2018 IL App (1st) 163049-U

No. 1-16-3049

Order filed December 27, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 18094
	)	
SETH BALSAM,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Evidence was sufficient to convict defendant of felony theft and use of counterfeited, forged, expired, revoked, or unissued credit or debit card. Charging instrument for latter offense, which defendant did not challenge before trial, was sufficiently specific to not constitute reversible error.

¶ 2 Following a 2016 bench trial, defendant Seth Balsam was convicted of felony theft and use of counterfeited, forged, expired, revoked, or unissued credit or debit card, and sentenced to concurrent probation terms of 30 months with community service, restitution, fines, and fees. On

appeal, defendant contends that (1) the evidence was insufficient to convict him of theft, (2) the charging instrument for use of counterfeited, forged, expired, revoked, or unissued credit or debit card was facially deficient, and (3) the evidence was insufficient to convict him of use of counterfeited, forged, expired, revoked, or unissued credit or debit card. We shall first consider his insufficiency claims regarding both counts, and then his challenge to the charging instrument. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with felony theft for knowingly obtaining unauthorized control over property of WMS Industries (WMS) – to wit, currency exceeding $10,000 but not $100,000 – with the intent to permanently deprive WMS of the use and benefit thereof. 720 ILCS 5/16-1(a)(1)(A) (West 2014). In the same information, defendant was charged with use of counterfeited, forged, expired, revoked, or unissued credit or debit card for knowingly using an American Express credit card ending in a specified number, issued to himself and WMS, with the intent to defraud WMS and using it in excess of $150 in a six-month period. 720 ILCS 5/17-36 (West 2014).

¶ 4 Defendant did not challenge the charging instrument before trial.

¶ 5 At trial, Karen Plendl testified to being a human resources manager for WMS in 2014. Defendant was employed by WMS until his employment was terminated on January 31, 2014. WMS issued American Express corporate credit cards to certain employees, to be used for business purposes such as travel expenses. Employees did not have permission to use the card for personal expenses. "WMS paid the entire bill, and the employee received a copy of the bill to their personal address at home, and then it was their responsibility to prepare and submit an expense report with the business-related expenses." Thus, each credit card bill went to WMS and

to the employee issued a card, and WMS retained its copy. WMS also kept a copy of the cardholder agreement with American Express.

¶ 6 When defendant was terminated on January 31, 2014, he had no authorized employment-related expenses and no further affiliation with WMS. However, an issue arose in July 2014 about the credit card issued to defendant "on the WMS account." Plendl reviewed the statements for the card issued to defendant, for February through June 2014, and reviewed the cardholder agreement. She found charges that were not business-related and were incurred after his employment terminated. Plendl was informed by the WMS accounts-payable department that WMS had paid the February and March statements.

¶ 7 Plendl sent defendant a letter on July 16, 2014, and attached the statements for February through June. Plendl did not hear from defendant after the letter was sent. She identified a copy of the cardholder agreement with American Express. She also identified the statements for the card issued to defendant for February through June as the copies received and retained by WMS.

¶ 8 On cross-examination, Plendl testified that defendant was hired by WMS in December 2013. However, she could not recall what he was informed of during employee orientation, and thus could not recall whether he was told of WMS policy on corporate credit cards. The employee handbook did not include that policy. When a corporate American Express card was issued, "the employee has to apply for that card through WMS and American Express." The card is sent to the employee, as he or she is the person listed in the cardholder agreement as the cardholder. The cardholder agreement for defendant indicated that he was personally liable for all charges that were not business-related. WMS's policy was that an expense report would have to be filed for WMS to pay American Express. As best as Plendl knew, defendant did not submit

any expense reports for charges on the card at issue. The statements Plendl read, indicating payments to American Express, did not indicate who made the payments. She did not review the WMS records indicating who paid those statements. She did not know if defendant received the July 16 letter, but she had a receipt that it was delivered.

¶ 9 Police detective Robert Ross testified that he met with WMS's director of corporate security in September 2014. Ross reviewed documents provided by the director, then conducted an investigation, after which he was seeking to interview defendant. Ross met with defendant at the police station on September 29. After being advised of his *Miranda* rights, he admitted that "he knew he was wrong for what he had done by using the company credit card for personal transactions." He conceded that he had been employed by WMS but was terminated in January 2014. When Ross reviewed the credit card statements provided by WMS, indicating various charges, defendant admitted that he made those transactions and that they were not business-related because he was no longer employed by WMS. He admitted that he was liable to WMS for about $10,000 and owed American Express $7000. Defendant maintained that he did not receive the July 2014 letter because he was out-of-town when it was sent.

¶ 10 On cross-examination, Ross reiterated that defendant came to the police station because he and Ross had arranged an interview. Even though WMS provided the cardholder agreement, Ross did not read the agreement in detail. Ross also did not know who owned the credit card at issue. Ross did not examine the statements to learn whether or by whom payments were made. Defendant did not claim in the interview that someone other than himself incurred the charges on the statements, and he admitted that he was responsible for the charges. On redirect examination, Ross testified that the charges on the statements totaled over $17,000.

¶ 11 The record on appeal includes copies of the letter, cardholder agreement, and statements, all of which were admitted into evidence without objection. The letter demanded payment to WMS, within 15 days of its sending on July 16, 2014, of $17,993.06 for purchases on the corporate credit card not for business purposes and "in violation of the Cardmember Agreement." The letter stated that "WMS will take all necessary actions, including pursuing legal remedies to protect its rights," if payment was not received. The February statement reflected new charges of $6016.12 and payments of $65. The March statement reflected new charges of $4296.94 and payments of $5999.36. The April statement reflected new charges of $2484.36 and payments of $4480.89. The May statement reflected new charges of $3123.21 and payments of $120. The June statement reflected new charges of $2537.86 and no payments.

¶ 12 Defense counsel made a motion for directed finding, arguing in part that the charge of use of counterfeited, forged, expired, revoked, or unissued credit or debit card did not allege all the elements of that offense. Following arguments by the parties, the court denied the motion.

¶ 13 The court found defendant guilty as charged, finding that his statement to Detective Ross indicated or acknowledged his intent.

¶ 14 Defendant's posttrial motion, as amended, challenged the sufficiency of the evidence and the admission of Plendl's testimony regarding WMS's payments to American Express for the credit card at issue. The written initial and amended motions did not include defendant's directed-finding claim that the charge of use of counterfeited, forged, expired, revoked, or unissued credit or debit card did not allege all the elements of that offense. The court denied the posttrial motion.

¶ 15 The court sentenced defendant to concurrent probation terms of 30 months, with 30 hours' community service, $10,000 restitution, and $734 in fines and fees.

¶ 16 On appeal, defendant contends that the evidence was insufficient to convict him beyond a reasonable doubt of felony theft and use of counterfeited, forged, expired, revoked, or unissued credit or debit card.

¶ 17 On a claim of insufficient evidence, we must determine whether, taking the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Gray*, 2017 IL 120958, ¶ 35. It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence, and it is better equipped than this court to do so as it heard the evidence. *Id.*; *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. We do not retry a defendant; that is, we do not substitute our judgment for that of the trier of fact on witness credibility or the weight of evidence. *Gray*, 2017 IL 120958, ¶ 35.

¶ 18 A trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. *Jonathon C.B.*, 2011 IL 107750, ¶ 60. Instead, it suffices if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *Id*. The trier of fact is not required to disregard inferences that flow normally from the evidence, nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *Id*. We will not find a witness incredible merely because a defendant says so. *Gray*, 2017 IL 120958, ¶ 36. Similarly, a conviction will not be reversed merely because there was contradictory evidence, as the task of the trier of fact is determining if and when a witness testified truthfully, and minor or collateral discrepancies need not render a witness's entire

testimony incredible. *Id.* ¶¶ 36, 47. A conviction will be reversed only if the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Id*. ¶ 35.

¶ 19 A person commits theft when he knowingly obtains or exerts unauthorized control over property of another with the intent to permanently deprive the owner of the use and benefit of that property. 720 ILCS 5/16-1(a)(1)(A) (West 2014). It is a Class 2 felony when the property stolen exceeds $10,000 but not $100,000. 720 ILCS 5/16-1(b)(5) (West 2014). "It is no defense to a charge of theft of property that the offender has an interest therein, when the owner also has an interest to which the offender is not entitled." 720 ILCS 5/16-1(f)(1) (West 2014).

¶ 20 A person commits use of counterfeited, forged, expired, revoked, or unissued credit or debit card when, with the intent to defraud the issuer, a person providing an item or items of value, or anyone else, he:

> "(i) uses, with the intent to obtain an item or items of value, a credit card or debit card obtained or retained *** without the cardholder's consent, or a credit card or debit card which he or she knows is counterfeited, or forged, or expired, or revoked[,] or,"
>
> "(ii) obtains or attempts to obtain an item or items of value by representing without the consent of the cardholder that he or she is the holder of a specified card or by representing that he or she is the holder of a card and such card has not in fact been issued." 720 ILCS 5/17-36 (West 2014).

¶ 21 It is axiomatic that intent is properly and typically inferred from the circumstances, including the natural and probable consequences of one's actions. *People v. Robards*, 2018 IL App (3d) 150832, ¶ 14.

¶ 22 Here, taking the evidence in the light most favorable to the State as we must, we cannot conclude that no reasonable trier of fact would find defendant guilty of theft and use of counterfeited, forged, expired, revoked, or unissued credit or debit card. In particular, the evidence seen in the light most favorable to the State showed that defendant retained the credit card at issue without the consent of the joint or mutual cardholder, WMS, and used the card with the intent to obtain items of value for himself at WMS's expense.

¶ 23 The cardholder agreement shows that WMS, as the "Company" therein, was "the entity in whose name the Corporate Card account is opened and whose name appears, in most instances, on the Corporate Card under your name." The credit card statements in the record indeed show "WMS" underneath defendant's name. It is thus reasonable to infer that WMS was the joint or mutual cardholder with defendant. Furthermore, it is reasonable to infer from the evidence of defendant's termination in January 2014, and the statements indicating charges on the card in months following his termination, that defendant incurred charges on the card without WMS's consent because no charges after his termination could be related to WMS's business. A reasonable trier of fact could infer that defendant, by incurring charges on the WMS corporate credit card after his termination by WMS, knew that he was doing so without WMS's consent. Moreover, defendant admitted to Detective Ross that he made charges on the card, reflected on statements for months after his termination, and knew they were not business-related because he no longer worked for WMS.

¶ 24 As to defendant's intent to defraud WMS and deprive it of property, Plendl's testimony indicated that WMS generally paid the statements sent to it, and particularly paid statements on defendant's corporate card after his termination. Also, Plendl sent defendant a letter in July 2014

giving him an opportunity to pay the charges before WMS would take legal action, and Plendl had proof of delivery. We need not raise to reasonable doubt the possibility that defendant was unaware (1) that WMS would pay the statements it received, or (2) of the letter that Plendl sent him. *Jonathon C.B.*, 2011 IL 107750, ¶ 60. It is a natural consequence of continuing to incur charges on a corporate credit card following termination, with the statements sent to the company for payment, that the company may pay the charges despite the termination. That is borne out by the evidence that WMS paid statements on defendant's corporate card despite his earlier termination. Moreover, as the court noted, defendant effectively admitted his knowledge and intent by his admission to Detective Ross that he owed $10,000 to WMS, separate from owing American Express $7000. In sum, we do not find the evidence of defendant's guilt to be so unreasonable, improbable, or unsatisfactory that a reasonable doubt of his guilt remains.

¶ 25 Defendant also contends, regarding the offense of use of counterfeited, forged, expired, revoked, or unissued credit or debit card, that the charging instrument was facially defective because it failed to allege material elements of the offense.

¶ 26 A criminal defendant has a fundamental right to be informed of the nature and cause of criminal accusations made against him. *People v. Carey*, 2018 IL 121371, ¶ 20. Section 111-3 of the Code of Criminal Procedure requires that a criminal charge be in writing and allege the commission of an offense by (1) stating the name of the offense, (2) citing the statutory provision alleged to have been violated, (3) setting forth the nature and elements of the offense, (4) stating the date and county of the offense, and (5) stating the name of the accused, if known. 725 ILCS 5/111-3(a) (West 2014). "This rule 'protects the defendant against being forced to speculate as to the nature or elements of the underlying offense, thus spreading his resources thin, attempting to

rebut all of the possibilities, while the prosecutor merely focuses on the most promising alternative and builds his case around that.' " *Carey*, 2018 IL 121371, ¶ 20 (quoting *People v. Hall*, 96 Ill. 2d 315, 320 (1982)).

¶ 27 When a defendant challenges the charging instrument, the timing of said challenge is key in determining whether his conviction must be reversed as a result of errors or omissions therein. *Id.* ¶ 21. If he raises the challenge before trial, the charging instrument must strictly comply with section 111-3(a). *Id*. If he does not raise it before trial, he must show that he was prejudiced in the preparation of his defense. *People v. Espinoza*, 2015 IL 118218, ¶ 23. When strict compliance is not required, the charging instrument is sufficient if it notified the defendant of the precise offense charged with enough specificity to allow him to prepare his defense and to plead the resulting conviction as a bar to future prosecution arising out of the same conduct. *Carey*, 2018 IL 121371, ¶ 22. The question is whether the charging instrument was so imprecise as to prejudice his ability to prepare a defense. *Id*. If we cannot say that a charging instrument error inhibited the defendant in the preparation of his defense, we cannot conclude that he suffered any prejudice. *Id*.

¶ 28 In making this determination, we may consider the charging instrument in light of the record. *Id*. We read all counts of a multiple-count charging instrument as a whole, so that elements missing from one count may be supplied by another count. *Id.* ¶ 25. The defendant bears the burden of showing that he was prejudiced in the preparation of his defense. *People v. Davis*, 217 Ill. 2d 472, 479 (2005). The sufficiency of a charging instrument is an issue of law reviewed *de novo*. *Carey*, 2018 IL 121371, ¶ 19.

¶ 29 Here, we find the count at issue to be sufficiently specific to not constitute reversible error. It alleged that defendant, between January 31 and June 13, 2014, knowingly used an American Express credit card ending in a specified number, issued to himself and WMS, with the intent to defraud WMS and with the value exceeding $150 in a six-month period. We conclude that this informed him which credit card was at issue, who the alleged victim was, when he was alleged to have improperly used the card, that his use was alleged to have been improper ("with intent to defraud"), and the statute he was alleged to have violated thereby, 720 ILCS 5/17-36 (West 2014). Also, by alleging that the card was issued partially to defendant, the count notified him that he was not being accused of using a counterfeited, forged, or unissued card. This was ample specificity from which to prepare a defense.

¶ 30 Moreover, the record sets forth that trial counsel mounted a capable defense, arguing that defendant was duly issued the credit card in question and was personally liable for all charges thereon under the cardholder agreement so that he did not have the requisite intent for either offense. Where a defendant's defense amounted to a complete denial of criminal activity, he cannot show that he was prejudiced by the charging instrument's lack of specificity. *People v. Stephenson*, 2016 IL App (1st) 142031, ¶ 22. We see no indication on this record that defendant's defense was hampered by any omissions or lack of specificity in the count at issue.

¶ 31 Lastly, the count at issue is certainly specific enough to preclude a double-jeopardy issue from this conviction. *Carey*, 2018 IL 121371, ¶ 22. Defendant could interpose the instant conviction if he were later charged with improperly using the card specified in the count within the time period specified in the count. We conclude that the count was sufficiently specific to not constitute reversible error.

¶ 32 Accordingly, the judgment of the circuit court is affirmed.

¶ 33 Affirmed.