2017 IL App (1st) 142893-U

FOURTH DIVISION
November 2, 2017

No. 1-14-2893

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 under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 C4 40808
	)	
DONALD HOFFMAN,	)	Honorable
	)	Noreen Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: Conviction for felony retail theft affirmed. Trial court sufficiently admonished defendant of consequences of waiver of right to jury trial, and State presented sufficient evidence of retail value of stolen items.

¶ 2 Following a bench trial, defendant Donald Hoffman was convicted of felony retail theft (720 ILCS 5/16-25(a)(1), (f)(3) (West 2012)) and sentenced to five years' imprisonment. On appeal, defendant contends that: (1) the trial court failed to adequately ensure that he knowingly

and voluntarily waived his right to a jury trial; and (2) the State failed to prove him guilty of retail theft beyond a reasonable doubt because there was insufficient evidence to prove that the value of the merchandise he took was more than $300. We affirm.

¶ 3 On November 13, 2013, defendant and his attorney appeared in court. The State told the trial court that, although defendant's case was set for a jury trial that day, defense counsel had said that defendant wanted a bench trial. Defense counsel agreed and said, "For the record, it was my error. [Defendant] told me immediately that he did want a bench trial." After the parties discussed a discovery issue, defendant filed a written jury waiver with the court. The court then admonished defendant concerning his waiver of a jury trial:

> "THE COURT: All right. [Defendant], I have here, sir, a jury waiver. Is that your signature?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And do you understand that by signing that you're giving up the right to have a trial by a jury?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Do you know what a jury trial is, sir?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Okay. So that will be the order."

¶ 4 On July 22, 2014, the parties answered ready for trial. After the State waived its opening statement, defense counsel began giving his opening statement, but then noted that defendant had "executed a jury waiver." The trial court admonished defendant a second time:

> "THE COURT: I have a jury waiver here, that's your signature?

THE DEFENDANT: Yes, ma’am.

THE COURT: You understand by signing that you give up the right to have a trial by jury?

THE DEFENDANT: Yes.

THE COURT: And you know what a jury trial is?

THE DEFENDANT: Yes.”

The record shows that the executed jury waiver defense counsel mentioned was the second written jury waiver filed by defendant, different than the one he filed on November 13, 2013.

¶ 5 At trial, the evidence showed that, in the afternoon of July 29, 2012, Sonia Castaneda, a loss prevention officer, and Jeffrey Frugoli, a loss prevention manager, were working in the loss prevention office of a J.C. Penney store located in North Riverside, Illinois. Castaneda was monitoring video surveillance and observed defendant enter the home department. After looking at some merchandise, defendant bought two pillows and sat down in the home department for a few minutes. Defendant got up, walked to a Dyson vacuum cleaner display, removed two boxed vacuum cleaners from a shelf, put them on the ground and walked away. A short time later, he returned to the display, picked up the boxes and exited the home department, carrying one box in each hand.

¶ 6 As soon as defendant picked up the boxes, Frugoli left the office and went to the store’s south exit. He saw defendant exit the store with the vacuum cleaners without stopping to pay for them. Once defendant was outside the store, Frugoli confronted him about the vacuum cleaners. Defendant could not produce a receipt for the items, so Frugoli handcuffed him and escorted him

to the loss prevention office. Defendant had a business card on him that stated "loss prevention consultant." When Frugoli inquired about the card, defendant responded, "That's my job." A police officer arrived at the office and took defendant to the police station.

¶ 7 Castaneda testified as to the value of the vacuums. She identified People's Exhibit No. 2, which was later admitted into evidence without objection, as the receipt for the two vacuum cleaners taken by defendant. She had generated the receipt by scanning the boxed items in the loss prevention office. The receipt showed the value of each vacuum cleaner was $600, or $1,200 combined. Castaneda testified that the receipt reflected the retail sales price for the vacuum cleaners on July 29, 2012.

¶ 8 Charles Witt, the J.C. Penney loss prevention district manager, testified that defendant was not an employee of J.C. Penney and that the store did not hire outside consultants to monitor loss prevention.

¶ 9 Defendant testified and acknowledged taking the vacuum cleaners. But he explained that he had created a business where he would use his background, which included previous convictions for retail theft, to consult with businesses and expose flaws in their loss prevention processes. He said he had executed a contract with someone who identified himself as the head loss prevention officer at the J.C. Penney and subsequently took the vacuum cleaners as part of this business agreement. Defendant did not have a copy of that contract, as the unidentified loss prevention manager had kept it. Defendant's business attorney, Steven Hinton, testified that he had drafted a "hold harmless agreement" for defendant and his business, "Gotcha, Inc.," so that defendant would be relieved from liability for removing merchandise from the stores with which he contracted.

¶ 10 In rebuttal, the State introduced three certified copies of defendant's convictions for retail theft in case numbers 09 CR 10325, 09 C3 30707 and 06 C4 40434.

¶ 11 The trial court found defendant guilty of felony retail theft, stating that it did not "believe [defendant] at all." After denying defendant's motion for new trial, the court sentenced defendant to five years' imprisonment. This appeal followed.

¶ 12 Defendant first contends that his right to a jury trial was violated because the trial court failed to adequately ensure that he knowingly and voluntarily waived this right. He argues that, despite him signing a written jury waiver and affirmatively responding to the court's jury waiver admonishments, the court's admonishments were inadequate to explain to him the nature of the right he was waiving.

¶ 13 Initially, defendant acknowledges that he did not raise this issue in the trial court, forfeiting his claim. See *In re R.A.B.*, 197 Ill. 2d 358, 362 (2001). However, he argues we may excuse his forfeiture under the second prong of the plain-error doctrine, which allows review of an unpreserved claim of error if the error is "so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. McDonald*, 2016 IL 118882, ¶ 48. Before determining whether there is plain error, we must first determine whether an error actually occurred. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008).

¶ 14 The right to a jury trial is a fundamental right afforded to criminal defendants by both our federal and state constitutions. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §§ 8, 13; *Bannister*, 232 Ill. 2d at 65. A defendant also has the right to waive a trial by jury. 725 ILCS 5/103-6 (West 2012). However, any such waiver must be "knowingly

and understandingly made" in open court. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004); see 725 ILCS 5/103-6 (West 2012) ("Every person accused of an offense shall have the right to a trial by jury unless *** understandingly waived by defendant in open court."). It is the trial court's duty to ensure that the defendant's waiver is made knowingly, but the trial court is not required to give a specific admonition or declaration to the defendant to ensure a knowing waiver. *Bannister*, 232 Ill. 2d at 66. Rather, each waiver must be evaluated on a case-by-case basis. *Bracey*, 213 Ill. 2d at 269.

¶ 15 "The crucial determination is whether the waiving defendant understood that his case would be decided by a judge and not a jury." *People v. Reed*, 2016 IL App (1st) 140498, ¶ 7. While a written jury waiver is evidence that the defendant knowingly waived his right to a jury trial, it is not dispositive. *Bracey*, 213 Ill. 2d at 269-70. The defendant bears the burden of establishing that his jury waiver was invalid. *Id.* Where the facts are not in dispute, as is the case here, we apply *de novo* review. *R.A.B.*, 197 Ill. 2d at 362.

¶ 16 In this case, the circumstances show that the trial court fulfilled its duty to ensure that defendant knowingly and voluntarily waived his right to a jury trial. On November 13, 2013, eight months before defendant's trial actually occurred, he was scheduled to have a jury trial. But defense counsel indicated that defendant instead wanted a bench trial, stating that defendant "told [him] immediately that he did want a bench trial." Defendant was in court and never voiced an objection to counsel's in-court request. See *Reed*, 2016 IL App (1st) 140498, ¶ 7 (finding a "present defendant's silence while his or her attorney requests a bench trial provides evidence that the waiver is valid"). That same

day, defendant filed a jury waiver with the trial court, who then admonished him that, by signing the jury waiver, he would be giving up his right to a jury trial. Defendant stated he understood and later confirmed that he knew the meaning of a jury trial.

¶ 17 On the day of defendant's trial, July 22, 2014, he filed a second written jury waiver with the court. The trial court again admonished defendant about his right to a jury trial, using substantially the same questions and receiving substantially the same responses as the previous admonishments. Defendant never expressed any confusion over his right to a jury trial and never vacillated on waiving his right during either occasion. Given these facts, we find that defendant understood that his case would be decided by a judge rather than a jury when he waived his right to a jury trial. Defendant has failed to demonstrate that the court did not fulfill its duty to adequately ensure he made a knowing and voluntary waiver of his right to a jury trial.

¶ 18 Furthermore, defendant has a criminal history dating back to 1982, including various convictions in 1984, 1985, 1986, 1988, 1990, 1994, 1999, 2000, 2004, 2007 and 2009, and was well aware of the criminal justice system, bolstering our conclusion that, when he waived his right to a jury trial, he understood his case would be decided by a judge rather than a jury. See *Bannister*, 232 Ill. 2d at 71 (defendant's extensive history with criminal justice system demonstrated that defendant "was already familiar with his right [to jury trial] and the relevant consequences of waiving it—that he would receive a bench trial."); *People v. West*, 2017 IL App (1st) 143632, ¶ 13 (finding that defendant's lengthy criminal history "belie[d] any claim that he did not know or understand judicial proceedings and, in particular, the difference between a bench and jury trial").

¶ 19 Defendant compares his case to *People v. Sebag*, 110 Ill. App. 3d 821 (1982), but we find that case to be distinguishable. In *Sebag*, the defendant represented himself and signed a written jury waiver. *Id.* at 828-29. The trial court's jury waiver admonishments consisted of the following:

> "THE COURT: You are entitled to have your case tried before a jury or judge.
>
> DEFENDANT SEBAG: Judge.
>
> THE COURT: Jury waiver. Do you understand that by waiving a jury at this time that you cannot reinstate it; do you understand that?
>
> DEFENDANT SEBAG: Yes." *Id.* at 829.

In finding that the defendant's jury waiver was invalid, the appellate court noted that "[t]he defendant was without the benefit of counsel, and it [did] not appear that he was advised of the meaning of a trial by jury nor does it appear that he was familiar with criminal proceedings." *Id.* Here, unlike in *Sebag*, defendant had the benefit of counsel, he had an extensive criminal history, and he was well aware of the workings of the criminal justice system, demonstrating his familiarity with his right to a jury trial, and, on two separate occasions, he specifically acknowledged understanding the meaning of a jury trial.

¶ 20 Defendant also faults the trial court for failing to give him certain admonishments discussed in *People v. Tooles*, 177 Ill. 2d 462, 469-73 (1997), such as whether he understood the difference between a bench and jury trial and whether he knew the right was constitutionally guaranteed. However, in *Tooles*, our supreme court emphasized that "no set admonition or advice is required" for a valid jury waiver, because the validity of the waiver "turns on the facts

and circumstances of each particular case." *Id.* at 469. While the supreme court may have outlined the best practices for conducting jury-waiver admonitions in *Tooles*, the absence of every admonishment from *Tooles* does not require us to find an invalid waiver here.

¶ 21 In sum, the trial court fulfilled its duty to ensure defendant knowingly and voluntarily waived his right to a jury trial. As the court did not commit any error, there can be no plain error. See *Bannister*, 232 Ill. 2d at 71.

¶ 22 Defendant next contends that the State failed to prove his guilt for felony retail theft beyond a reasonable doubt, because it did not present sufficient evidence to prove the value of the vacuum cleaners exceeded $300. Defendant does not dispute that he committed a retail theft of the vacuum cleaners, but rather argues that, because of the State's insufficient evidence of their value, his conviction must be reduced from a felony (720 ILCS 5/16-25(a)(1), (f)(3) (West 2012)) to a misdemeanor (720 ILCS 5/16-25(a)(1), (f)(1) (West 2012)).

¶ 23 When a defendant challenges his conviction based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all the elements of the crime proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All reasonable inferences must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. While we must carefully examine the evidence before us, we must give deference to the trier of fact on issues of witness credibility and the weight to be assigned to their testimony. *Brown*, 2013 IL 114196, ¶ 48. We will only overturn a conviction if the evidence is "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Id.*

¶ 24 To sustain defendant's conviction for retail theft, the State was required to prove that he knowingly carried away merchandise offered for sale in a retail mercantile establishment with the intention of retaining the merchandise or with the intention of depriving the merchant permanently of possession without paying the full retail value of the merchandise. 720 ILCS 5/16-25(a)(1) (West 2012). In order to convict defendant of the felony version of retail theft in this case, the State also had to prove that the "full retail value" of the property he carried away exceeded $300. 720 ILCS 5/16-25(f)(3) (West 2012); see also *People v. DePaolo*, 317 Ill. App. 3d 301, 308 (2000) ("[V]alue is an element of the offense that must be resolved by the trier of fact as either exceeding or not exceeding [$300]."). The "full retail value" of the stolen property means "the merchant's stated or advertised price of the merchandise" (720 ILCS 5/16-0.1 (West 2012)).

¶ 25 Here, the evidence, when viewed in the light most favorable to the State, proved beyond a reasonable doubt that the value of the two vacuum cleaners exceeded $300. Castaneda, a loss prevention officer, testified that she saw defendant pick up two boxes containing Dyson vacuum cleaners and leave the store without paying for them. Castaneda testified that she scanned the vacuum cleaners, which generated a receipt listing the value of each vacuum cleaner as $600, or $1,200 combined, and she answered yes when asked whether the receipt "truly and accurately depict[ed] the prices that the merchandise was offered for sale on the date of [the theft]." The State then submitted the receipt into evidence without an objection from defendant. In light of these facts, there was sufficient evidence to establish that the value of the vacuum cleaners exceeded $300 to support defendant's conviction for felony retail theft.

¶ 26 Defendant argues that Castaneda's testimony regarding the value of the vacuum cleaners was insufficient, because she merely based the value of the vacuum cleaners off of the scanned receipt but did not have an independent or personal knowledge of their value. Defendant asserts that Castaneda never testified to being involved in the store's sales operations, showing she was "not competent" to offer an opinion on the value of the vacuum cleaners.

¶ 27 We disagree. "Questions regarding the knowledge of a witness in valuing property go toward the weight of the evidence, not its competency" (*DePaolo*, 317 Ill. App. 3d at 309), which is an issue reserved for the trier of fact. *Brown*, 2013 IL 114196, ¶ 48. It was the trial court's prerogative to determine the weight to give to Castaneda's testimony regarding the vacuum cleaners' value. We see no reason to second-guess the trial court's decision to give weight to Castaneda's testimony on appeal.

¶ 28 Defendant relies on *People v. Mikolajewski*, 272 Ill. App. 3d 311 (1995), for the proposition that the State must establish a witness's basis of knowledge regarding the value of merchandise. But in *Mikolajewski*, the only evidence of the value of the stolen property was a security officer's testimony that she had seen the amount listed on the price tags, which had been placed on the items in a distribution center in Wisconsin. *Id.* at 313. The State did not introduce the price tags at trial, and the photographs of the items did not show the price. *Id.* at 313-14. And the officer had no personal knowledge of "how or why the price tags were placed on the packages." *Id.* at 318.

¶ 29 By contrast, here, the State introduced the receipt that reflected J.C. Penney's advertised prices for the vacuum cleaners. Unlike *Mikolajewski*, where the State's case rested entirely on an officer's testimony regarding price tags that were not produced at trial, the State produced a

document reflecting the advertised price of the vacuum cleaners, which established their retail value. See 720 ILCS 5/16-0.1 (West 2012). Nor did defendant object to the admission of the receipt or otherwise challenge the reliability of the process by which it was generated.

¶ 30 Defendant also argues that the receipt was not properly admitted into evidence under the business-records exception to the hearsay rule, because the foundational requirements for its admission were not met, nor were the additional foundational requirements for computer-generated evidence met. But again, defendant did not object to the receipt's admission into evidence, and thus the evidence should be given its proper probative effect. *People v. Akis*, 63 Ill. 2d 296, 299 (1976) ("when evidence of [an alleged hearsay] character is admitted without objection it is to be considered and given its natural probative effect."); *Rodriguez v. Frankie's Beef/Pasta & Catering,* 2012 IL App (1st) 113155, ¶ 14 ("Hearsay evidence admitted without objection is considered and given its natural probative effect."); *People v. Banks*, 378 Ill. App. 3d 856, 861 (2007) ("It is well established that when hearsay evidence is admitted without an objection, it is to be considered and given its natural and probative effect.").

¶ 31 Alternatively, we would find that defense counsel invited the alleged error in admitting the receipt by failing to object. As we recently noted, "a party cannot acquiesce to the manner in which the trial court proceeds and later claim on appeal that the trial court's actions constituted error." *People v. Cox*, 2017 IL App (1st) 151536, ¶ 73. Our reasoning there, in the context of an alleged confrontation-clause violation, is equally true here: "If the defense had objected at any point during trial [to the admission of a State Police record], when it was given multiple opportunities to do so by the trial court, the State could have easily remedied the problem by simply calling [a proper witness] to the stand. This was an evidentiary issue that was easily fixed

***." *Id.* ¶ 75. Here, defendant did not object to the testimony of the witness as to what the receipt showed, and counsel stated that the defense had no objection to the admission into evidence of the receipt. Had defense counsel raised any objection as to foundation, the State could have easily cured any deficiency that may have existed. We find the invited-error doctrine to be an alternative ground for affirmance. See *People v. Dinelli*, 217 Ill. 2d 387, 403 (2005) (reviewing court may affirm circuit court ruling on any basis supported by record); *People v. Johnson*, 208 Ill. 2d 118, 132 (2003) (same).

¶ 32 We hold that the State presented sufficient evidence of the value of the merchandise stolen.

¶ 33 The judgment of the circuit court of Cook County is affirmed.

¶ 34 Affirmed.