

NOTICE
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2013 IL App (4th) 120168-U
NO. 4-12-0168
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
August 29, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
HERBIE McBRIDE,)	No. 11CF347
Defendant-Appellant.)	
)	Honorable
)	Peter C. Cavanagh,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Steigmann and Justice Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The State presented sufficient evidence to sustain defendant's conviction for retail theft under principles of accountability (720 ILCS 5/16A-3(a), 5-2(c) (West 2010)).
- (2) Defendant was entitled to \$5 *per diem* credit against his \$5 Child Advocacy Center (CAC) fine.
- (3) Defendant's Violent Crime Victims Assistance Act (VCVA) fine was reduced from \$20 to \$4.
- ¶ 2 In October 2011, a jury found defendant, Herbie McBride, guilty of three counts of retail theft (720 ILCS 5/16A-3(a) (West 2010) (renumbered 720 ILCS 5/16-25(a)(1) (eff. Jan. 1, 2012))). Defendant moved for judgment of acquittal notwithstanding the verdict on all three counts. The trial court granted defendant's motion as to two of the counts. In December 2011, the court denied defendant's motion for a new trial and sentenced him on the remaining count to

10 years' imprisonment with credit for 235 days served. The court also assessed various fines and fees, including a \$5 Child Advocacy Center (CAC) fine and a \$20 Violent Crime Victims Assistance Act (VCVA) fine. In February 2012, the court denied defendant's motion to reconsider his sentence.

¶ 3 Defendant appeals, arguing (1) the State failed to present sufficient evidence to sustain his conviction for retail theft and (2) the court erred in computing his CAC and VCVA fines. We affirm as modified and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In May 2011, the State charged defendant with three counts of retail theft (720 ILCS 5/16A-3(a) (West 2010)) and one count of possession of a controlled substance (720 ILCS 570/402(c) (West 2010) (less than 15 grams of a substance containing cocaine)). The three counts of retail theft related to separate incidents occurring on April 29, April 30, and May 1, 2011. Because the jury acquitted defendant of possession of a controlled substance and the trial court entered judgment of acquittal notwithstanding the verdict on the counts of retail theft relating to April 29 and April 30, the only count at issue in this appeal is the alleged retail theft occurring on May 1. In that count, the State alleged defendant, or one for whose conduct he was legally accountable, took possession of a Dyson brand vacuum cleaner from a Walmart store in Springfield with the intent to permanently deprive the merchant of possession, and without paying full retail value.

¶ 6 A. Defendant's October 2011 Trial

¶ 7 The State's first witness was Gina Lucas, a manager at the Walmart store in Springfield. At approximately 10:45 a.m. on May 1, 2011, Lucas was walking toward the cash

registers at the front of the store when she noticed a white male pushing a shopping cart past the registers toward the main entrance to the store. The only item in the shopping cart was a Dyson brand vacuum cleaner packaged in a cardboard box. Because Dyson vacuum cleaners are expensive, they are usually wrapped with a security device known as "spider wire," which triggers an alarm if it passes through the front doors of the store without being deactivated. Lucas noticed the vacuum cleaner in the man's cart was not wrapped with spider wire.

¶ 8 Lucas attempted to use her handheld radio to contact the store's asset-protection office but she was unable to reach anyone. She followed the man toward the front entrance. As the man passed through the front doors, Lucas asked the "people greeter," a Walmart employee stationed near the front entrance, whether she had checked to see if the man had a receipt for the vacuum cleaner. Lucas did not receive a response from the people greeter, who was talking with a black male. The black male stood between the people greeter and the white male pushing the shopping cart.

¶ 9 Lucas followed the white male outside and yelled to him, "Hey, do you have a receipt?" The man did not produce a receipt. Lucas took control of the shopping cart containing the vacuum cleaner and brought it back inside the store. Lucas then relayed her observations to Zachary Marshall, the store's Asset Protection Associate, who had arrived for his shift shortly after Lucas brought the vacuum cleaner back inside.

¶ 10 Marshall testified he reviewed video footage from the store's surveillance system. Marshall compiled video footage from eight different Walmart surveillance cameras onto a single compact disk (CD). That CD was admitted into evidence and the video footage was played for the jury. Each portion of video is imprinted with a common timestamp that allows the

viewer to ascertain the exact time of events among multiple cameras. Marshall provided narration as the video footage was played for the jury.

¶ 11 The first portion of video footage shows one of the main aisles of the store. A white male and a black male can be seen emerging into the main aisle from a side aisle with an empty shopping cart. The white male is wearing a tie-dyed shirt, oversized denim shorts and white shoes. The black male is wearing a gray baseball cap, an oversized white T-shirt, an oversized black jacket, oversized denim shorts, and black shoes. The white male can be seen removing a Dyson vacuum cleaner from an aisle display and putting it into the shopping cart. Marshall testified the vacuum cleaner was priced at \$499.90 at the time. The black male is standing next to the shopping cart. The black male, holding a cellular phone to his ear, then walks into a side aisle and the white male follows him with the shopping cart.

¶ 12 The next portion of video shows both men emerging from the other end of the side aisle approximately 70 seconds later. The black male, still holding the cellular phone to his ear, walks toward the main entrance. The white male follows closely behind him, pulling the shopping cart containing the vacuum cleaner.

¶ 13 The next portion of video, captured from an inside camera facing out toward the main entrance, shows the black male, still holding the cellular phone to his ear, walking toward the exit. The white male follows closely behind, pushing the shopping cart. The black male turns toward the people greeter, removing the cellular phone from his ear, and appears to begin a conversation with her. The white male continues past, pushing the shopping cart out of the store. Approximately five seconds later, Lucas follows the white male out of the store. Lucas can be seen gesturing to the people greeter as she walks past. As Lucas passes by him and the people

greeter, the black male stops talking to the people greeter, puts the cellular phone back to his ear, and follows Lucas outside.

¶ 14 The next portion of video, captured from an outside camera facing toward the main entrance, shows the white male pushing the shopping cart out of the store. Lucas follows closely behind him. The black male follows closely behind Lucas.

¶ 15 Video from a camera facing the parking lot shows the white male stop in the middle of the parking lot and turn around. Lucas approaches the man and appears to speak with him. The man says something to Lucas, throws his hands in the air, and walks away from the shopping cart. Lucas pulls the shopping cart containing the vacuum cleaner back toward the store. The black male, still holding a cellular phone to his ear, passes by Lucas and walks in the same direction as the white male. Once he passes by Lucas, he removes the cellular phone from his ear and carries it at his side.

¶ 16 Video footage of a different area of the parking lot shows the two men approach a white Ford Escort and get into the backseat. Two people are already in the front seats of the car. The car then leaves the parking lot.

¶ 17 Officer Brian Hayes of the Springfield police department testified he was dispatched to the Walmart in response to the theft of the vacuum cleaner. After reviewing the surveillance video with Marshall, Hayes provided a description of the suspects and the vehicle to police dispatch. Dispatch aired the description over police radio.

¶ 18 Shortly thereafter, a police officer located the white Ford Escort. Hayes responded to the scene. Based on clothing and physical characteristics, Hayes recognized two of the vehicle's passengers as the men depicted in the Walmart surveillance video. The white male

was Jess Levendoski (without objection, the State admitted into evidence a Sangamon County death certificate indicating Levendoski died on June 22, 2011). Hayes identified defendant as the black male shown in the surveillance video. Hayes arrested defendant.

¶ 19 Sergeant Douglas Cookson of the investigations division of the Springfield police department interviewed defendant at the police station following his arrest. An audio recording of the interview was admitted into evidence and played for the jury.

¶ 20 Defendant told Sergeant Cookson he had been living with Levendoski and several other men at a motel room in Springfield. The men used drugs together. Defendant's drug of choice was crack cocaine mixed with marijuana. When Sergeant Cookson asked defendant about the theft of the vacuum cleaner, defendant told Cookson he separated from Levendoski after entering the store. When Cookson challenged defendant on that story, defendant admitted he was present when Levendoski placed the vacuum cleaner in the shopping cart. Defendant told Cookson he walked beside Levendoski as Levendoski pushed the shopping cart containing the vacuum cleaner past the cash registers and out of the store.

¶ 21 Sergeant Cookson asked defendant about additional thefts at other retail stores. Cookson testified as to defendant's response, as follows:

"[Defendant] indicated in fact, I asked specifically about the group committing additional thefts at other store locations and asked [defendant] if any of the videos from these stores would show him specifically pushing any of the stolen items out of the stores, and he indicated again that no, none of the videos would show him pushing anything out of the stores but added that the

video may show him removing some of the security wrap from items or may show him placing the items in a basket, but again would not show him pushing anything out of the stores, and again, therefore, he could not be charged with theft because he was not the individual that removed the item past the last point of check out."

Defendant told Sergeant Cookson he and his friends used money from selling the stolen merchandise to buy drugs. When Cookson asked if the vacuum cleaner was to be stolen to buy drugs, defendant responded, "Probably for drugs, yeah." Although he claimed he did not participate in selling the stolen merchandise, defendant explained to Cookson how the stolen merchandise is sometimes sold to people on the streets or brought back to the store and returned for a cash exchange.

¶ 22 The State next presented evidence relating to the remaining charges, which included possession of a controlled substance and two additional counts of retail theft relating to separate thefts of vacuum cleaners from the Target store in Springfield.

¶ 23 The defense did not present evidence.

¶ 24 The jury found defendant guilty of three counts of retail theft and not guilty of possession of a controlled substance. The trial court granted defendant's motion for acquittal notwithstanding the verdict as to the two counts of retail theft relating to Target, explaining, "[t]he defendant was not identified in open court as having been in Target." The court entered conviction against defendant on one count of retail theft.

¶ 25 B. Posttrial Proceedings

¶ 26 In December 2011, the court denied defendant's motion for a new trial and sentenced him to 10 years' imprisonment with credit for 235 days served. The court also assessed a \$5 CAC fine and a \$20 VCVA fine.

¶ 27 In February 2012, the court denied defendant's motion to reconsider his sentence.

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 On appeal, defendant argues (1) the State failed to present sufficient evidence to sustain his conviction for retail theft (720 ILCS 5/16A-3(a), 5-2(c) (West 2010)), (2) he is entitled to \$5 in *per diem* credit for time served against his \$5 CAC fine, and (3) his VCVA fine should be reduced from \$20 to \$4.

¶ 31 A. The State Presented Sufficient Evidence to Sustain Defendant's
Conviction for Retail Theft

¶ 32 Defendant asserts the State's evidence failed to prove beyond a reasonable doubt he was legally accountable for the theft of the vacuum cleaner from Walmart. We disagree.

¶ 33 1. *Standard of Review*

¶ 34 When presented with a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979)). "Under this standard, a reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *People v. Bush*, 214 Ill. 2d 318, 326, 827 N.E.2d 455, 460 (2005). This

standard applies in all criminal cases, regardless of the nature of the evidence. *Id.*

¶ 35

2. *Elements of the Offense*

¶ 36

A person commits retail theft when he or she knowingly:

"Takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale in a retail mercantile establishment 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 of such merchandise[.]" 720 ILCS 5/16A-3(a) (West 2010) (renumbered 720 ILCS 5/16-25(a)(1) (eff. Jan. 1, 2012).

Without objection, the State submitted a jury instruction on the issue of accountability, which read as follows:

"A person is legally responsible for the conduct of another person when, either before or during the commission of the offense, and with the intent to promote or facilitate the commission of the offense, he knowingly solicits, aids, abets, agrees to aid, or attempts to aid the other person in the planning or commission of the offense."

This jury instruction reflects the provision of the criminal code defining accountability. See 720 ILCS 5/5-2(c) (West 2010); see also Illinois Pattern Jury Instructions, Criminal, No. 5.03 (4th ed. Supp. 2009).

¶ 37

3. *The State's Evidence*

¶ 38 At trial, the State presented an audio recording of the police station interview in which defendant admitted having knowledge of the retail thefts being perpetrated by the men he lived and used drugs with. He stated the group committed those thefts to get money for drugs. He admitted being present for multiple previous retail thefts. He also admitted removing security packaging from some items that were later stolen, as well as placing items into shopping carts. He unambiguously voiced his belief he could not be charged with retail theft because he did not actually transport the items out of the stores. The jury could easily infer from this background evidence, as well as the high price of the Dyson vacuum cleaner at issue, defendant knew the vacuum cleaner was going to be stolen when Levendoski placed it in the shopping cart.

¶ 39 Surveillance video showed defendant walking in front of the shopping cart Levendoski was pushing. Defendant did not walk toward the point of payment, but instead walked directly toward the store's main entrance. With Levendoski following closely behind, defendant walked directly to the only employee stationed near the entrance, the people greeter, and began to speak with her. Defendant's body obstructed the people greeter's view of Levendoski and the shopping cart. As Lucas, the store manager, walked past and asked the people greeter if she had checked Levendoski for a receipt, defendant immediately stopped talking with the people greeter and followed Lucas outside. The jury was free to conclude defendant's actions were intended to help Levendoski avoid detection by distracting the people greeter.

¶ 40 Although defendant was not required to present evidence, the State's evidence left the jury with no reasonable, innocent explanation as to why defendant entered the Walmart in the

first place, watched Levendoski place a \$499.90 vacuum cleaner into a shopping cart, walked with Levendoski to the front of the store without purchasing anything, started a brief conversation with the people greeter just as Levendoski pushed the cart past, then followed Levendoski out. The State's evidence was sufficient to allow a reasonable jury to find defendant guilty of retail theft on a theory of accountability.

¶ 41 B. Defendant is Entitled to \$5 *Per Diem* Credit for Time Served

¶ 42 Pursuant to section 110-14 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/110-14(a) (West 2010)), defendant is entitled to a statutory \$5-per-day credit against creditable fines for time spent in presentence custody. "Such credit may only be applied to offset eligible fines, not fees." *People v. Vlahon*, 2012 IL App (4th) 110229, ¶ 33, 977 N.E.2d 327. The CAC assessment is such a fine. *People v. Folks*, 406 Ill. App. 3d 300, 305, 943 N.E.2d 1128, 1132 (2010). The State concedes defendant is entitled to such credit. The trial court credited defendant with 235 days for time served. Defendant is entitled to \$5 credit against his \$5 CAC fine.

¶ 43 C. Defendant's VCVA Fine is Reduced From \$20 to \$4

¶ 44 Defendant asserts the VCVA fine (725 ILCS 240/10(b) (West 2010)) should be reduced to \$4 because another fine was imposed. The State concedes defendant's VCVA fine should be \$4.

¶ 45 Pursuant to section 10(b) of the VCVA, the VCVA fine is \$4 for each \$40, or fraction thereof, of fine imposed. 725 ILCS 240/10(b) (West 2010); *Vlahon*, 2012 IL App (4th) 110229, ¶ 37, 977 N.E.2d 327. Pursuant to section 10(c) of the VCVA, a \$20 VCVA fine is improper where another fine is imposed. 725 ILCS 240/10(c) (West 2010); see *People v. Jake*,

2011 IL App (4th) 090779, ¶¶ 32, 34, 960 N.E.2d 45 (modifying \$25 VCVA fine to \$4 where other fine was imposed); *People v. Childs*, 407 Ill. App. 3d 1123, 1134, 948 N.E.2d 105, 114 (2011) (modifying \$20 VCVA fine where other fines were imposed). Defendant's VCVA fine should be reduced to \$4.

¶ 46

III. CONCLUSION

¶ 47 The State presented sufficient evidence to sustain defendant's conviction for retail theft (720 ILCS 5/16A-3(a), 5-2(c) (West 2010)). Defendant is entitled to \$5 credit against his \$5 CAC fine and his VCVA fine should be reduced to \$4. On remand, we direct the trial court to instruct the circuit clerk to adjust defendant's sentence and credits accordingly. Because the State successfully defended a portion of the criminal judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 48

Affirmed as modified and remanded with directions.