2018 IL App (1st) 150243-U

No. 1-15-0243

Order filed March 15, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 21343
	)	
MEYER GELFMAN,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: Defendant's conviction for theft by deception affirmed. Evidence was sufficient to prove defendant guilty beyond reasonable doubt.

¶ 2 Following a bench trial, defendant Meyer Gelfman was convicted of theft by deception (720 ILCS 5/16-1(a)(2)(A) (West 2012)) and sentenced to 30 months' probation. On appeal, he argues that the trial court improperly admitted opinion testimony from a lay witness and that the evidence was insufficient to prove him guilty beyond a reasonable doubt. We affirm.

¶ 3 Defendant was charged by information with one count of theft and one count of theft by deception stemming from acts occurring on October 15, 2013, in Chicago.

¶ 4 At trial, Tracy Zhao testified that, on October 15, 2013, she was working as the manager of Michael's Jewelry located at 1 North Wabash Avenue. A man she knew as "Tony" sent her a text message indicating that he was bringing a client over to the store. Tony had stopped by the store the day before and months earlier regarding a particular ring. He arrived with another man, identified in court as defendant, and asked to see the ring he had looked at on previous occasions. The ring was "a three carat 65 round, round brilliant cut diamond [] mounted in a solitary ring that has four prongs" and valued at $39,800.

¶ 5 Zhao went to hand the ring to Tony, but defendant took the ring. Defendant had the ring in his hand and used a loupe, a magnifying device, to view the ring. At this point, Zhao helped another customer who had entered the store. Defendant then handed a ring back to Zhao and told her the diamond was too small, and that he wished to see something bigger. Zhao looked in the safe for a bigger ring and, while doing this, she placed the ring she had gotten back from defendant on her index finger. She noticed that the ring should not have fit her index finger, as the ring given to defendant was a size 4.75, and a ring for her index finger should be about a size 6. Zhao then looked at the stone of the ring and realized it was not a real diamond. She confronted defendant about the ring, but defendant did not respond. Tony had already left the store.

¶ 6 Zhao testified that the ring originally given to defendant was a jade color, which is slightly yellow and "has an inclusion by the prong of the stone." She further stated "[the ring] has a little feather on the edge so when you look at it you would be able to identify that this is the

stone versus the stone that I got back from him is a lot whiter stone and a cubic zirconia does not have any inclusions." Zhao explained that the ring she received from defendant was whiter in color and did not have any inclusions.

¶ 7 Zhao testified the store had a surveillance video depicting the events of October 15, 2013, and that she had viewed the video. The video was played in court and Zhao described what it showed. She testified that, after Tony and defendant entered the store, she gave the ring to defendant. Shortly after, a man entered the store and Zhao approached him. Zhao was not looking at defendant and Tony. The video showed defendant holding the loupe near his face in his right hand and the ring in his left hand. Next, defendant moved his left hand towards Tony while lowering his right hand. Tony moved his left hand towards defendant's left hand. Defendant then moved his right hand towards Tony's left hand and used his left hand to take something from Tony's left hand. Zhao then returned to Tony and defendant, and defendant began looking through the loupe at something in his left hand.

¶ 8 With respect to this portion of the video, the following exchange occurred:

"Q. What do you see happening?

A. I see he gave the ring to Tony and they have like hand movements. He is getting the ring right here.

Q. Now what do you see the defendant doing?

A. Looks like he's picking up the ring.

[Defense Counsel]: Objection, Judge, as to what it looks like.

THE WITNESS: He is picking up the ring and the loupe.

THE COURT: There's an objection on the table. The Court is viewing the video at the same time as she's testifying. Overruled on her comments as to that question.

¶ 9 Defendant handed Zhao back a ring, which she placed on her index finger. Zhao spoke with defendant and Tony for a few minutes before Tony left the store. Zhao examined the ring given to her by defendant. She then called 911 and remained in the store with defendant until the police arrived. The trial court later sustained defendant's objection to Zhao's testimony where she stated, "when I turned around to the other guy, they switched the ring."

¶ 10 On cross-examination, defense counsel showed the video to Zhao again, and portions were rewound and replayed. Defense counsel questioned Zhao extensively regarding what she saw in the video asking, among other things, "so this is where they're switching the ring in your opinion?" Zhao answered, "yes."

¶ 11 Zhao further testified that, when the police arrived, defendant pretended that he did not know what was going on. Defendant showed the officer a ring he said he had previously purchased from someone else and some cash he had on him. Defendant denied stealing the ring.

¶ 12 Defendant testified that, on October 15, 2013, he went to the jewelry store with a person named "Victor." (The parties on appeal agree that "Victor" and "Tony" refer to the same individual. For simplicity and uniformity, we will refer to him as "Tony.") Defendant had met Tony before at a coffee shop, where a friend introduced them. He told Tony he was interested in buying a diamond about a week before going to the store. On October 15, defendant purchased a ring at another store before meeting Tony around 2 p.m. outside 5 South Wabash.

¶ 13 Defendant and Tony then went to Michael's Jewelry store. Tony introduced him to a woman behind the counter. Tony spoke to the woman who then brought out a ring and handed it

to Tony. As Tony was examining the ring, he told defendant to look at it. Defendant explained that he did not know about rings, but that his wife told him she wanted a four-carat ring. Defendant handed the ring back to the woman, and Tony asked for a bigger ring. Tony started leaving the store when the woman stated defendant did not give her the right ring. Defendant denied giving her the wrong ring and switching rings with Tony.

¶ 14 On cross-examination, defendant explained that he bought a different ring at 5 South Wabash for approximately $2,500, several days before going to Michael's Jewelry. Because his wife did not like this ring, he went with Tony to purchase another ring. Defendant's budget on a ring was about $50,000. On redirect, defendant explained he had obtained a court judgment of $500,000 stemming from a lawsuit he filed.

¶ 15 Chicago police officer Samuel Kendrick, Jr., testified that, on October 1, 2013, he responded to a call at 1 South Wabash. There, he observed several individuals including a store clerk and a man, identified in court as defendant. Kendrick learned that a ring had been taken. Defendant was taken into custody and a custodial search was performed. The search recovered a ring with a white stone from his pocket. The store clerk stated that this ring did not belong to her and that defendant was with another man.

¶ 16 The trial court found defendant guilty of theft by deception. It noted the video showed defendant switch and replace the authentic ring with something far less valuable. The court stated, "[t]he offense was played out on video and the State's interpretation of those motions and those actions is just accurate from what the Court saw as well."

¶ 17 Defendant filed a written motion for a new trial and two amendments. The trial court denied it, stating, *inter alia*, "[i]t was shown on tape. The witness who testified was there at all

times, at the time she was on tape. The Court saw for itself and needing no interpretation the defendant sitting at the counter of that jewelry store at all times when he was viewing—he was given the real diamond ring to view, and at all times when something was handed back to the clerk." The trial court sentenced defendant to 30 months' probation and ordered him to pay $32,000 in restitution. Defendant filed a timely notice of appeal.

¶ 18 On appeal, defendant argues (1) the trial court improperly admitted testimony by Zhao, a lay witness, where she was allowed to give opinion testimony regarding the switching of rings in the surveillance video, and (2) the evidence was insufficient to prove him guilty beyond a reasonable doubt, as it did not show that he knowingly obtained control over a diamond ring, with the attempt to permanently deprive the jewelry store.

¶ 19 Defendant argues that he was denied a fair trial where the court admitted improper opinion testimony from a lay witness, Zhao, who testified about the switching of the rings based on the surveillance video.

¶ 20 In order to be admissible, lay opinion witness testimony must be "(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony of the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702." Ill. R. Evid. 701 (eff. Jan. 1, 2011); *People v. Thompson,* 2016 IL 118667, ¶ 39.

¶ 21 We review the trial court's decision to admit lay opinion testimony for an abuse of discretion. See *People v. Gharrett*, 2016 IL App (4th) 140315, ¶ 79; *cf. Thompson*, 2016 IL 118667, ¶ 53 (reviewing the trial court's decision to admit lay opinion identification testimony for an abuse of discretion).

¶ 22 Defendant argues Zhao provided improper lay opinion testimony on cross-examination when defense counsel asked, "so this is where they're switching the ring in your opinion." As defense counsel specifically asked for Zhao's opinion, defendant cannot later argue on appeal that this was improper and grounds for reversal. *People v. Ramirez*, 2013 IL App (4th) 121153, ¶ 78; see *People v. Harvey*, 211 Ill. 2d 368, 386 (2004) ("neither defendant may now raise on appeal the error that they invited in the trial court").

¶ 23 Defendant also cites other instances where he claims that Zhao improperly provided opinion testimony regarding the switching of rings. First, defendant argues improper opinion testimony was admitted when Zhao testified, "later I was looking at the camera and I found out that they have some hand movements when he was trying to hand over the ring. And at the same time, there was another customer coming in asking for my help. And I think trying to divert my attention." Next, defendant points to Zhao's testimony where, over objection, she stated that it "looks like [defendant is] picking up the ring."

¶ 24 Defendant asserts that, because Zhao did not actually personally observe the rings being switched, she should not have been able to testify about when she thought the rings were switched.

¶ 25 Ultimately, we need not and do not decide whether the challenged testimony constituted improper opinion evidence. Even if it was, any error in admitting the testimony was harmless. See *People v. Oglesby*, 2016 IL App (1st) 141477, ¶ 271. A reviewing court will consider, in determining whether an error is harmless, the following factors: "(1) whether the error contributed to the conviction; (2) whether the other evidence in the case overwhelmingly supported the conviction; and (3) whether the improperly admitted evidence was cumulative or

duplicative of the properly admitted evidence." *People v. Littleton*, 2014 IL App (1st) 121950, ¶ 66.

¶ 26 Here, the record shows the trial court did not rely on Zhao's opinions in reaching its determination of guilt. Defendant argues that the trial court, by stating "[t]he offense was played out on video and the State's interpretation of those motions and those actions is just accurate from what the Court saw as well" shows it relied on Zhao's opinion. We disagree. A straightforward reading of that line indicates the trial court was referencing the State's closing argument, which occurred moments earlier, rather than Zhao's testimony. Further, at the hearing on a motion for a new trial, the court stated, "[t]he Court saw for itself and need[ed] no interpretation" that the video showed the rings were switched. Because the trial court did not consider Zhao's opinion, any error in its admission was harmless. See *Oglesby*, 2016 IL App (1st) 141477, ¶ 272.

¶ 27 Moreover, the other evidence overwhelming supported the conviction. Before being shown the video at trial, Zhao testified that she handed defendant a size 4.75 "three carat 65 round, round brilliant cut diamond [] mounted in a solitary ring that has four prongs." Defendant then inspected this ring with Tony before a ring was eventually handed back to Zhao. Zhao observed that this new ring was a bigger size and a different color than the ring originally given to defendant. Specifically, she testified the original ring was slightly yellow and "has an inclusion by the prong of the stone," while the ring returned to her had "a lot whiter stone and a cubic zirconia does not have any inclusions." Thus, Zhao's testimony before viewing the video, which was based on her personal knowledge, overwhelming supports defendant's conviction.

¶ 28 Furthermore, Zhao's testimony was generally duplicative of the properly admitted video evidence. Although her testimony arguably contained impermissible opinion—*e.g.*, her conclusion about when defendant and Tony switched the rings—the vast majority of her testimony merely describes what can plainly be seen on the video.

¶ 29 Finally, defendant's reliance on *People v. Sykes*, 2012 IL App (4th) 111110, is misplaced. In *Sykes*, a loss-prevention officer was allowed to testify to the contents of a surveillance video depicting the defendant committing a theft. *Id.* ¶ 6. The officer did not personally witness the theft but later reviewed the surveillance tape as part of his investigation. *Id.* The jury was then shown a blurry copy of the video, and the officer described what he had seen on the original clearer, video. *Id.* ¶ 9.

¶ 30 On appeal, the appellate court found that the officer's "testimony regarding his observations from the original VHS recording he viewed on the VCR that recorded the video was inadmissible lay opinion testimony and invaded the province of the jury." *Id.* ¶ 34. The court further found that, because the only issue the jury needed to determine was whether defendant removed money from a cash register, as depicted by the blurry video introduced into evidence, the officer was in no better position to make that determination than the jury, and his testimony therefore invaded the province of the jury. *Id.* ¶ 42. Based on the admission of improper opinion testimony and the State's subsequent closing argument that relied on this improper opinion testimony, the appellate court reversed the defendant's conviction. *Id.* ¶¶ 56-57, 70.

¶ 31 We find *Sykes* to be distinguishable. *Sykes* involved a jury trial where the only evidence of the defendant's guilt was the blurry surveillance video, and the officer's testimony regarding it invaded the province of the jury. See *id.* ¶¶ 42, 68. In the present case, any improper admission

of lay opinion testimony was harmless, because the trial court did not rely on it in finding defendant guilty, and Zhao's testimony prior to the video was overwhelming evidence of guilt. Accordingly, *Sykes* is distinguishable, and we reject defendant's contention that the trial court's admission of improper opinion testimony warrants a new trial.

¶ 32 Defendant next argues the evidence was insufficient to prove him guilty beyond a reasonable doubt. When reviewing the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31. In a bench trial, the trial judge, as the trier of fact, is tasked with determining the credibility of witnesses, weighing the evidence and any inferences derived, and resolving any conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). We will not reverse a conviction unless "the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 33 In order to sustain a conviction for theft by deception, the State must prove the defendant knowingly obtained, by deception, control over property of the owner and intended to deprive the owner permanently of the use or benefit of the property. 720 ILCS 5/16-1(a)(2)(A) (West 2012); *People v. Kotlarz*, 193 Ill. 2d 272, 299 (2000). Deception means to knowingly "[c]reate or confirm another's impression which is false and which the offender does not believe to be true." 720 ILCS 5/15-4(a) (West 2012); *Kotlarz*, 193 Ill. 2d at 302. "A defendant's intent is rarely susceptible of direct proof and is generally proved circumstantially." *People v. Jiles*, 364 Ill.

App. 3d 320, 332 (2006). Intent may be inferred (1) from the defendant's conduct surrounding the act and (2) from the act itself. *People v. Phillips*, 392 Ill. App. 3d 243, 259 (2009).

¶ 34 Viewing the evidence in the light most favorable to the State, we find it was sufficient to prove defendant guilty beyond a reasonable doubt of theft by deception. Here, defendant knowingly obtained by deception control over the 3.65 carat diamond ring by entering into the store with Tony, who previously told Zhao he had a client interested in the ring. Tony then asked to see the ring, and defendant took the ring from Zhao as a potential buyer. Zhao testified this ring was a size 4.75 and valued at $39,800. It further had a jade color, which is slightly yellow and "has an inclusion by the prong of the stone." Defendant began inspecting the ring with a loupe before Zhao walked away to speak with another customer. At this point, the surveillance video showed defendant move his left hand towards Tony while lowering his right hand. Tony then moved his left hand towards defendant's left hand. Defendant then moved his right hand towards Tony's left hand and used his left hand to take something from Tony's left hand. When Zhao returned, defendant was examining an object with the loupe.

¶ 35 The deception occurred when defendant switched the ring with a cheaper cubic zirconia and represented to Zhao that it was the original ring. Specifically, Zhao testified that defendant handed her back a bigger ring, which she was able to fit on her index finger. Zhao believed this ring was a size 6, rather than the size 4.75 she had given to defendant. She further determined the ring returned to her was whiter in color and did not have any inclusions. Finally, the intent to permanently deprive the store of the ring was established when defendant apparently gave the 3.65 carat diamond ring to Tony, who later left the store. The evidence was therefore sufficient to prove defendant guilty of theft by deception.

¶ 36 Defendant argues that the State failed to prove him guilty beyond a reasonable doubt, because Zhao did not see the rings being switched and instead relied on the surveillance video, which was inconclusive. However, Zhao testified that she gave defendant a 3.65 carat diamond ring and later received back a cubic zirconia ring. She testified to how she knew the rings were not the same and explained in great detail those differences based on her inspection of the ring and not the surveillance video. We conclude her testimony supported a finding that defendant switched the rings, and she was not required to have actually seen the rings being exchanged in order to sustain the conviction. Further, the trial court independently reviewed the surveillance video, which showed furtive hand movements between defendant and Tony when Zhao was attending to another customer, leading to the reasonable inference that the rings were switched at this point.

¶ 37 Defendant also contends that Zhao based her testimony on the surveillance video and that video fails to show "if [defendant] had a fake ring on him, if [defendant] switched the real diamond ring with a fake ring, when the rings were allegedly switched, and if [defendant] hid the real diamond ring." However, the video did not need to resolve these issues in order to sustain the conviction. As discussed, the State had to prove defendant knowingly obtained, by deception, control over the ring with the intent to deprive the store permanently of its use or benefit. Zhao's testimony regarding the original ring she handed defendant and the ring she received back satisfies these elements. See *People v. Smith*, 185 Ill. 2d 532, 541 (1999) ("[t]he testimony of a single witness, if it is positive and the witness credible, is sufficient to convict"). Moreover, the surveillance video, showing defendant's and Tony's hand movements while Zhao was interacting with another customer, leads to an inference that the rings were switched at that point.

¶ 38 Defendant seems to further argue that, because he had the necessary funds to purchase the ring, the State did not prove he had the requisite intent to deprive the store of the ring. We disagree. Defendant raised this argument at trial and the court rejected it. We will not substitute our judgment for that of the trier of fact. *People v. Hutchison*, 2013 IL App (1st) 102332, ¶ 37. Moreover, "the trier of fact is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt." *Siguenza-Brito*, 235 Ill. 2d at 229.

¶ 39 Defendant next argues that the evidence failed to show he was accountable for Tony's theft of the ring. Specifically, defendant argues that, even if the State proved the rings were switched, the State still failed to prove defendant guilty, as there was no evidence he knew about Tony's plan or acted in concert with him. We disagree for two reasons. First, the State did not need to prove defendant was accountable for the theft, as the evidence established defendant's participation as a principal.

¶ 40 Second, the evidence also supports defendant's guilt under an accountability theory. A defendant may be convicted under an accountability theory if, either before or during the commission of the offense, with the intent to promote or facilitate that commission, he solicited, aided or abetted another person in the planning or commission of the offense. See 720 ILCS 5/5-2(c) (West 2012); *People v. Fernandez*, 2014 IL 115527, ¶ 13. In order to prove intent to promote or facilitate the crime, the State must establish beyond a reasonable doubt that either (1) defendant shared the criminal intent, or (2) there was a common criminal design. *People v. Perez*, 189 Ill. 2d 254, 266 (2000).

¶ 41 "Accountability may be established through a person's knowledge of and participation in the criminal scheme, even though there is no evidence that he directly participated in the criminal act itself." *Id.* at 267. However, a defendant's mere presence at the scene of the offense is not sufficient to render him accountable. *People v. Taylor*, 186 Ill. 2d 439, 446 (1999).

¶ 42 The evidence presented at trial established that defendant aided Tony in the commission of the theft. Defendant entered the store with Tony, accepted the 3.65 carat diamond ring from Zhao, and inspected it with a loupe. We have already described the surveillance video capturing furtive hand movements between defendant and Tony while Zhao attended to another customer. When Tony left the store, defendant handed a cubic zirconia ring back to Zhao. A rational trier of fact could easily conclude that defendant directly participated in the theft of the diamond, and that defendant was more than simply present at the scene as a bystander.

¶ 43 We affirm the judgment of the circuit court of Cook County.

¶ 44 Affirmed.