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2019 IL App (3d) 160005-U

Order filed February 5, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-16-0005 Circuit No. 15-CF-241
JEAN A. O'BRIEN,)	Honorable Paul P. Gilfillan, Judge, presiding.
Defendant-Appellant.)	

JUSTICE CARTER delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* The evidence presented by the State was sufficient to prove defendant guilty of retail theft beyond a reasonable doubt. Defendant was not deprived of her right to the effective assistance of counsel.
- ¶ 2 Following a jury trial, defendant, Jean O'Brien, was convicted of retail theft (720 ILCS 5/16-25(a)(1) (West 2014)), and sentenced to one year of imprisonment. Defendant appeals, arguing: (1) the State failed to prove that she intended to permanently deprive Kohl's department store of the possession, use, or benefit of the subject merchandise to support her conviction for

retail theft; and (2) her counsel provided ineffective assistance by agreeing that the State could elicit certain testimony from the Kohl's loss prevention officer. We affirm the trial court's judgment.

¶ 3

FACTS

¶ 4

Defendant was charged with retail theft (720 ILCS 5/16-25(a)(1) (West 2014)), with the superseding indictment alleging that on or about February 14, 2015, defendant, who had previously been convicted of retail theft in Tazewell County (case no. 08-CF-600), knowingly took possession of merchandise offered for sale at Kohl's, a retail mercantile establishment, with the said merchandise having a retail value not exceeding \$300, with defendant having the intent to permanently deprive Kohl's of the possession, use, or benefit of said merchandise, without paying the full retail value of said merchandise.

¶ 5

Prior to trial, the State filed a motion *in limine*, to include evidence of defendant's prior criminal convictions as impeachment evidence if defendant testified. Defendant's criminal history included three convictions in the last 10 years for retail theft and one conviction in the last 10 years of theft. (The last offense took place in 2012, with a sentencing date of 2013, and this offense occurred in 2015). Defendant's attorney opposed the motion, arguing defendant would be prejudiced because defendant's prior convictions involved offenses that were too similar to the alleged offense in this case. The trial court allowed the motion in part, ruling that defendant's prior convictions for retail theft were inadmissible and defendant's 2012 theft conviction was admissible. The trial court instructed the State to only reference the prior theft conviction once in impeachment if defendant testified and only once during closing arguments.

¶ 6

On October 26, 2015, defendant's jury trial began. Prior to opening statements, defendant's attorney informed the trial court that he had just been handed a report and requested

a 10 minute recess to review the report with his client. After a short recess, defendant's attorney indicated the report was "nothing new" and that he was not going to make any objection "even though it is new material but it covers the same material that [he] ha[d] been provided."

Defendant's attorney indicated that the report "raise[d] another issue," in that the loss prevention supervisor for Kohl's, Susan Weber, who arrested defendant in this case, had also arrested defendant for retail theft in 2008. Defendant's attorney indicated that he wanted to show the jury that Weber knew defendant, but he did not want Weber to be questioned or testify regarding defendant's arrest for retail theft in 2008. The prosecutor indicated she intended to ask Weber why her attention was drawn to defendant and that the prosecutor had instructed Weber to respond that she had "previous professional contact with defendant," without mentioning the prior retail theft. Defendant's attorney responded that would be satisfactory.

¶ 7 Weber testified that she is a loss-prevention supervisor at Kohl's and has worked for Kohl's for over 20 years. On the evening of February 14, 2015, Weber was observing the store on the surveillance camera system. She began paying attention to defendant because she knew defendant from "a professional, previous encounter." Weber observed defendant make a return at the customer service desk and request and receive a bag of merchandise that she had placed on hold a few days earlier. The hold bag was tied closed and a paper hold slip was stapled to the bag. Defendant took the hold bag and a decorative piece of coral to the registers at the front of the store. Defendant placed the hold bag and the decorative coral piece on the counter but did not directly give the hold bag to the cashier. Weber left her office to observe the transaction between defendant and the cashier from five to seven feet away. Weber was not close enough to hear defendant and the cashier speaking.

¶ 8 Weber observed the cashier ring up and bag the piece of coral that defendant had placed on the counter. Defendant picked up the bag with purchased coral, picked up the hold bag, and walked out of the store. Weber did not observe defendant attempt to hand the cashier the hold bag to be rung up. Weber confirmed with the cashier that only one piece of coral had been rung up and then she followed defendant outside, detained defendant, and asked defendant to return to the store. When defendant and Weber were inside Weber's office, Weber examined the contents of the hold bag, which contained two additional pieces of coral.

¶ 9 On cross-examination, Weber testified that items on hold with the store are placed in a bag with a hold slip, while items purchased online for an in-store pick up are placed in a sealed bag after the customer signs off a form verifying the items were purchased. Placing merchandise in a bag could make an employee think the item had been purchased. All items that are placed on the checkout counter are supposed to be rung up by the cashier. Weber testified the cashier not ringing up the items in the hold bag was not a failure on the part of the cashier because defendant did not present the items to the cashier for purchase.

¶ 10 The surveillance video shows defendant walked from the customer service counter to a checkout register holding her large purse, paperwork or card with store credit, and her phone in her left hand, while cradling the piece of decorative coral in her left arm and clutching the hold bag with her right hand. The checkout counter was three or four feet long. As defendant faced the cashier, the cashier and the checkout scanner screen were on her left side. Defendant placed the hold bag on the counter on her right side toward the end of the counter further away from the checkout scanner, and she handed the cashier the decorative coral with both hands as the cashier reached to take the coral from defendant. The cashier rang up the coral, wrapped it in tissue paper, used the scanner gun to scan something from defendant's phone, and scanned what

appeared to be a coupon or card with store credit. The cashier bagged the decorative coral. The hold bag remained unopened and unmoved on the checkout counter to defendant's right. As the cashier took defendant's reward card and credit card or card with store credit, defendant picked up the unopened hold bag from the right side of the counter with her right hand and transferred it to her left hand. The cashier returned defendant's card by placing it on the counter in front of defendant. Defendant picked up the card. The cashier removed the receipt from the register, wrote or highlighted something on the receipt with a pen or marker, and placed the receipt down in front of defendant. Defendant picked up the receipt and walked out of the store with her purse, the hold bag, and the purchase bag in her left hand.

¶ 11 Officer Jeffrey Bieber testified that he was dispatched to Kohl's at approximately 7:30 p.m., on February 14, 2015. He spoke with Weber and defendant. After Bieber read defendant her *Miranda* rights, he questioned her about what happened and why she did not pay for some of the items. Defendant indicated she was in a hurry and was not paying attention. She did not notice paying only \$18 for items that should have cost over \$70 because she assumed she had bonus reward points giving her the discount. Defendant indicated she could not see very well and "maybe she did not notice the bag sitting on the counter." Bieber testified that defendant was texting almost the whole time he was speaking with her, and defendant did not appear to have any problems looking down at her phone.

¶ 12 Defendant testified that she was at Kohl's at 7 p.m. on February 14, 2015, to make two returns and pick up a small decorative coral that she had placed on hold the prior Saturday. The small coral that defendant had placed on hold was on sale for \$14.99 (regular price was \$29.99). The prior Saturday defendant had also signed up for the Kohl's rewards program and was told that once she registered online she would receive a 15% discount offer. When defendant went to

Kohl's on February 14, 2015, she picked up a large piece of coral from a display that was \$19.99. After picking up the large decorative coral, defendant completed her returns at the customer service counter, received an in-store merchandise credit, and was given a bag with the item she had placed on hold the prior Saturday. She did not open the hold bag, assuming it contained the small piece of decorative coral she had placed on hold. Defendant did not think the hold bag contained two pieces of decorative coral. Defendant testified that she put the items onto the checkout counter, including the item that had been placed on hold, intending to purchase two pieces of coral (the one she had carried over from the display and the one in the hold bag). Defendant asked the cashier if she could use her 15% off rewards offer, which she had received via email and which she had access to on her phone. The cashier scanned the coupon off defendant's cellular phone so that defendant could receive a discount on "the entire purchase." The cashier asked defendant for her rewards card and then told defendant the price of the purchase. Defendant handed the cashier her in-store merchandise credit card, which the cashier swiped and handed back to defendant. The cashier did not ask for any additional money, which alerted defendant that the price seemed low because she anticipated the purchase would have exceeded the amount of her merchandise credit. Defendant asked, "is that right?" The cashier responded that it was correct because "they're \$19.99, less 50 percent off, less the 15 percent off." The screen went black as the cashier explained the price, cashed out the transaction, and handed defendant the receipt. Defendant accepted the cashier's answer, put the receipt in her purse, and left the store. Defendant never considered that the cashier failed to ring up either of the two items, and she did not intend to take advantage of Kohl's by trying to get some decorative coral without paying for it. Shortly after February 14, 2015, defendant had an eye

exam and received glasses because she had difficulty reading things up close, including small print. She would not have been able to read the receipt without glasses.

¶ 13 On cross-examination, defendant testified that she knew the items in the hold bag had not been paid for when she picked the hold bag up from the customer service counter. Defendant acknowledged that she did not hand the cashier the hold bag but, rather, placed it on the counter. Defendant did not observe the cashier ring up the items in the hold bag. She did not look at her receipt and would have been unable to read the receipt if she had looked at it. In 2012, defendant had been convicted of theft in a prior, unrelated case.

¶ 14 The jury found defendant guilty of retail theft. Defendant filed a motion for a new trial, or a judgment notwithstanding the verdict, which the trial court denied. The trial court sentenced defendant to one year of imprisonment. Defendant filed a motion for the trial court to reconsider the sentence, which the trial court denied.

¶ 15 Defendant appealed.

¶ 16 ANALYSIS

¶ 17 I. Sufficiency of the Evidence

¶ 18 On appeal, defendant first argues the State failed to prove her guilty of retail theft beyond a reasonable doubt because the State failed to show that she had intended to permanently deprive Kohl's of the possession, use, or benefit of merchandise without paying for it where she "placed the hold bag on the counter and made a reasonable, yet mistaken, assumption that the cashier would do her job and ring up its contents." The State argues that the evidence presented at trial was sufficient to prove defendant guilty of retail theft beyond a reasonable doubt.

¶ 19 A reviewing court faced with a challenge to the sufficiency of the evidence must view all the evidence in the light most favorable to the prosecution to determine whether any rational trier

of fact could have found the elements of the crime were proven beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985); *People v. Holman*, 2014 IL App (3d) 120905, ¶ 56. The reviewing court must allow all reasonable inferences that could be drawn from the evidence in favor of the prosecution. *Holman*, 2014 IL App (3d) 120905, ¶ 56. Determinations of a witness's credibility, the weight to be given to testimony and evidence, and the reasonable inferences to be drawn from the evidence are the responsibility of the trier of fact, with the trier of fact resolving any conflicts in testimony. *Id.* A reviewing court will not reverse a conviction on the basis of insufficient evidence unless the evidence is so improbable, unsatisfactory, or inconclusive that it leaves reasonable doubt of defendant's guilt. *Id.*

¶ 20 Here, defendant contends that the evidence was insufficient to convict her of retail theft because the State failed to prove intent—that her conscious objective or purpose was to take possession of or carry away the decorative coral in the hold bag without paying for it. See 720 ILCS 5/4-4 (West 2014) (a person intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described within the statute when his or her “conscious objective or purpose is to accomplish that result or engage in the conduct”). Defendant challenges the sufficiency of the State's evidence only in regard to the element of her intent.

¶ 21 The element of retail theft of the defendant's intent to retain permanent unauthorized control of merchandise can be inferred from circumstantial evidence. *People v. DePaolo*, 317 Ill. App. 3d 301, 307 (2000). In viewing the evidence in the light most favorable to the prosecution, it can be concluded that a rational juror could have reasonably inferred that defendant intended to permanently deprive Kohl's of the possession, use, or benefit of the decorative coral without paying for it where defendant placed the sealed hold bag on the side of the counter away from the cashier without further acknowledging it, knowing the sealed bag

contained at least one item that had not been purchased, removing the bag from the checkout counter after the purchase price for the first item had been totaled, and walking out of the store with it, even though the hold bag remained unopened and did not pass down the counter or through the checkout scanner and was never touched by the cashier. Therefore, we conclude the evidence was sufficient to prove defendant guilty of retail theft beyond a reasonable doubt.

¶ 22

II. Ineffective Assistance of Counsel

¶ 23

Defendant next argues that her counsel provided ineffective assistance by agreeing that the State could elicit testimony from Weber (the loss prevention supervisor at Kohl's) indicating that Weber had directed her attention to defendant because she knew defendant from a previous professional encounter. Defendant argues that the jury would have easily inferred that defendant previously committed retail theft in Kohl's based on this testimony because Weber had testified she had been working as a loss prevention officer at Kohl's for the past 20 years and Weber would not have focused on defendant if defendant had not done anything wrong in their "prior encounter." The State argues that defendant's counsel was not ineffective because allowing the jury to know that Weber knew defendant from a prior encounter was part of counsel's trial strategy.

¶ 24

Ineffective assistance of counsel is shown where counsel's representation falls below an objective standard of reasonableness and defendant was prejudiced by counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 686-693 (1984); *People v. Albanese*, 125 Ill. 2d 100, 106 (1988). There is a strong presumption that trial counsel's actions were the result of trial strategy rather than incompetence, and a court of review will not second-guess counsel's decisions involving use of counsel's discretion or strategy. *People v. Brown*, 2017 IL App (3d) 140921, ¶ 21.

¶ 25 Here, the record indicates that part of defense counsel’s strategy was for the jury to know that Weber had a prior encounter with defendant to show that Weber had intentionally focused on defendant while she was in the store because of their prior encounter. In closing arguments, defense counsel argued that Weber knew defendant “from the get-go” and zoomed in and out on defendant with the cameras. The argument supported the theory that, based on Weber’s preconception of defendant, defendant’s arrest was an overreaction by Weber to an innocent oversight on the part of both defendant and the employees of Kohl’s. Defense counsel’s strategy to argue that defendant had been targeted by Weber “from the get-go” proved to be unsuccessful but does not, however, equate to deficient performance. Additionally, as discussed above, defendant’s intent was proven beyond a reasonable doubt so that she was not prejudiced by her attorney’s decision to agree to Weber testifying to having had a prior professional encounter with defendant. Therefore, defendant’s counsel did not provide ineffective assistance.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Tazewell County is affirmed.

¶ 28 Affirmed.