

2017 IL App (2d) 160407-U
No. 2-16-0407
Order filed June 7, 2017

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 15-CF-73
)	
SUSAN A. DIXON,)	Honorable
)	Daniel B. Shanes,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not abuse its discretion in remedying the State’s discovery violation by allowing extensive cross-examination about the missing evidence and by providing the jury with an adverse-inference instruction: the violation did not deny defendant due process, as the missing evidence was only potentially useful and there was no showing of bad faith; further, as the missing evidence was not demonstrably relevant, excluding the retained evidence (and thus effectively dismissing the case) would have been too extreme a sanction; (2) the State proved defendant guilty beyond a reasonable doubt of theft of government property, as the evidence showed both that defendant took property that she was unauthorized to take (and/or that she assisted others in doing so) and that the government (a park district) had a possessory interest in the property.

¶ 2 Defendant, Susan A. Dixon, appeals her conviction of theft of government property (720 ILCS 5/16-1(a)(1)(A) (West 2014)) She contends that the evidence was insufficient to prove her guilty beyond a reasonable doubt and that the court erred in denying her motions to exclude videotape evidence and for discovery sanctions. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted in connection with her work distributing toys for a Toys for Tots event from December 12, 2014, to December 15, 2014, when she was a commissioner of the Foss Park District (the park district). The indictment alleged that she knowingly obtained unauthorized control over toys that were government property of the park district, with a value not in excess of \$500. The State's theory of the case was that defendant took multiple toys without authorization and also gave others permission to do so. Before trial, the State was required to provide copies of video recordings from the park district's building. The State failed to provide all of the recordings, because portions of the recordings had been lost or destroyed, and defendant moved to exclude evidence of the recordings and for discovery sanctions.

¶ 5 The facts concerning the recordings are generally undisputed. Exhibits attached to the motion showed that there were 24 cameras, in and around the building, that constantly recorded. There were also multiple camera angles in some areas. The footage was stored and downloaded to a computer hard drive and kept for 18 days, after which it was either overwritten or deleted. The day after the event, on December 16, 2014, Detective Sturt of the North Chicago police department viewed recordings sent to him by the park district on multiple USB drives. He was informed by a park distinct employee, Brad Skof, that there were issues backing up the recordings because the files were too large. Sturt asked Skof to download certain recordings so they could be reviewed fully. He asked for the recordings that he thought would give the best

views of the thefts as they occurred. One of the recordings requested, for December 12, 2014, which might have included footage of toys being delivered, was not provided, likely because it did not copy correctly. When it was requested a second time, the file had been overwritten and Sturt did not ask that any parts of the recordings be deleted.

¶ 6 Skof encountered difficulties downloading the recordings because there was not enough storage space on his hard drive. He contacted an IT professional to help him and, on December 29, 2014, he purchased additional drives to contain the recordings. Skof was able to provide four terabytes of recordings. He made two copies for the police and made two additional copies as backups, but then gave those to the police at their request. Sturt combined the recordings to one drive, which he provided as evidence. Defendant was charged on January 11, 2015.

¶ 7 In her motion, defendant stated that she did not allege that there was a conspiracy to exclude evidence that would have exonerated her or that selective editing was done with the intent to deprive her of a defense. However, she argued that the failure to preserve the full recordings was still a discovery violation. She argued that missing portions of the recordings could possibly contain exculpatory evidence. For example, she argued that recordings of toy deliveries could show the number of toys delivered, which could refute claims by the State as to how many had gone missing and could support defense claims that there was a shortage of toys for certain age groups. At the hearing, she noted that gaps in the recordings made it impossible to track toys allegedly being removed from the building, since it was impossible to show that a bag with toys from one recording was the same bag that was later put in a vehicle in another recording. She argued that the failure to preserve the evidence was a due process violation and a discovery violation under Illinois Supreme Court Rule 415 (eff. Oct. 1, 1971).

¶ 8 The court, in a particularly thorough ruling, discussed the relevant case law at length, holding that, to prove a due process violation, defendant was required to show bad faith in preventing the discovery of materially exculpatory evidence. The court then found that the missing material, while potentially useful, was not materially exculpatory. The court also found that there was no bad faith, because the intent was to preserve the recordings that actually mattered. Thus, the court found that there was no due process violation. As to a discovery violation under Rule 415, the court found that there was no dishonesty or ill will. It found that a dismissal or suppression of the evidence, which would have the effect of a dismissal because the State would be unable to prove its case, was too extreme a remedy. Instead, the court stated that it would allow extensive cross-examination and would give an adverse-inference instruction that the jury could infer from the absence of evidence that it was not favorable to the State.

¶ 9 Evidence at trial showed that, in December 2014, the park district held a Toys for Tots event. Toys for Tots was a nonprofit organization. The purpose of the program was to collect toys from the public and donate them to less fortunate children. Members of the United States Marine Corps and other volunteers collected the toys in a warehouse where they were sorted by gender and age. In October 2014, Gunnery Sergeant Dennis Jones met with Angela Smith and Frankye Brooks of the park district to discuss how the toys would be distributed. The plan required registration, a birth certificate, and proof of residency. Grandparents were not to be allowed to register grandchildren unless they were the legal guardians of the children. Information from the registration was provided to the Marines, who would then fill the orders based on gender and age. The number of toys each child would receive was based on the number of toys collected. Two to four toys per child was standard, along with additional stuffed toys, books, and stocking stuffers.

¶ 10 There were 1,835 children registered for the event. On December 12, 2014, the Marines delivered 3,670 toys, 1,835 stocking stuffers, and 1,835 books. Jones said that it was rare that they would miscount of the number of toys. When the order was filled, a count was kept with a clicker to ensure that the correct number of toys was delivered. Smith signed for the toys when they were delivered. She inquired whether employees and volunteers could receive toys before distribution and was told that it was in the discretion of the park district. Brooks testified that the park district allowed employees to register for the event. She testified that some exceptions were made that allowed people to sign up their grandchildren for the event. For example, if a grandparent came in because her daughter could not get off work and had the proper identification, an exception would be made. Defendant registered her five grandchildren for the event. On the first day of the event, Smith gathered the event workers in the toy room to fill their orders, but it is unknown if that included park district commissioners.

¶ 11 Jones testified that, on December 13, 2014, within two hours after the start of the event, he received a call from the park district stating that they were short on toys for one age group. As a result, 1,038 additional toys were delivered. Jones was surprised by the shortage since the Marines provided the correct number of toys, but he also identified various reasons that a shortage could occur, such as toys being given out to the wrong age group. Defendant told volunteers that they could leave early that day because they were running out of toys. On December 14, 2014, the park district called Jones again, stating that they were short on toys for one age group, and 217 additional toys were delivered. Later that day, either Brooks or defendant called stating that they were again short on toys, and another 265 toys were delivered. Defendant again told volunteers to leave early that day because they were running out of toys. On December 15, 2014, after the event ended, Brooks called and informed Jones that there were left-

over toys. Jones told her that the park district could keep them. He said that, at that point, the park district was the owner of the toys. Brooks testified that defendant gave volunteers permission to take six toys each. The rest were stored at the facility.

¶ 12 For the event, volunteers would verify the participants, and a runner would bring a slip of paper listing a child's age and gender to a room containing the toys where they were placed in a garbage bag. The runner would then bring the toys to the registration room where the slip was placed in a bin. Each child was to receive two toys and one or two stocking stuffers, although defendant told the police that up to three stocking stuffers were actually being given away. Another person testified that, later in the event, three toys were given, along with a book and a game. Defendant told the police that, other than some people trying to collect toys twice, she did not see anyone violating the procedures. She did not see workers bagging toys without a slip. A few times the slips could not be found after the toys were distributed. Defendant told the police that they were short on toys for certain age groups and that Smith and Brooks called Jones for additional toys.

¶ 13 Tommie Kindle, who was also charged with theft in connection with the event, testified for the State. All charges against Kindle were dismissed in exchange for his testimony. At the time of the event, Kindle was a park district employee and a runner at the event. He said that, on the first day of the event, both defendant and a Marine who was volunteering gave him permission to place toys in a bag without a registration slip. He put 12 toys in a bag for his two nieces. The next day he took eight more toys. That same day, Kindle carried two bags of toys to the parking lot. One was his and the other belonged to defendant. He placed defendant's bag in her car. On the last day, when employees were given permission to take toys, he took eight more.

¶ 14 After the event, the police were contacted and provided with the video recordings. Sturt testified that he met with Skof several times because of issues downloading the videos and that the more they watched, the more evidence they found. Skof pointed out items of concern to Sturt, who then decided what would be downloaded. When they realized that they needed more space for the data, Skof purchased additional drives. Sturt testified that there were several hundred hours spent watching the videos and that he did not request recordings from cameras in rooms not used for the event or from times when the building was closed. Sturt said that it was the police department's policy to collect all pertinent evidence and preserve it. He testified that the missing recordings were not pertinent, but he also admitted that he did not know what was on them. He verified that the video of the initial delivery of the toys was missing. Further, all of the video from December 12, 2014, was lost and footage from only 14 of the 24 cameras was preserved.

¶ 15 The recording of the first day of the event showed defendant's son taking toys from a box and setting them aside. He was also seen placing toys in a closet. He later took an empty box to the closet and brought it out filled with toys and then took the box with a green bag on top to defendant's van and put the toys inside. On another occasion, he and an unidentified woman left the building with two bags of toys and placed the bags in defendant's van. Defendant's son then returned to the building where he retrieved another bag and took that bag to the van. He did not have a slip of paper during those activities. Defendant was seen going through boxes while holding a bag containing toys and was seen placing toys in a bag without holding a slip of paper. However, at other times defendant was shown placing items in bags while holding a registration slip. Overall, the State provided evidence that defendant put at least 28 toys in bags for herself during the event. At the end of the day, defendant's son and other individuals were shown taking

bags, exiting the building, and placing the bags in defendant's van. Recordings of the second day showed defendant's son and Kindle taking bags, exiting the building, and placing the bags in defendant's van. At around 5:30 p.m. defendant drove away in the van.

¶ 16 Defendant's motion for a directed finding was denied. The court gave an accountability instruction, telling the jury that it could find defendant guilty if she solicited or aided another person in the commission of the offense. The jury was also instructed that, if it found that the State allowed evidence to be lost or destroyed whose content or quality was at issue, it could infer that the true fact was against the State's interest.

¶ 17 The jury found defendant guilty. Her posttrial motion for judgment notwithstanding the verdict or a new trial was denied. She was sentenced to 18 months' probation, and she appeals.

¶ 18 **II. ANALYSIS**

¶ 19 Defendant first contends that the trial court erred in its rulings on her motions for discovery sanctions and to exclude evidence. She argues that the trial court should have dismissed the case or excluded the videos as a sanction.

¶ 20 "A discovery violation may be analyzed either as a due-process violation under *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), or under Illinois Supreme Court Rule 415(g)(i) (eff. Oct. 1, 1971)." *People v. Stolberg*, 2014 IL App (2d) 130963, ¶ 25. The United States Supreme Court and our supreme court have distinguished between instances where the lost or destroyed evidence is materially exculpatory and where it is only potentially useful. *Illinois v. Fisher*, 540 U.S. 544, 547 (2004); *People v. Sutherland*, 223 Ill. 2d 187, 235 (2006). A denial of due process occurs if materially exculpatory evidence is withheld or destroyed; good or bad faith by the State is irrelevant. *Sutherland*, 223 Ill. 2d at 235. On the other hand, if the destroyed evidence is merely potentially useful, the State's failure to preserve the evidence does not violate due

process unless a criminal defendant can affirmatively demonstrate bad faith on the part of the State. *Youngblood*, 488 U.S. at 58; *Stolberg*, 2014 IL App (2d) 130963, ¶ 28.

¶ 21 Under previous Illinois case law, the failure to preserve evidence requested by a discovery motion constituted a due process violation without a requirement that the defense show that it had exculpatory value, and a showing of bad faith was not necessary. *People v. Newberry*, 166 Ill. 2d 310, 317 (1995). However, in *Fisher*, the Supreme Court later disagreed, holding that potentially useful evidence required a showing of bad faith. *Fisher*, 540 U.S. at 547-48. Thus, we now follow the rule set forth in *Fisher*. *Stolberg*, 2014 IL App (2d) 130963, ¶ 28; *People v. Voltaire*, 406 Ill. App. 3d 179, 183 (2010).

¶ 22 “Bad faith ‘implies a furtive design, dishonesty or ill will.’” *People v. Nunn*, 2014 IL App (3d) 120614, ¶ 17 (quoting *People v. Danielly*, 274 Ill. App. 3d 358, 364 (1995)). “Factors to consider when examining the State’s duty to preserve evidence include whether the State acted in good faith and per its normal practice and whether the evidence was significant in defendant’s defense and was such that comparable evidence could not be obtained by other reasonable and available means.” *Id.* A mere showing of negligence by the police in losing evidence in the absence of bad faith is insufficient to create a due process violation. *Sutherland*, 223 Ill. 2d at 237. The defendant has the burden of establishing that the State acted with a sinister motive or ill will when destroying the evidence, and he cannot merely argue that the evidence was destroyed. See *Danielly*, 274 Ill. App. 3d at 364 (the defendant failed to affirmatively demonstrate bad faith where there was no evidence that the police acted with a sinister motive or ill will).

¶ 23 Where, as here, the facts giving rise to the alleged discovery violation are not in dispute, we consider *de novo* the issue of whether there was a discovery violation. *People v. Hood*, 213 Ill. 2d 244, 256 (2004). We review for abuse of discretion a trial court’s decision as to the

appropriate sanction for a discovery violation. *People v. Mullen*, 313 Ill. App. 3d 718, 730 (2000).

¶ 24 Here, defendant's due process claim is without merit. First, defendant does not argue that the missing recordings were exculpatory and she stated in her written motion that she was not alleging that the recordings were edited with the intent to deprive her of a defense. Instead, she referred to the recordings as potentially exculpatory and, in her written motion, she incorrectly relied on outdated case law to argue that a showing of bad faith was not required. On appeal, she suggests that bad faith was shown based on Sturt's neglect or refusal to fulfill his duty to preserve the evidence. But she was required to show more than neglect. Here, there was no showing that Sturt acted with a sinister motive or ill will. Accordingly, there was no due process violation.

¶ 25 Defendant next argues that the court should have dismissed the action or excluded the evidence under Rule 415. Under Rule 415, "If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances." Ill. S. Ct. R. 415(g)(i) (eff. Oct. 1, 1971).

¶ 26 The goal of discovery is to eliminate surprise and unfairness and afford an opportunity to investigate. *People v. Hawkins*, 235 Ill. App. 3d 39, 41 (1992). Sanctions for discovery violations are designed to compel compliance rather than to punish. *Id.* "For this reason, exclusion of evidence is not favored as a sanction as it does not contribute to the goal of truth seeking." *Id.*

The exclusion of evidence is a last resort, demanded only when other sanctions would be ineffective. See *id.*

¶ 27 “The correct sanction to be applied for a discovery violation is a decision appropriately left to the discretion of the trial court, and its judgment shall be given great weight.” *People v. Kladis*, 2011 IL 110920, ¶ 42. “The trial court is in the best position to determine an appropriate sanction based upon the effect the discovery violation will have upon the defendant.” *Id.* “[A]n abuse of discretion exists only where the decision of the trial court is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would take the view adopted by the trial court.” *Id.*

¶ 28 Here, the trial court noted that exclusion of the recordings would be an extreme sanction, as it would prevent the State from being able to prove its case. Thus, the court fashioned a remedy to address the matter by allowing extensive cross-examination about the missing recordings and by giving an adverse-inference instruction. The missing recordings were of rooms that were not used for the event and depicted times that the building was closed. The lack of evidence that the missing recordings were actually relevant made such an instruction reasonable. There was no evidence that Sturt acted in any way to fabricate a case against defendant or selectively edit recordings to place her in a false light. Instead, the record shows that defendant was charged promptly after the police were able to view hundreds of hours of the recordings, during which multiple instances of evidence of theft were observed and preserved. Accordingly, the trial court did not abuse its discretion.

¶ 29 Defendant next contends that the evidence was insufficient to prove her guilty beyond a reasonable doubt. She argues that the State failed to prove that the toys were government property and failed to prove that she took them without authorization.

¶ 30 A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). On a challenge to the sufficiency of the evidence, “ ‘the relevant question 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.). *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard applies regardless of whether the evidence is direct or circumstantial, and circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). The trier of fact is responsible for resolving conflicts in the testimony, weighing the evidence, and determining what inferences to draw, and a reviewing court ordinarily will not substitute its judgment on these matters for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000). The mere existence of conflicts in the evidence does not by itself require reversal, and the resolution of the conflicts in the evidence and the credibility of the witnesses is the province of the trier of fact. *People v. Ellzey*, 96 Ill. App. 2d 356, 358-59 (1968).

¶ 31 A person commits the offense of theft when (1) he or she knowingly obtains or exerts unauthorized control over property, and (2) he or she intends to permanently deprive the owner of the use and benefit of the property. 720 ILCS 5/16-1(a)(1)(A) (West 2014). An “owner” is defined as “a person, other than the offender, who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property.” 720 ILCS 5/15-2 (West 2014). Theft is a Class 2 felony when the value of the property does not exceed \$500 and the theft was of government property. 720 ILCS 5/16-1(b)(4.1) (West 2014).

¶ 32 Here, there was sufficient evidence that defendant exerted unauthorized control over the property and intended to permanently deprive the park district of the use of it. While there was evidence that she registered her grandchildren, she did so despite a rule prohibiting it. More importantly, there was evidence that she took more toys than those she would be entitled to for five children. Further, Kindle testified that defendant gave permission to others to take toys, and her son was seen concealing toys in a closet and putting toys into her van on multiple occasions. Thus, even if the jury determined that she was authorized to take toys for her grandchildren, it could have found her guilty based on an accountability theory.

¶ 33 There was also sufficient evidence that the toys were government property. The park district clearly had possession of the toys and had an interest in them. The toys were delivered to the park district, which signed for them, took control of them, stored them on park district property, and was able to formulate policies concerning how they were distributed. Generally, the Marines who filled the toy orders did not take part in the distribution. The park district was told to keep the toys that were left over after the event. Thus, it was reasonable for the jury to find that the toys were government property. Accordingly, the evidence was sufficient to prove defendant guilty beyond a reasonable doubt.

¶ 34

III. CONCLUSION

¶ 35 The trial court did not abuse its discretion in ruling on defendant's motions for discovery sanctions and to exclude evidence, and the evidence was sufficient to prove her guilty beyond a reasonable doubt. Accordingly, the judgment of the circuit court of Lake County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 36 Affirmed.