SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1277-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J. M.,[1]

Defendant-Appellant.

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Submitted October 11, 2022 – Decided November 4, 2022

Before Judges Whipple and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment No. 17-09-1029.

Joseph E. Krakora, Public Defender, attorney for appellant (Thomas P. Belsky, Assistant Deputy Public Defender, of counsel and on the briefs).

Yolanda Ciccone, Middlesex County Prosecutor, attorney for respondent (Joie D. Piderit, Assistant Prosecutor, of counsel and on the brief).

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[1] We use initials to protect the identity of the victim. See R. 1:38-3(c)(12).

PER CURIAM

Defendant J.M. appeals from a September 16, 2019 judgment of conviction for theft of movable property belonging to T.E. Defendant raises the following issues on appeal:

> POINT I
> THE TRIAL COURT ERRED IN DENYING [DEFENDANT'S] MOTION FOR JUDGMENT OF ACQUITTAL CONCERNING FOURTH-DEGREE THEFT BECAUSE THE STATE PRESENTED NO EVIDENCE FROM WHICH THE JURY COULD CONCLUDE THAT THE CELL PHONE REFERENCED IN THE INDICTMENT HAD A VALUE OF AT LEAST $200.
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> POINT II
> ALTERNATIVELY, THIS COURT SHOULD REMAND [DEFENDANT'S] CASE FOR A CORRECTED JUDGMENT OF CONVICTION TO REFLECT A CONVICTION FOR A FOURTH-DEGREE THEFT INSTEAD OF A THIRD- DEGREE THEFT. (NOT RAISED BELOW) [2]

On March 31, 2017, T.E. filed a complaint with the Jamesburg Police Department alleging defendant physically and sexually assaulted her and demanded money from her. After she underwent a medical exam, she sought and obtained a restraining order against defendant.

[2] The State concedes this issue and agrees the matter should be corrected for the entry of an amended judgment of conviction for fourth-degree theft.

A Middlesex County grand jury charged defendant with two counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1) and N.J.S.A. 2C:12-1(b)(12); third-degree criminal restraint, N.J.S.A. 2C:13-2(a); second-degree robbery, N.J.S.A. 2C:15-1(a)(1); third-degree theft by unlawful taking, N.J.S.A. 2C:20-3(a); second-degree burglary, N.J.S.A. 2C:18-2(a)(1); second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1); and fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b).

The jury trial took place from July 9 to 11, 2019. T.E. testified that she threw eggs at defendant's car because she was angry with him. On March 31, 2017, defendant called her repeatedly, threatening to damage her car and demanding $500 for the damage to his car. Defendant arrived at her apartment, pushed her, and again demanded $500 for repairs. As he left, he took her cell phone, an iPhone 6 Plus and her car keys. He did not give her phone back.

Months later, T.E. met defendant in a bank parking lot where, she testified, he took a second iPhone 6 Plus she had bought as a replacement. She withdrew $300 from the bank and gave it to him. She claimed he never returned either of the phones.

Defendant testified the damage to his car was about $300. He admitted taking T.E.'s cell phone and not returning it at that time. He wanted to hold on to it as collateral until she paid him for his car. Defendant testified he returned her cell phone when she gave him the $300 at the bank. He denied taking the second cell phone from T.E.

At the close of the State's case, defendant moved for a judgment of acquittal on all counts in the indictment, which the court denied. As to the theft count, the court stated:

> [The court]: The theft is the phone, if we believe her testimony the phone was never returned. That . . . whatever phone he gave back was a phone that was gotten from her car, that the phone originally taken was -- she was permanently deprived of that phone . . . . [A]lthough there was no testimony about the value, I guess I can make an inference that a -- . . . I don't even know the make or model of the phone. . . .
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> [The State]: She testified that it was an iPhone 6 [Plus].
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> [The court]: Oh, iPhone 6, you're correct. I'm sorry. So, . . . I think an iPhone 6[,] it exceeds -- well, it exceeds well over $200 in value.

The court instructed the jury how to find the value of the iPhone:

> Since the value of the moveable property determines the degree or severity of the crime, the State must prove its value beyond a reasonable doubt. If you find the defendant guilty of an offense you must then

> indicate whether the value of the property is at least $200 or is less than $200. Value means the fair market value of the property at the time and place of the alleged theft. Fair market value is the price that buyer would be willing to pay and the seller would be willing to accept if both parties were aware of all the relevant surroundings, circumstances, and neither party were under any compulsion to buy or sell. The State has the burden of proving fair market value of the property involved. This means that the State must prove beyond a reasonable doubt that the property is worth what the State claims.

The jury found defendant guilty of fourth-degree theft and acquitted him of all other charges.

Before sentencing, defendant renewed his motion for judgment of acquittal concerning the fourth-degree theft, submitting evidence that the value of an iPhone 6 Plus was less than $200. The trial court again denied defendant's motion, reasoning:

> The value of the property taken is an element of the offense to be proven by proof beyond a reasonable doubt. [N.J.S.A. 2C:1-14(m)] defines amount involved in a theft as, "The fair market value at the time in place of the operative act." And the case law essentially holds that fair value, fair market value is the price that a buyer would be willing to pay and the seller would be willing to accept if both parties were aware of all the relevant circumstances, and neither party were under any compulsion to buy or sell.
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> In this case, the victim acting arguably as the buyer gave . . . defendant $300. And defendant acting

> in the role of the seller gave the victim her iPhone back. In this [c]ourt[']s view, this exchange demonstrated that at the time the iPhone's fair market value exceeded $200. Therefore the [m]otion for [j]udgment of [a]cquittal is denied.

This appeal followed.

"In assessing the sufficiency of the evidence on an acquittal motion," an appellate court applies a de novo standard of review. State v. Williams, 218 N.J. 576, 593-94 (2014) (citing State v. Bunch, 180 N.J. 534, 548–49 (2004)). Defendant argues the trial court erred in denying his motion for a judgment of acquittal because the State did not present evidence of the value of T.E.'s iPhone 6 Plus. We agree.

A judgment of acquittal shall be entered "[a]t the close of the State's case . . . if the evidence is insufficient to warrant a conviction." R. 3:18-1. An appellate court views "the State's evidence in its entirety, be that evidence direct or circumstantial." State v. Jones, 242 N.J. 156, 168 (2020) (quoting State v. Reyes, 50 N.J. 454, 459 (1967)). "In considering circumstantial evidence, we follow an approach 'of logic and common sense. When each of the interconnected inferences [necessary to support a finding of guilt beyond a reasonable doubt] is reasonable on the evidence as a whole, judgment of

acquittal is not warranted.'" Id. (quoting State v. Samuels, 189 N.J. 236, 246 (2007)) (alteration in original) (internal citations and quotation marks omitted).

Moreover, the Court has said,

> When evaluating motions to acquit based on insufficient evidence, courts must view the totality of evidence, be it direct or circumstantial, in a light most favorable to the State. More specifically, we must give the government in this setting "the benefit of all its favorable testimony as well as of the favorable inferences [that] reasonably could be drawn therefrom[.]" Within that framework, the applicable standard is whether such evidence would enable a reasonable jury to find that the accused is guilty beyond a reasonable doubt of the crime or crimes charged.
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> [State v. Perez, 177 N.J. 540, 549-50 (2003) (alteration in original) (quoting Reyes, 50 N.J. at 459).]

The State bears the burden to prove the value of stolen movable property beyond a reasonable doubt. Model Jury Charges (Criminal), "Theft of Movable Property" (N.J.S.A. 2C:30-3(a)) (Rev. Feb. 11, 2008). The stolen items in a theft prosecution are to be valued at the time of the theft. State v. Gosa, 263 N.J. Super. 527, 537 (App. Div.), certif. denied, 134 N.J. 477 (1993). "[F]or purposes of fixing the degree of an offense, that value shall be the fair market value at the time and place of the operative act." N.J.S.A. 2C:1-14(m). Third-degree theft involves an amount between $500 and

$75,000, N.J.S.A. 2C:20-2(b)(2)(a), while fourth-degree theft involves an amount between $200 and $500, N.J.S.A. 2C:20-2(b)(3). A theft is a disorderly persons offense if the amount involved was less than $200. N.J.S.A. 2C:20-2(b)(4)(a).

"Statements of fact or opinion [relevant to value] that are not even remotely supported by personal knowledge or experience are not evidence and may not be the basis for an indictment." State v. Vasky, 218 N.J. Super. 487, 492 (App. Div. 1987). "No defendant should be subjected to a jury which can do [no] more than speculate on the evidence before it." State v. DiRienzo, 53 N.J. 360, 377 (1969).

Here, the trial court erred in denying defendant's motion for a judgment of acquittal because the State presented no evidence of the value of T.E.'s iPhone 6 Plus. T.E. did not testify as to how much she paid for the phone, or what condition it was in. The State did not present evidence as to the fair market value—the amount a buyer would pay a seller for an iPhone 6 Plus in 2017. Instead, the court speculated, without apparent personal knowledge or any factual basis, that an iPhone 6 Plus would be more than $200. The State's failure to present evidence likely subjected the defendant to jury speculation. Id. at 377.

Additionally, when defendant renewed his motion before sentencing, the court accepted the State's theory that, because T.E. paid $300 to defendant in return for getting her phone back, T.E. acted as the "buyer" and defendant as the "seller." Even viewing the evidence in the light most favorable to the State, the inference that T.E. "purchased" her phone from defendant for $300 is not reasonable. See Perez, 177 N.J. at 549-50. In an ordinary market, a person does not buy something they already own.

Moreover, the State's argument in its brief that a jury could draw reasonable inferences from T.E.'s testimony that the value of the phone exceeded $200 is unpersuasive. T.E. testified that defendant demanded $500 for the damage to his car and took her iPhone 6 Plus and car keys. She then testified that she gave him $300, he took her replacement iPhone 6 Plus, and he did not return either of the phones.

If the State's evidence is accepted as true, then the reasonable inference is that defendant accepted the two phones in lieu of the remaining $200 he demanded. Neither phone individually would be valued at $200. At best, one phone would be valued at $0.01 and the other at $199.99, just short of $200 pursuant to N.J.S.A. 2C:20-2(b)(3). Moreover, the theft of only one of the phones on March 31, 2017, formed the basis of the indictment. In sum, the

State presented sufficient evidence to convict defendant only of a disorderly persons theft under N.J.S.A. 2C:20-2(b)(4)(a). Therefore, we reverse, vacate and remand for amendment of the judgment of conviction to a disorderly persons theft. State v. R.P., 223 N.J. 521, 528-59 (2015).

Reversed and remanded consistent with our instructions, we do not retain jurisdiction.