2012 IL App (1st) 110708-U

FOURTH DIVISION
December 6, 2012

No. 1-11-0708

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 MC 195376
	)	
TAMARA PERTEET,	)	The Honorable
	)	Jim Ryan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

HELD: Defendant was not denied her right to a fair trial when the trial court allowed the State to amend the charging instrument on the day of trial to correct only a formal defect which did not change the nature or elements of the crime charged, nor when the trial court allowed certain testimony over her hearsay objection. In addition, pursuant to the agreement of the parties, defendant's fines and fees order must be modified to reflect a $5 credit.

¶ 1 Following a bench trial, defendant Tamara Perteet (defendant) was convicted of retail theft and sentenced to one year conditional discharge and $250 in fines and fees. She appeals, contending that the trial court denied her right to a fair trial when it allowed the State to amend the charging instrument on the day of trial and when it allowed inadmissible hearsay testimony against her. She also contends that she is owed $5 in credit against her fines and fees order. She asks that we reverse and remand for a new trial or, alternatively, that we order the trial court to reduce her fines and fees order. For the following reasons, we affirm defendant's conviction but modify her fines and fees order.

¶ 2 BACKGROUND

¶ 3 Defendant, a pharmacy technician at Jewel-Osco on Sheridan Road in Chicago, was charged with misdemeanor retail theft regarding an incident that took place there on February 9, 2010. The complaint against defendant, as well as the police report, stated that defendant knowingly carried away "a prescription container containing 150 tablets of Lexapro 20 mg." from Jewel-Osco with the intent to permanently deprive the store thereof and without first paying full retail value.

¶ 4 Before trial, defendant moved to bar prior bad acts. The trial court granted this motion. Defendant also moved to bar any testimony related to video surveillance of the incident at issue. The trial court granted this motion, too, as the video had not been available before trial. For its part, the State moved to amend the complaint to state that defendant knowingly carried away "a prescription container containing tablets of prescription drugs" from Jewel-Osco with the intent to permanently deprive the store thereof and without first paying full retail value. The trial court,

over defendant's objection, granted the State's motion.

¶ 5 The cause then proceeded to trial. Marty Oppenhauser, security manager for the Jewel-Osco where the incident took place, testified that in early February 2010, he viewed a security video that led him to set up a hidden camera in the pharmacy locker room. Later, on the night in question, Oppenhauser observed defendant, at the end of her shift, grab a prescription bottle from the pharmacy and not fill it. As she began to leave the store, Oppenhauser stopped her and brought her to the security office. Inside her purse, he found a prescription container with 150 tablets of extra strength Vicodin, for which defendant had not paid. The State asked Oppenhauser "[w]hat was the label on the bottle?," at which time defendant objected on hearsay grounds. The trial court sustained defendant's objection.

¶ 6 Oppenhauser further testified that, while being held in the security office, defendant verbally admitted to him that she had stolen the prescription drugs. Oppenhauser then identified a document presented into evidence as defendant's written confession stating she stole 150 prescription Vicodin extra strength tablets, and averred that her statement was witnessed by him and another store employee. Oppenhauser also stated that defendant apologized for taking the drugs and told him she needed them because she was going through some problems.

¶ 7 Defendant's confession was admitted into evidence. In it, defendant stated that she took the Vicodin that day because she is "addicted to it" and has been for the last six years. She further admitted that she has taken Vicodin from the store "about 4 times with the quantity of 120 tablets." Defendant signed and dated her confession.

¶ 8 On cross-examination, defendant brought out that Oppenhauser was not present in the

pharmacy when defendant was working but, rather, saw everything he related in court on a live video surveillance feed. Defendant also questioned Oppenhauser regarding a different instance during her same shift when defendant left the store, went out to her car and came back into the store, and elicited testimony from Oppenhauser that he did not stop her during any of that time.

¶ 9 On redirect examination, the State once again asked Oppenhauser if he saw the prescription bottle defendant had and whether her name was on the label. Defendant again objected on hearsay grounds, but this time, the trial court overruled her objection, stating that she had "open[ed] the door." Oppenhauser testified that the label on the bottle was from the Jewel-Osco store and that defendant's name was not on it.[1]

¶ 10 The State rested its case-in-chief, and defendant rested without presenting any evidence. Following closing argument, the trial court found defendant guilty. In its colloquy, the court stated that it based its decision on Oppenhauser's "creditable, truthful testimony" regarding his investigation, his conversation with defendant, and defendant's handwritten and signed statement admitting she took the drugs. The cause immediately proceeded to sentencing, with the trial court sentencing defendant to one year conditional discharge and $250 in fines and fees.

¶ 11 ANALYSIS

¶ 12 Defendant's first contention on appeal is that she was denied a fair trial when the trial court allowed the State to amend the complaint against her on the day of trial. She asserts that doing so after the defense had already prepared its case prejudiced her ability to prepare and

[1]The prescription bottle was not admitted into evidence. Oppenhauser testified that after defendant gave him the bottle out of her purse, he turned it over to corporate headquarters.

present a competent defense. We disagree.

¶ 13 A charging instrument may be amended at any time to correct a formal defect. See *People v. Alston*, 302 Ill. App. 3d 207, 210 (1999); see also 725 ILCS 5/111-5 (West 2006). Amendment, even on the day of trial, is proper and permissible as long as the change is not substantive, that is, it is not material and does not alter the nature or elements of the offense originally charged. See *Alston*, 302 Ill. App. 3d at 210; see also *People v. Gray*, 396 Ill. App. 3d 216, 223 (2009) (citing *People v. Martin*, 266 Ill. App. 3d 369, 373 (1994)). This is especially true where the defendant is not surprised or prejudiced by the change, or if she was already aware of the actual charge. See *Gray*, 396 Ill. App. 3d at 223 (citing *Martin*, 266 Ill. App. 3d at 373); *Alston*, 302 Ill. App. 3d at 210-11. As long as the charging instrument gives the defendant adequate notice of the subsequent charges, her ability to prepare for trial on those subsequent charges is not hindered in any way. See *People v. Mays*, 2012 IL App (4th) 090840, ¶ 45; accord *People v. Gutierrez*, 402 Ill. App. 3d 866, 890 (2010) (citing *People v. Likar*, 329 Ill. App. 3d 654, 660 (2002) (when defendant challenges the sufficiency of the charging instrument on appeal, reviewing court must determine whether it apprised her of precise offense charged with enough specificity to allow her to prepare her defense). Ultimately, the decision regarding whether to allow amendment of the charging instrument lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. See *People v. Ross*, 395 Ill. App. 3d 660, 668 (2009); accord *Alston*, 302 Ill. App. 3d at 211. Specifically, regarding challenges to the act of amending a charging instrument, as in the instant cause, this would require us, as the reviewing court, to find that the trial court exceeded all bounds of reason

and ignored the law, resulting in substantial prejudice to the defendant. See *People v. Smith*, 2012 IL App (4th) 100901, ¶ 99 (citing *People v. Covington*, 395 Ill. App. 3d 996, 1003 (2009)).

¶ 14 In the instant cause, we find that the State's amendment of the complaint against defendant changing "Lexapro" to "tablets of prescription drugs" on the day of trial was proper and permissible in light of the record before us.

¶ 15 First, the amendment here did not drastically or fundamentally alter the complaint at issue. Defendant was charged with retail theft. The State was required to prove, beyond a reasonable doubt, that defendant took possession of or carried away "any merchandise displayed, held, stored or offered for sale" at the Jewel-Osco "with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value." 720 ILCS 5/16A-3 (West 2010). The nature and elements of crime, then, were that defendant carried away merchandise without paying for it and with the intent to deprive the store of it. These did not change simply because the merchandise was amended to read "prescription drugs" rather than "Lexapro." In other words, this change did not broaden the scope of the crime or add an extra element to it, nor did it affect the applicable punishment. Instead, the focus of retail theft–the essence of the crime itself–is the carrying away of merchandise to deprive the merchant thereof without first paying for it. That the more general term "prescription drugs" replaced the specific term "Lexapro" is, therefore, merely a formality.

¶ 16 Moreover, we do not find that defendant was surprised or prejudiced by the amendment. As noted, the amendment changed the more specific term "Lexapro" to the more generic

"prescription drugs." Clearly, the merchandise alleged to be taken here was always drugs. In addition, Oppenhauser unequivocally testified that defendant told him she stole Vicodin tablets, and defendant herself wrote and signed a confession stating the same. Accordingly, defendant knew long before trial that the merchandise at issue was not Lexapro tablets but, rather, Vicodin–merchandise which, although not the cited Lexapro, is, nevertheless, a prescription drug. Amending the complaint to reflect a more general term in order to correct a minor discrepancy, when the record clearly demonstrates that defendant was already aware of the actual charge against her here, did not deprive her of notice or compromise her ability to sufficiently prepare for trial.

¶ 17 Defendant relies principally on *People v. Zajac*, 244 Ill. App. 3d 42 (1991), in support of her contention that the amendment changed the nature of the evidence necessary to obtain her conviction and, thus, substantively prejudiced her. *Zajac*, however, is markedly distinguishable. In that case, the defendant was charged under section 11-501(a)(1) of the Illinois Vehicle Code, which stated that a person shall not drive when " '[t]he alcohol level of [his] blood or breath is 0.10 or more.' " *Zajac*, 244 Ill. App. 3d at 43 (quoting Ill.Rev.Stat.1987, ch. 95½, ¶ 11-501(a)(1)). On the day of trial, after the jury had been sworn but before any witness testified, the State moved to amend the charge, changing the section number to 11-501(a)(2), which stated that a person shall not drive while " '[u]nder the influence of alcohol.' " *Zajac*, 244 Ill. App. 3d at 43 (quoting Ill.Rev.Stat.1987, ch. 95½, ¶ 11-501(a)(2)). The jury found the defendant guilty under the amended section. On appeal, the *Zajac* court found this amendment to be a substantive, rather than a formal, change because it changed the nature of the evidence necessary to obtain the

defendant's conviction. See *Zajac*, 244 Ill. App. 3d at 44. That is, the two statutory subsections created two very distinct statutory offenses which required the State to prove different elements in order prove the defendant guilty beyond a reasonable doubt–under the former charge, the defendant's blood/breath alcohol level was critical, while under the new charge it was not. See *Zajac*, 244 Ill. App. 3d at 44. Accordingly, with two separate and distinct crimes, it was more than likely that different defenses would be involved, which defendant was deprived of adequately preparing due to the last-minute amendment. See *Zajac*, 244 Ill. App. 3d at 44.

¶ 18 Contrary to defendant's insistence, *Zajac* is not at all like the instant case. The amendment at issue here was not a change in the statute, section or subsection with which defendant was charged. Also, the amendment did not create or cite a separate and distinct crime from that originally charged. Defendant here was, before and after the amendment, always charged with retail theft–the same statutory section which always had the same elements and always carried the same available punishment. *Zajac*, therefore, is inapplicable here.

¶ 19 Ultimately, "amendments changing the manner in which the defendant committed the offense are formal, not substantive." *Ross*, 395 Ill. App. 3d at 670. The amendment in defendant's cause, which merely changed the manner in which she committed retail theft from stealing "Lexapro" to stealing "prescription drugs," falls within this category. Accordingly, having failed to demonstrate that the trial court abused its discretion by ignoring the law or reason in allowing the amendment, we will not reverse defendant's conviction on this ground. See *Ross*, 395 Ill. App. 3d at 670-73 (amendments to indictment alleging criminal sexual assault changing type of sexual conduct were formal and not substantive); *Alston*, 302 Ill. App. 3d at 211

(amendment to unlawful use of weapons charge to include phrase "about his person" was permissible); *People v. Hester*, 271 Ill. App. 3d 954, 956 (1995) (amendment to add "or on his land" to charge of possessing weapon "in his abode" was proper); see also *People v. Flores*, 250 Ill. App. 3d 399, 401 (1993) (amendment to indictment to change controlled substance possessed from "heroine" to "cocaine" was formal and did not prejudice the defendant where all the evidence to be presented at trial dealt with cocaine); *People v. McCoy*, 295 Ill. App. 3d 988, 994 (1998) (amendment to change "heroine" to "cocaine" was proper and only formal where this was clear before trial had even begun).

¶ 20 Defendant's next contention on appeal is that she was denied her right to a fair trial when the trial court allowed the introduction of hearsay evidence. She cites to the State's redirect examination of Oppenhauser during which the trial court allowed him to testify regarding his recollection of the label on the prescription bottle, which was not admitted into evidence. She claims that this testimony was inadmissible and contrary to a previous evidentiary ruling issued by the trial court, that the doctrine of curative admissibility does not apply and that this was crucial to her conviction, thereby amounting to reversible error. We disagree.

¶ 21 We note at the outset that defendant claims a *de novo* standard of review is applicable because "a legal issue" is involved. However, it is axiomatic that the admissibility of evidence at trial, which is essentially what defendant is arguing here, is a matter within the sound discretion of the trial court. See *People v. Illgen*, 145 Ill. 2d 353, 364 (1991); *People v. Taylor*, 409 Ill. App. 3d 881, 914 (2011). We will not overturn the court's decision with respect to admissibility absent a clear abuse of discretion, which occurs, particularly in the context of alleged hearsay

evidence, only when its decision is arbitrary, fanciful or where no reasonable man would take the view adopted by that court. See *Illgen*, 145 Ill. 2d at 364; See *People v. Rush*, 401 Ill. App. 3d 1, 10 (2010). Moreover, as defendant was tried in a bench trial, we note that the trial judge here, as the trier of fact, is presumed to know the law and to have considered only competent, admissible evidence in reaching its determination on the merits of the cause before it. See *People v. Brown*, 185 Ill. 2d 229, 258 (1998); *People v. Koch*, 248 Ill. App. 3d 584, 591-92 (1993). Ultimately, to rebut this presumption, defendant must make an affirmative showing in the record that the trial court actually used the challenged evidence improperly as alleged. See *Koch*, 248 Ill. App. 3d at 592.

¶ 22 Defendant's claim of hearsay evidence is based entirely on the redirect testimony of Oppenhauser. As noted earlier, during Oppenhauser's direct examination, the State asked him, "[w]hat was the label on the bottle?," at which time defendant objected on hearsay grounds and the trial court sustained the objection. Later, on cross-examination, defendant questioned Oppenhauser regarding a different instance earlier during defendant's same shift at Jewel-Osco when she had left the store, went out to her car and came back, with Oppenhauser never stopping her. Immediately following this, on redirect examination, the State again asked Oppenhauser if he saw the prescription bottle defendant had and whether her name was on the label. Defendant again objected on hearsay grounds, but this time, the trial court overruled her objection, stating that she had "open[ed] the door." At this point, Oppenhauser testified that the label on the bottle was from the Jewel-Osco store and that defendant's name was not on it.

¶ 23 We do not find the trial court's decision to allow Oppenhauser's statement into evidence

to have been improper, for several reasons. First, in our view, we do not consider his statement to be hearsay. Hearsay is an out-of-court statement used to prove the truth of the matter asserted. See *People v. Banks*, 237 Ill. 2d 154, 180 (2010). Such statements are inadmissible because they lack reliability and the opposing party is unable to question the unavailable declarant. See *People v. Munoz*, 398 Ill. App. 3d 455, 479 (2010). Yet, if the statements fall within a recognized exception to the hearsay rule, or if they are admitted for a purpose other than to prove their truth, then these statements are admissible. See *Banks*, 237 Ill. App. 3d at 180. Moreover, the statements can be admitted if there is considerable assurance that they are reliable and trustworthy. See *People v. Jones*, 2012 IL App (1st) 093180, ¶ 57.

¶ 24 Defendant intimates that the bottle itself, which was not admitted into evidence at trial, was the "declarant" here and, thus, since it was unavailable, the text on it, as recollected by Oppenhauser during his testimony, constituted hearsay evidence. However, Oppenhauser did not testify as to the exact text on the bottle's label. He was merely asked if he saw the bottle and if he saw defendant's name on it. As Oppenhauser was present in court to be cross-examined regarding his ability to observe and recollect what he saw on the day in question, we are not dealing with an unavailable declarant and his out-of-court statement, which are the hallmarks of hearsay evidence.

¶ 25 In addition, even if this were an out-of-court statement, it was not offered for the truth of the matter asserted, namely, that defendant's name was not on the bottle. Rather, upon our reading of the record, we find that it was offered to explain the investigatory procedure used in this cause. Oppenhauser was the security manager for the Jewel-Osco where defendant worked

as a pharmacy technician. He testified that, earlier that month, he was alerted to possible thefts from the pharmacy department, and this led him to set up video surveillance in the pharmacy locker room. During his investigation into these claims, he saw, on the day in question, defendant take a prescription bottle from the pharmacy and not fill it. Consequently, he followed her as she exited the store, stopped her, and brought her to the security office, whereupon she admitted she stole prescription drugs from the pharmacy and gave him the bottle, which she retrieved from her purse. At this point in his investigation, Oppenhauser took the bottle and identified, via his own observations (to which he testified in court), that it belonged to Jewel-Osco and did not have defendant's name on it, thereby connecting defendant to the retail theft. None of this invokes hearsay concerns. See *People v. Drake*, 131 Ill. App. 3d 466, 470-71 (1985) (fact that items allegedly stolen were not produced in court was immaterial to prosecution for retail theft, nor was store manager's statement regarding items found on the defendant hearsay since he was in court to testify regarding his ability to identify items based on his own personal knowledge and observations as store manager); see, *e.g.*, *People v. Brown*, 113 Ill. App. 3d 625, 631-32 (1983) (testimony of police officer regarding investigatory procedures which were entirely within his knowledge was not inadmissible hearsay where purpose was to show why he acted as he did).

¶ 26 Even if we were to accept defendant's assertion that the testimony at issue here was inadmissible hearsay, we still would not find reversible error in the trial court's decision to allow it into evidence at trial. As both parties discuss on appeal, the doctrine of curative admissibility allows that, in a criminal case, if the defendant on cross-examination opens the door to a

particular subject, the State on redirect examination may question the witness to clarify or explain the subject brought out during, or remove or correct any unfavorable inferences left by, the defendant's cross-examination, even if this may elicit evidence that is otherwise improper or inadmissible. See *People v. Manning*, 182 Ill. 2d 193, 216-17 (1998); *People v. Liner*, 356 Ill. App. 3d 284, 292-93 (2005). While this doctrine is not unlimited, it is properly intended to help shield the State in those situations where undue prejudicial inferences might arise from the defendant's cross-examination. See *Manning*, 182 Ill. 2d at 216-17 (citing *People v. Chambers*, 179 Ill. App. 3d 565, 581 (1989)); *Liner*, 356 Ill. App. 3d at 293. And, just as with the admission of other evidence, the decision to allow curative evidence lies within the sound discretion of the trial court. See *Manning*, 182 Ill. 2d at 216-17 (citing *Chambers*, 179 Ill. App. 3d at 581); *Liner*, 356 Ill. App. 3d at 293.

¶ 27 Examining the entire context of Oppenhauser's testimony as presented in the record, rather than isolating the statement at issue, we find that his testimony that defendant's name was not on the bottle (again, if it was inadmissible hearsay) was properly admitted under the doctrine of curative admissibility. That is, on cross-examination, defendant elicited testimony from Oppenhauser that, earlier during her shift that night, defendant left the store, went out to her car, and returned to the store, without Oppenhauser having stopped her. Clearly, defendant was attempting to point out that, having left the store earlier without being stopped by Oppenhauser, it was more than reasonable that she could have retrieved the prescription bottle from her car and brought it into the store, rather than having taken it from the store without paying first. This questioning and testimony, then, opened the door to the inference that defendant did not take a

prescription bottle that did not belong to her from the Jewel-Osco but, perhaps, had retrieved the bottle from her car and that the bottle and its contents were, indeed, hers. To counter this, Oppenhauser's testimony that the bottle was from the store and that defendant's name was not on it was necessary to explain and clarify what occurred.

¶ 28 Moreover, even if this were inadmissible hearsay and the doctrine of curative admissibility were inapplicable, we would still conclude that its introduction at trial was, at most, harmless error within the context of the instant cause. Error in the admission of hearsay evidence is harmless where such testimony is only cumulative, or where the admission did not affect the outcome of the trial and there is other properly-admitted evidence in the record supporting the verdict. See *People v. Griffin*, 175 Ill. App. 3d 111, 118 (1988); *People v. Bobiek*, 271 Ill. App. 3d 239, 244 (1995); *People v. Chandler*, 231 Ill. App. 3d 110, 115 (1992). Again, we will reverse the defendant's conviction only when she makes an affirmative showing in the record that the trial judge actually used the challenged evidence improperly as alleged. See *Koch*, 248 Ill. App. 3d at 592.

¶ 29 Considering the evidence against defendant, it is clear beyond a reasonable doubt that she would have been convicted of retail theft even absent Oppenhauser's testimony about the prescription bottle. The remainder of the evidence presented at trial showed that defendant, while working at the Jewel-Osco, took a bottle of prescription drugs, namely, Vicodin, from the store and left without first paying for it. Not only did the majority of Oppenhauser's properly admitted testimony bear this out, but the State also introduced a document–written, signed and dated by defendant herself–confessing that she did exactly that. Accordingly, the cited testimony

was merely cumulative. Most significantly, in its colloquy at the conclusion of defendant's trial, the trial court never mentioned the portion of Oppenhauser's testimony at issue here. Rather, the court specifically stated that it was basing its decision on Oppenhauser's "creditable, truthful testimony" regarding his investigation, his conversation with defendant, and defendant's handwritten and signed statement admitting she took the drugs. Therefore, we do not find any reversible error here.

¶ 30 Ultimately, based on all this and contrary to her contention, we find that defendant was not denied a fair trial by the admission of Oppenhauser's cited testimony regarding the prescription bottle.

¶ 31 Defendant's third, and final, contention on appeal is that, should we uphold her conviction, she is entitled to a $5 credit against her accrued fines and fees. She asserts that, as she was arrested on February 9, 2010, and released on bond on February 10, 2010, she spent one day in custody, for which she was not given credit.

¶ 32 The State concedes this issue. Accordingly, defendant’s mittimus must be amended regarding her presentence credit for time served. And, a reviewing court on appeal may correct the mittimus at any time, without remanding the cause to the trial court. See *People v. Davis*, 303 Ill. App. 3d 684, 688 (1999); *People v. Mitchell*, 234 Ill. App. 3d 912, 921 (1992).

¶ 33 Defendant was ordered to pay $250 in fines, fees and costs following her guilty verdict. Part of this was a $30 fine imposed for the Children's Advocacy Center and, as the parties here agree, it is to this portion of the order that we apply defendant's $5 presentence credit. See *People v. Anthony*, 2011 IL App (1st) 091528, ¶ 32 (citing *People v. McNeal*, 405 Ill. App. 3d

647, 680-81 (2010)) (money for presentence credit may be applied to fines, including that ordered for the Children's Advocacy Center). Therefore, defendant's fines and fees order should be amended to reflect a $5 presentence credit, to be applied to her Children's Advocacy Center fine, with a final, total charge of fines and fees in the amount of $245.

¶ 34 CONCLUSION

¶ 35 For all the foregoing reasons, we affirm the judgment of the trial court, with a modification to defendant's fines and fees order to include a $5 presentence credit.

¶ 36 Affirmed, fines and fees order modified.