UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1176

September Term, 2014

JONATHAN LUIS BADILLO

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: September 30, 2015

Jonathan Luis Badillo ("Badillo") was convicted by a jury sitting in the Circuit Court for Baltimore City of two counts of theft of property with a value less than $1,000, and one count of theft of property with a value between $1,000 and $10,000. The court imposed concurrent suspended sentences of eighteen-months' imprisonment, with five years probation, for each of the theft under $1,000 convictions, as well as a concurrent suspended sentence of six years' imprisonment, with five years probation, for the theft of property valued between $1,000 and $10,000 conviction. Additionally, the court ordered Badillo to pay $6,547.73 in restitution to the victim. In this appeal, Badillo presents a single question for our review, *viz*.:

Was the evidence sufficient to sustain appellant's convictions?

We shall answer that question in the affirmative.

I.

FACTS PROVEN AT TRIAL[1]

Andrew Simoff Horse Transportation, LLC ("Simoff Transportation") is owned by Elizabeth and Andrew Simoff. Simoff Transportation, whose main office is in Delaware, specializes in transporting horses throughout the eastern portion of the United States.

In the Spring of 2013, Simoff Transportation employed approximately sixteen drivers to transport horses. Some jobs called for a tractor trailer to be used, in which case, two

[1]Because appellant's sole contention is that the evidence was insufficient to convict him of any crime, the evidence summarized in Part I of this opinion is presented in the light most favorable to the State. Appellant's version of events is omitted even though, if the jury had believed him, he would have been acquitted of all charges.

drivers were required to be present in the truck. On such trips, one of the drivers would be provided with a Wright Express fuel credit card. The fuel card, which had to be presented when used, could only be utilized to buy fuel, oil, or other items needed to operate the truck. The entry of a four-digit authorization PIN (personal identification number) was required to use the credit card.

Simoff Transportation had approximately ten to twelve fuel credit cards it gave to drivers as needed. Company policy was that any Wright Express fuel credit cards, when not in the possession of an authorized driver, were to be kept in the desk of the company's office. All of the fuel cards had the same PIN.

Badillo worked for Simoff Transportation between November 2012 and April 19, 2013. While employed at Simoff Transportation, he was never authorized by his employer to use a Wright Express credit card.

When Mrs. Simoff checked Simoff Transportation's Wright Express credit card bill for July 2013, she noticed charges that were attributed to fuel card no. 55, which had been last issued to a driver named Luis Calderon. Mr. Calderon left the company about six months earlier. After Mr. Calderon left the company's employ, credit card no. 55 was not immediately deactivated; instead, it had simply been placed in an unlocked desk drawer at the company's office. Further inspection of the Wright Express credit card bills showed $6,547.73 in unauthorized charges on card no. 55 between April and July of 2013. Moreover, close scrutiny of the billing statements also showed that many of the transactions

occurred back-to-back in a very short period of time at the same location. The billing statements related to that card showed purchases that totaled $728.49 for the April billing period, $1,486.19 for the May billing period, $3,333.05 for the June billing period, and $1,000 for the July billing period.[2] Simoff Transportation paid each of these bills in full.

After discovering the unauthorized charges, Mr. Simoff called Wright Express and cancelled the card that Mr. Calderon had formerly been authorized to use. Mrs. Simoff then contacted the owner of a CITGO gas station, located at 900 East Patapsco Avenue in Baltimore, Maryland, where a recent charge on the card had been made, and requested any surveillance video that may have captured the transaction. The station was able to provide a still picture of Badillo using the card in question to purchase $450 worth of fuel on July 9, 2013. That still picture was introduced into evidence at trial as was the videotape that showed Badillo entering the PIN for the credit card and buying fuel.

Among the unauthorized charges were four fuel purchases of $150 each, *i.e.*, $600 total, made at a Baltimore gas station located at 3550 Potee Street. One of these transactions occurred on May 9, 2013, two occurred on June 21, 2013, and one occurred on July 3, 2013. According to Mrs. Simoff, these purchases caught her attention because all were in even

[2]The billing cycle for Simoff Transportation's Wright Express credit card account ended on the 5th of each month. The billing periods here relevant ended on May 5th, June 5th, July 5th and August 5th, respectively.

amounts whereas, typically, fuel purchases would come to an uneven amount "like $230.25 or something."

When defense counsel cross-examined Mrs. Simoff, the following exchange occurred:

> Q. But the question is how do you know that it didn't go into your trucks? Is it just because the - -
>
> A. Because my trucks were not on the road in Baltimore when he made those charges and he wasn't working for me, so how could he put fuel into my truck if he wasn't driving it or he wasn't working for me and my trucks weren't even down there?
>
> He had quit working for me in April. The charges were after that. He no longer drove for me. He hadn't driven any of my trucks. How does he put fuel in my trucks if he wasn't driving them?

Additional facts will be provided below as our analysis requires.

II.

STANDARD OF REVIEW

In *DeGrange v. State*, 221 Md. App. 415, 420-21 (2015), we reiterated the well-established standard for appellate review when the appellant raises a sufficiency of the evidence challenge:

> The test of appellate review of evidentiary sufficiency 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. The Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, but rather is only with whether the verdicts were supported with sufficient evidence – that is, evidence that either showed directly, or circumstantially, or supported a

> rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offense charged beyond a reasonable doubt. We must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference. Further, we do not distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.

(quoting *Donati v. State*, 215 Md. App. 686, *cert. denied*, 438 Md. 143 (2014) (internal quotation marks and citations omitted)).

III.

ANALYSIS

A. Counts I and II

In counts one and two, Badillo was convicted of theft of property worth less than $1,000 as prohibited by Md. Code (2012 Repl. Vol) Criminal Law Article ("Crim. Law") section 7-104(a), which provides:

> **§ 7-104. General theft provisions.**
>
> (a) *Unauthorized control over property.* – A person may not willfully or knowingly obtain or exert unauthorized control over property, if the person:
>
> (1) intends to deprive the owner of the property;
>
> (2) willfully or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or
>
> (3) uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

Crim. Law section 7-101(h) defines "owner" as a person, other than the offender: (1) who has an interest in or possession of property . . . and (2) without whose consent the offender has no authority to exert control over the property. *See also Cicoria v. State*, 332 Md. 21, 31 (1993) (explaining that the term "person" for the purposes of the theft statute has been "interpreted expansively, as including individuals . . . corporations . . . and financial institutions.") (citations omitted).

Count I charges that Badillo had taken property of Simoff Transportation on three separate transactions worth a total of $600. The charge in Count I was based on transactions that took place at the gas station located at 3550 Potee Street in Baltimore on May 9, 2013, June 21, 2013, and July 3, 2013.

Count II was based on the July 9, 2013 incident that was captured on videotape and showed that Badillo was in sole possession of fuel card no. 55 on that date and used the card to buy fuel worth $450.

In regard to Counts I and II, appellant argues:

> In the present case, appellant's misdemeanor theft charges, under section § 7-104, were for the unlawful taking of property with a value of less than $1000 from Andrew Simoff Horse Trans LLC C/O Elizabeth Simoff, the property taken being $600 (count one) and $450 (count two). The evidence adduced at trial, however, was that any use of the credit card was to purchase diesel ($600) from a gas station on Potee Street in Baltimore City (count one) and from a Citgo gas station located at 900 Patapsco Avenue in Baltimore City (count two). The evidence presented simply does not establish that appellant exerted unauthorized control over property of Andrew Simoff Horse Trans, LLC, as charged; rather, the property was taken from the merchants. *Cf. Clark v. State*, 188 Md. App. 185, 203, 981 A.2d 710 (2009) (the statute

> proscribing "use of a stolen credit card, viewed the defrauded merchant as the principal victim" because the cardholder who has taken reasonable steps to notify the card issuer of the theft has no liability in excess of $50); *Dyson v. State*, 163 Md. App. 363, 384, 878 A.2d 711 (2005) ("The conduct or transaction of stealing property consisting of a credit card is not the same conduct or transaction as obtaining or exerting control over other property by use of the stolen credit card, however.").

Technically, it is true, as appellant contends, that diesel fuel was taken from the merchants (the sellers of the diesel fuel) and not from Simoff Transportation. But, the evidence at trial showed that the "merchants" lost nothing due to the transactions with appellant. Simoff Transportation paid for the fuel that appellant pumped and the company was never reimbursed. Within the meaning of Crim. Law section 7-101(h), Simoff Transportation, after appellant used the Wright Express card to pay for the fuel, became the owner of that fuel. Therefore, at the moment appellant used credit card no. 55 to pay for the fuel oil, that oil became the property of the holder of the card (Simoff Transportation) and was no longer the property of the merchant. By using credit card no. 55 to buy fuel for his own purposes, appellant obtained control of the fuel oil, which its owner (Simoff Transportation) never authorized. Based on the evidence that Simoff Transportation never received the oil, the jury could properly infer that when appellant took it, he intended to permanently deprive Simoff Transportation of that oil. Thus, taking the evidence in the light most favorable to the State, every element necessary to convict appellant of violation of Crim. Law 7-104 was proven.

Appellant's reliance on *Dyson v. State*, 163 Md. App. 363 (2005) and *Clark v. State*, 188 Md. App. 185, 203 (2009) is misplaced. Neither case stands for the proposition cited, which is that when a credit card is used by a person other than the person to whom the card is issued, the "victim" is not the owner of the card who pays for the merchandise, but instead is the merchant who accepts the card and sells the merchandise.

For our purposes, *Dyson* stands for the unremarkable principle that when determining whether charges should merge for purposes of sentencing, the illegal conduct of stealing a credit card is not the same illegal conduct as using the stolen card to obtain merchandise. *Dyson*, 163 Md. App. at 384.

Clark, likewise, is not on point, because that case, insofar as here relevant, dealt with identity theft as proscribed by Crim. Law section 8-301 and use of a stolen credit card as prohibited by Crim. Law section 8-206. Here, neither of those crimes was charged and therefore, who the "principal victim" might be under those statutes is irrelevant when: 1) the merchant who sold appellant the fuel was paid in full; and 2) appellant's former employer was the only "person" that lost anything due to appellant's use of the credit card.

III.

Appellant was charged in Count III with engaging in a theft scheme involving the theft of at least $1,000 but less than $10,000 in violation of Crim. Law section 7-103(f). As to Count III, appellant's entire argument is as follows:

> [T]he evidence also failed to establish a scheme. The purported thefts occurred throughout a four month period, separated by lapses of time, and involved different merchants throughout Maryland. Accordingly, the evidence failed to establish that the takings were part of a single scheme or continuing course of conduct. *See Kelley v. State*, 402 Md. 745, 756, 939 A.2d 149 (2007) (stating that for theft scheme "the ultimate criterion is whether the separate takings were part of a single scheme or continuing course of conduct"). As such, reversal is required.

In *Painter v. State*, 157 Md. App. 1, 15 (2004) we set forth the purposes behind the theft scheme provision in the Maryland theft statute, as follows:

> The purpose of this provision, as this Court has said, "is to permit the State to aggregate the value of all property stolen pursuant to one scheme or continuing course of conduct to determine whether the theft is a misdemeanor or felony." *State v. Hunt*, 49 Md. App. 355, 360 (1981). "[Whether or not there [is] present in a particular case the requisite single continuous intent, scheme, or plan which would render a series of takings a single larceny is a question to be determined by the trier of fact." Peter G. Guthrie, *Series of Takings Over a Period of Time as Involving Single or Separate Larcenies*, 53 A.L.R. 3d 398 § 6 (1973); *see also Horsey v. State*, 225 Md. 80, 83 (1961).

Id.

In *Kelley v. State*, 402 Md. 745, 750-51 (2008), the Court analyzed, in detail, *Horsey v. State*, 225 Md. 80 (1961). The *Kelley* Court recognized that "*Horsey* expanded Maryland common law to the point of recognizing the single larceny doctrine, or at least its substance, where several items of property are stolen either at the same time from the same or different people or at different times from the same owner." *Id*. at 751. In *Horsey*, the evidence showed that all of the merchandise that appellant was alleged to have stolen was not stolen on the same date, but rather on a series of dates during a period between March and the end

of May 1960. *Id*. Based on that evidence, the defendant argued in *Horsey* that several different thefts had been committed, rather than one theft as alleged in the indictment. Therefore, according to *Horsey*, the court could not aggregate the value of the merchandise together for the purposes of determining whether a felony had been committed. *Horsey*, 225 Md. at 83. In *Horsey*, the Court of Appeals rejected the defendant's argument and found that the trier of fact could properly have found that the separate takings were pursuant to a common scheme or intent. *Id*. The *Horsey* Court added that "[i]t is generally held that if [the takings are pursuant to a common scheme or intent] the fact that the takings occur on different occasions does not establish that they are separate crimes." *Id*.

The *Kelley* Court said that Crim. Law section 7-103(f):

> makes clear that, when theft is committed "under one scheme or continuing course of conduct, whether from the same or several sources: (1) the conduct may be considered as one crime; and (2) the value of the property or services may be aggregated in determining whether the theft is a felony or a misdemeanor."

402 Md. at 752.

Moreover, the *Kelley* Court noted, that when the evidence is sufficient to support the existence of a single larcenous scheme, the factfinder's conclusions that such a scheme existed will not be disturbed. *Id*. at 756.

In the subject case, the separate thefts all involve the same victim, the same *modus operandi*, the same perpetrator, and the same general geographic area. All the transactions at issue involved credit card no. 55, which was the card assigned to Luis Calderon. Most

transactions, as Mrs. Simoff pointed out in her testimony, involved card transactions where the sum involved was rounded off to an exact figure, which was unusual because legitimate transactions on the company's credit cards were not rounded off in that manner. Moreover, credit card no. 55, during the period between April and July 2013, was used almost always in either the Washington or Baltimore Metropolitan areas.[3] One exception was that on a single occasion the credit card was used in Belcamp, Maryland, which is in Harford County. The evidence showed that appellant lived in Laurel, Maryland and therefore most of the places where credit card no. 55 was used by appellant were within easy driving distance from his home in Laurel. Lastly, contrary to appellant's argument, the thefts of property were not, as appellant contends, perpetrated against "different merchants;" instead, as previously explained, the victim of his crimes was his former employer, Simoff Transportation.

From the evidence introduced by the State, the jury could properly infer that Badillo would drive to one of seven gas stations within Maryland, use credit card no. 55 to purchase fuel, enter the four-digit PIN and take fuel that rightfully belonged to his former employer.

[3]The billing statements related to fuel card no. 55 showed that the fuel card was used (between April and July 2013) at the following gas stations: BP Gas Station 6830 Baltimore-Annapolis Blvd., N. Linthicum, Md.; Sunoco Gas Station 4836 Kenilworth Avenue, Hyattsville, Md.; 1298 E. Gude Drive, Rockville, Md.; 3550 Potee Street, Baltimore, Md.; BP Gas Station 881- Washington Blvd., Jessup Md.; Sunoco Gas Station 1 Carroll Island, Baltimore, Md., Sunoco Gas Station 1319 Riverside Parkway, Belcamp, Harford County, Md.

In summary, as in *Painter*, *supra*, the evidence of one common scheme was sufficient to convict appellant under Crim. Law section 7-103(f). Therefore, we affirm appellant's conviction as to Count III.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.