2017 IL App (4th) 150437-U

NOS. 4-15-0437, 4-15-0438 cons.

FILED
October 25, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. (No. 4-15-0437) BRENDA ANN MARTIN, Defendant-Appellant.	)	Appeal from Circuit Court of McLean County No. 14CM1270
THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. (No. 4-15-0438) BRENDA ANN MARTIN, Defendant-Appellant.	)	No. 14CM1265 Honorable William A. Yoder, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court (1) affirmed defendant's convictions, (2) vacated the public-defender fees and lump-sum surcharge fine, and (3) credited defendant with $15 in *per diem* credit for three days spent in custody.

¶ 2 In July 2014, the State charged defendant, Brenda Ann Martin, with retail theft (720 ILCS 5/16-25(a)(1) (West 2014)) (McLean County case No. 14-CM-1265) and possession of stolen property (720 ILCS 5/16-1(a)(4) (West 2014)) (McLean County case No. 14-CF-1270). Following April 2015 bench trials, the trial court found defendant guilty in both cases and imposed a $100 public-defender fee in each case.

¶ 3 Defendant appeals, asserting (1) the evidence in both cases was insufficient to support her convictions, (2) the public-defender fees assessed in both cases must be vacated, (3)

she is entitled to $15 in *per diem* credit for the three days she spent in custody in McLean County case No. 14-CM-1265, and (4) the clerk-imposed lump-sum surcharge fine must be vacated in McLean County case No. 14-CM-1265. We affirm in part and vacate in part.

¶ 4 I. BACKGROUND

¶ 5 A. Retail-Theft Case
(McLean County Case No. 14-CM-1265)

¶ 6 In July 2014, the State charged defendant with retail theft, a Class A misdemeanor, alleging she knowingly took possession of certain items of general merchandise intended for sale at Walmart, a retail mercantile establishment, with the intention of permanently depriving Walmart of the use or benefit of the products and without paying the full retail value of that merchandise. 720 ILCS 5/16-25(a)(1) (West 2014).

¶ 7 Defendant waived her right to a jury trial and the case proceeded to a bench trial in April 2015. No transcript exists of the bench trial; however, the parties submitted an agreed bystander's report.

¶ 8 Dane Kaldahl testified he is an asset-protection agent for Walmart. On July 19, 2015, Kaldahl observed defendant selecting certain items from the shelves at Walmart and placing them in her purse. He then observed defendant proceed to the store exit, passing all points of purchase without attempting to pay for the merchandise. Kaldahl stopped defendant after she passed the last point of sale and escorted her to a Walmart office, where he retrieved 12 to 15 merchandise items from her purse. During this time, Kaldahl did not see anyone with defendant. On cross-examination, Kaldahl acknowledged a customer who wanted to use a motorized scooter could only retrieve one at the front of the store, which is past the last point of purchase.

¶ 9 Officer Michael Johnson testified he responded to a call from Walmart about a theft. When he arrived, he observed defendant to be confrontational, and his search of her purse yielded several merchandise items and a LINK card.

¶ 10 Defendant testified she had taken prescription pain medication before entering Walmart. Because she did not anticipate purchasing many items, she declined to use a basket or cart. According to defendant, she would commonly place items in her purse while shopping, then pay for them before leaving the store. After a few minutes of shopping, defendant felt light-headed due to her medication, and walked to the store entrance to obtain a motorized cart. Defendant said she had no intention of leaving the store but explained she had to pass the last point of purchase to reach the motorized carts. According to defendant, she was arrested next to the motorized carts. Defendant admitted she did not have any cash or credit cards on her, but she said her daughter was present with a credit card to pay for the items.

¶ 11 Following the presentation of evidence, the trial court stated it did not find defendant's version of events credible. The court did not believe defendant's intention was to obtain a cart and continue shopping, particularly where she had no money to purchase the items and she was not observed with anyone else in the store who might have paid. Accordingly, the court found defendant guilty of retail theft.

¶ 12 In May 2015, the trial court denied defendant's motion for acquittal or for a new trial and sentenced her to 30 days in the county jail with no fines. The court also imposed a $100 public-defender fee.

¶ 13 B. Possession-of-Stolen-Property Case
(McLean County Case No. 14-CM-1270)

¶ 14 In July 2014, the State charged defendant with possession of stolen property, a Class A misdemeanor, alleging she, or one for whose conduct she is legally responsible,

knowingly obtained control over certain stolen property of Carpet Weavers—a Hilti wheel grinder kit—with the intent to permanently deprive Carpet Weavers of the property and under such circumstances that would reasonably induce her to believe the property was stolen. 720 ILCS 5/16-1(a)(4) (West 2014)). Defendant waived her right to a jury trial and the case proceeded to a bench trial in April 2015. No transcript exists of the bench trial; however, the parties submitted an agreed bystander's report.

¶ 15 Brian White testified he was employed by Carpet Weavers. In January 2014, he reported to police that a Hilti wheel grinder kit (serial number 035855) belonging to Carpet Weavers was stolen from his work vehicle.

¶ 16 Kathleen Pierce testified she owned Monster Pawn and, on April 30, 2014, two black females entered her pawnshop with a Hilti wheel grinder kit (serial number 035855) and attempted to borrow money against the item. Upon seeing a Carpet Weavers insignia on the tool, Pierce called the local Carpet Weavers store and learned the item had been stolen. Pierce called the police and told the women they would need to speak with the police about the item. The women then left the store and drove away before police arrived. Pierce described defendant as wearing sunglasses and a dark hooded jacket, while the other woman—later identified as defendant's daughter, Latisharie Thigpen—wore a grey sweatshirt and a dark hooded jacket. Pierce said her interactions were with the woman wearing the gray sweatshirt.

¶ 17 Officer Brian Melton responded to Pierce's call and verified the wheel grinder kit had been reported as stolen in January 2014. On May 1, 2014, defendant admitted to Officer Melton that she and Thigpen were at the pawnshop on April 30, 2014. According to defendant, she and Thigpen were clearing out a vacant house for a man they knew only as "David," who offered to let them keep anything they wanted from the residence. Defendant told Officer

Melton that Thigpen located the wheel grinder and asked defendant to drive her to the pawnshop to exchange it for cash. Defendant testified she was unaware the tool was stolen. After learning the tool might have been stolen, defendant and Thigpen left the pawnshop.

¶ 18 After considering the evidence, the trial court found defendant's version of events was not credible. Rather, according to the court, defendant's actions at the pawnshop and her knowledge of the Carpet Weavers insignia proved beyond a reasonable doubt she knew the item was stolen. The court therefore found defendant guilty of possession of stolen property.

¶ 19 In May 2015, the trial court denied defendant's motion for acquittal or for a new trial, and sentenced her to a straight conviction with no fines. The court also imposed a $100 public-defender fee.

¶ 20 Defendant appeals in both cases. We docketed the retail-theft case (McLean County case No. 14-CM-1265) as No. 4-15-0438 and the possession-of-stolen-property case (McLean County case No. 14-CM-1270) as No. 4-15-0437. We have consolidated these cases for appeal.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant challenges the sufficiency of the evidence in both cases. Additionally, defendant asserts (1) the trial court erroneously assessed public-defender fees without a hearing, (2) she is entitled to $15 *per diem* credit toward her fines in the retail-theft case, and (3) the lump-sum surcharge fine imposed by the circuit clerk must be vacated in the retail-theft case. We turn first to the sufficiency of the evidence.

¶ 23 A. Sufficiency of the Evidence

¶ 24 In a trial, the State bears the burden of proving the defendant guilty of every element of the offense beyond a reasonable doubt. *People v. Maggette*, 195 Ill. 2d 336, 353, 747

N.E.2d 339, 349 (2001). "A reviewing court will not set aside a criminal conviction on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *Id*. In other words, where the trier of fact finds a defendant guilty, our inquiry is whether, in viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004). We begin by addressing the retail-theft case.

¶ 25 1. *Retail-Theft Case*

¶ 26 To convict a defendant of retail theft, the State must prove the defendant knowingly took possession of merchandise offered for sale at a retail mercantile establishment with the intention of depriving the merchant permanently of the possession, use, or benefit of such merchandise without paying the full retail value for such merchandise. See 720 ILCS 5/16-25(a)(1) (West 2014); Illinois Pattern Jury Instruction, Criminal, No. 13.43 (4th ed. 2000) (hereinafter IPI Criminal 4th). Defendant does not dispute she took possession of merchandise offered for sale at Walmart—a retail mercantile establishment. Rather, the question on appeal is whether the State proved defendant had the intention of depriving Walmart permanently of the merchandise when she walked past the last point of purchase with merchandise concealed in her purse.

¶ 27 In a retail-theft case, if a defendant:

> "(1) conceals upon his or her person or among his or her belongings unpurchased merchandise displayed, held, stored or offered for sale in a retail mercantile establishment; and

(2) removes that merchandise beyond the last known station for receiving payments for that merchandise in that retail mercantile establishment,

then the trier of fact may infer that the person possessed, carried away or transferred such merchandise with the intention of retaining it or with the intention of depriving the merchant permanently of the possession, use[,] or benefit of such merchandise without paying the full retail value of such merchandise." 720 ILCS 5/16-25(c) (West 2014).

¶ 28 In this case, because defendant had concealed merchandise in her purse when she walked past the last point of purchase, the trial court may infer that she had the intention of depriving Walmart permanently of the possession, use, or benefit of those items without paying the full retail value of the merchandise. Defendant, however, asserts the facts in this case overcome this permissive inference.

¶ 29 Specifically, defendant points to her statement that she walked to the front of the store for a motorized cart—the area where she was apprehended—as demonstrating she lacked any intention of permanently depriving Walmart of the possession, use, or benefit of the merchandise. "The trier of fact determines the witnesses' credibility, weighs the evidence, draws inferences, and resolves any conflicts in the evidence." *People v. Kirchner*, 2012 IL App (2d) 110255, ¶ 11, 973 N.E.2d 444. It is not for this court to substitute its judgment for that of the trial court. *Id.* "The trier of fact need not accept the defendant's explanation, but may consider its probability or impossibility in light of the surrounding circumstances." *People v. Kaye*, 264 Ill. App. 3d 369, 383, 636 N.E.2d 882, 892 (1994).

¶ 30 Here, the trial court found defendant's testimony lacked credibility. Just because defendant was apprehended prior to leaving the store does not require the court to believe she intended to get a motorized cart and return to her shopping. "[T]he trier of fact is not required to disregard inferences which flow normally from the evidence and to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *People v. Hall*, 194 Ill. 2d 305, 332, 743 N.E.2d 521, 538 (2000). Following defendant's line of reasoning, an asset-protection person would be required to follow a suspect outside the store before stopping them, even though the law provides that an inference of guilt can be drawn when the suspect passes the last point of purchase. See 720 ILCS 5/16-25(c) (West 2014). The court also found defendant's statement that her daughter was present to purchase the merchandise lacked credibility, as no one observed defendant with another person.

¶ 31 As the trial court noted, the evidence in this case demonstrates defendant concealed items in her purse, had no apparent ability to pay for those items, and was apprehended in the vestibule located past the last point of purchase. In considering the surrounding facts and circumstances, we conclude sufficient evidence supported the trial court's finding that defendant knowingly took possession of the merchandise with the intention of depriving Walmart of permanent possession, use, or benefit of that merchandise without paying the full retail value. Accordingly, we affirm the finding of guilt in the retail-theft case (McLean County case No. 14-CM-1265).

¶ 32 2. *Possession-of-Stolen-Property Case*

¶ 33 To convict defendant of possession of stolen property in this case, the State was required to prove defendant knowingly obtained control over a wheel grinder kit owned by Carpet Weavers under such circumstances as would reasonably induce her to believe the wheel

grinder was stolen. See 720 ILCS 5/16-1(a)(4) (West 2014); IPI Criminal 4th No. 13.24. "While possession is an element of this offense, knowledge that the property was stolen is also an essential element. Both elements must be proved in order to establish guilt." *People v. Baxa*, 50 Ill. 2d 111, 114, 277 N.E.2d 876, 878 (1971). Possession alone is insufficient to prove the defendant knew the property was stolen at the time she received it. *Id.* at 115, 277 N.E.2d at 878. However, "[k]nowledge may be established by proof of circumstances that would cause a reasonable man to believe that the property had been stolen." *Id.* at 114-15, 277 N.E.2d at 878.

¶ 34 Here, it is undisputed defendant and her daughter had possession of a stolen Hilti wheel grinder kit belonging to Carpet Weavers. The question is whether the circumstances are such that would reasonably induce her to believe the property was stolen. Even if the trial court accepted defendant's argument that she and Thigpen obtained the tool from "David" while cleaning out, at his request, a vacant house, the evidence in this case shows that the wheel grinder kit had a Carpet Weavers insignia and a serial number attached. Because this tool was not given to them directly by a representative of Carpet Weavers, a rational trier of fact could conclude such identifying information would reasonably induce a person to believe the item was stolen from Carpet Weavers. At that point, rather than placing a call to Carpet Weavers to determine whether it was stolen, defendant and her daughter opted to pawn the item. In doing so, defendant wore a hooded sweatshirt and sunglasses — actions that could be interpreted as an attempt to conceal her identity. In addition, defendant left the scene when she learned the tool was stolen and police had been called. Clearly, an inference of guilt may be drawn from such behavior. *People v. Hillsman*, 362 Ill. App. 3d 623, 634, 839 N.E.2d 1116, 1126 (2005) (flight from the scene shows consciousness of guilt). In viewing the evidence in the light most favorable to the prosecution, these facts support the trial court's finding that defendant knowingly

possessed a stolen wheel grinder kit and under such circumstances that would reasonably induce her to believe the item was stolen.

¶ 35 Defendant relies on *People v. Housby*, 84 Ill. 2d 415, 420 N.E.2d 151 (1981), to support her contention that insufficient evidence supported her conviction. In *Housby*, the State charged the defendant with burglary and theft after he was observed in possession of property that had been stolen from a residence earlier that evening. *Id.* at, 425, 420 N.E.2d at 156. In affirming the defendant's convictions, the supreme court set forth a three-part test for determining whether the defendant's possession of a stolen item was sufficient to support a finding of guilt on the underlying burglary. *Id.* at 424, 420 N.E.2d at 155. In addition to possession of the stolen property, the State must show (1) a rational connection between the defendant's recent possession of the stolen property and her participation in the burglary; (2) the defendant's "guilt of burglary is more likely than not to flow from [her] recent, unexplained[,] and exclusive possession of burglary proceeds"; and (3) other evidence corroborates the defendant's guilt. *Id.*

¶ 36 We fail to see how *Housby* is applicable to the present case. In *Housby*, the defendant was charged with burglary, not with possession of stolen property. *Id.* at 419, 420 N.E.2d at 153. Rather, the State was using the defendant's possession of the stolen property to create an inference that he committed the burglary. Such a situation is inapposite to this case, where the State charged defendant with possession of stolen property, not the underlying burglary or theft. To sustain a conviction, the State was not required to demonstrate defendant participated in or had any connection with the underlying burglary. The State needed to show only that defendant knowingly possessed the wheel grinder kit under such circumstances that

would reasonably induce her to believe the wheel grinder was stolen. As noted above, the State met its burden.

¶ 37 Accordingly, we affirm the trial court's finding of guilt as to the possession-of-stolen-property case (McLean County case No. 14-CM-1270).

¶ 38 B. Public-Defender Fees

¶ 39 Defendant next asserts the trial court improperly imposed $100 public-defender fees in both cases without first providing defendant with notice and a proper hearing to determine her ability to pay. Whether the court imposed a public-defender fee in compliance with section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2014)) is subject to *de novo* review. *People v. Gutierrez*, 2012 IL 111590, ¶ 16, 962 N.E.2d 437.

¶ 40 Section 113-3.1 requires the trial court provide a defendant with a hearing to determine the defendant's financial circumstances prior to imposing a public-defender fee. 725 ILCS 5/113-3.1(a) (West 2014). The State concedes the trial court failed to provide defendant a hearing prior to imposing a public-defender fee in both cases, and we accept the State's concession. We therefore vacate the public-defender fee of (1) $100 in McLean County case No. 14-CM-1265 and (2) $100 in McLean County case No. 14-CM-1270.

¶ 41 C. *Per Diem* Credit

¶ 42 Defendant contends she is entitled to $15 in *per diem* credit against her fines in McLean County case No. 14-CM-1265. The State concedes this issue, and we accept the State's concession.

¶ 43 A defendant is entitled to $5 *per diem* credit for each day spent in pretrial detention, which can be applied to any creditable fines. 725 ILCS 5/110-14(a) (West 2012).

Because defendant spent three days in custody, she is entitled to $15 credit applied to the creditable fines, if any.

¶ 44 D. Clerk-Imposed Fines

¶ 45 Defendant argues the lump-sum surcharge fine imposed by the circuit clerk in McLean County case No. 14-CM-1265 must be vacated. The State concedes this issue, and we accept the State's concession.

¶ 46 Circuit clerks lack the authority to impose fines and, therefore, any fines imposed by the circuit clerk are void from their inception. *People v. Daily*, 2016 IL App (4th) 150588, ¶ 28, 74 N.E.3d 15. "The propriety of the imposition of fines and fees presents a question of law, which this court reviews *de novo*." *Id.* ¶ 27. This court has previously determined the lump-sum surcharge constitutes a fine. *People v. Hible*, 2016 IL App (4th) 131096, ¶ 24, 53 N.E.3d 319. Because the circuit clerk improperly imposed this fine, the lump-sum surcharge must be vacated.

¶ 47 III. CONCLUSION

¶ 48 For the foregoing reasons, we affirm defendant's convictions. We vacate the $100 public-defender fee imposed in both cases and the lump-sum surcharge imposed by the circuit clerk in McLean County case No. 14-CM-1265. We further order defendant is entitled to $15 of *per diem* credit in McLean County case No. 14-CF-1265 against any creditable fines. As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 49 Affirmed in part and vacated in part.