v. Price*, 221 Ill. 2d 182, 192 (2006). Accordingly, the State concedes that by relying on an invalid legal theory, and thereby making extremely damaging admissions as to the defendant's guilt, defense counsel " 'entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing ... mak[ing] the adversary process itself presumptively unreliable.' *United States v. Cronin*, 466 U.S. 648, 659 (1984)." The State further concedes that defense counsel was ineffective and prejudice must be presumed. We agree and therefore reverse the defendant's conviction.

¶ 20 The State argues that this case must be remanded for a new trial because there was sufficient evidence to prove the defendant's guilt beyond a reasonable doubt. The defendant argues that the State is not entitled to retry him because it did not prove beyond a reasonable doubt that he obtained control over the clothing under circumstances that would reasonably induce him to believe the clothing was stolen, and he must therefore be acquitted. We agree with the State.

¶ 21 When reviewing the sufficiency of the evidence in a criminal case, a reviewing court's inquiry is " '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 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under this standard, a reviewing court must allow all reasonable inferences from the record in favor of the prosecution. *Davison*, 233 Ill. 2d at 43. We will not substitute our judgment for that of the trier of fact where the facts could lead to either of two inferences, unless the inference accepted by the fact finder is inherently impossible or unreasonable. *People v. Lemke*, 349 Ill. App. 3d 391, 398 (2004).

¶ 22 We need not recite again the evidence presented at trial. Suffice it to say that based on the evidence presented a rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. Where the evidence is sufficient to prove the defendant guilty beyond a reasonable doubt, double jeopardy does not bar a retrial. *People v. Wilson*, 392 Ill. App. 3d 189, 202 (2009). Accordingly, we remand this cause for a new trial.

¶ 23 For the foregoing reasons, the judgment of the circuit court of Johnson County is hereby reversed and this cause is remanded for a new trial.

¶ 24 Reversed and remanded.