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ARKANSAS COURT OF APPEALS

DIVISIONS I and II
No. CACR09-514

JONATHON MOSS APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** February 3, 2010 APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. CR2008-432] HONORABLE DAVID L. REYNOLDS, JUDGE AFFIRMED

JOHN MAUZY PITTMAN, Judge

After a bench trial, appellant was found guilty of theft of property valued at more than $500 and was sentenced to twenty years' imprisonment. On appeal, he argues that the evidence establishing the value of the stolen property was hearsay that was erroneously admitted over his objection. We find no error, and we affirm.

A person commits theft of property if he knowingly takes or exercises unauthorized control over the property of another person, with the purpose of depriving the owner of the property. Ark. Code Ann. § 5-36-103(a)(1) (Repl. 2006). Theft of property is a Class C felony if the value of the property is less than $2,500 but more than $500. Ark. Code Ann. § 5-36-103(b)(2)(A) (Repl. 2006). It is undisputed that appellant attempted to leave a Wal-Mart store without paying for an Epson television, a Phillips S-video cable, and an RCA

HDMI cable. The sole issue on appeal is whether the proof offered to establish the value of those items was hearsay.

Proof of value was established through the testimony of Mr. Dallas Sprinkle, a Wal-Mart employee. He testified that his job title was Asset Protection Associate and that he had received special training in loss protection. His course of training took several weeks, and he had stopped approximately two hundred shoplifters during his five years of employment with Wal-Mart. He testified that, in cases of suspected shoplifting, he is required to get a value for the merchandise by scanning the bar code of the items at a cash register to access Wal-Mart's inventory-control system and thereby determine their price, which is then recorded on a receipt. Mr. Sprinkle then testified that the total value of the items in question was $1,035.14. The trial court overruled appellant's objections that Mr. Sprinkle lacked personal knowledge of the items' value and that the receipt that he generated was hearsay.

Appellant argues that Mr. Sprinkle's testimony did not establish that he was trained in the use of the store's inventory system or that it was part of his job to be familiar with the cost and retail price of the items through the records in Wal-Mart's computer system. Appellant argues that Mr. Sprinkle's testimony is analogous to that of the security guard in *Lee v. State*, 264 Ark. 384, 571 S.W.2d 603 (1978), where a security guard's testimony as to value, based on a price tag, was held to be hearsay and inadmissible to prove the value of the stolen property.

It is true that it is necessary in a case like this to have someone testify who has actual knowledge of the property's fair market value. *Brooks v. State*, 303 Ark. 188, 792 S.W.2d 617 (1990). However, we cannot say that the State failed to do so in this case. In *Christian v. State*, 54 Ark. App. 191, 925 S.W.2d 428 (1996),[1] testimony that a Wal-Mart employee knew the value of the items and that it was part of her job to be familiar with the cost and retail price of the items through the records in Wal-Mart's computer system was held to be sufficient to establish personal knowledge of the items' value. Here, Mr. Sprinkle testified that he was regularly required to obtain the price of items retrieved from alleged shoplifters by scanning the items' bar codes into the store's inventory database and thereby determine the retail price and obtain a receipt reflecting that price. He also testified that he had apprehended approximately two hundred shoplifters during the course of his employment. We think that this was sufficient to permit the trial court to find that Mr. Sprinkle had sufficient knowledge of and familiarity with the computer inventory database, and with the means of accessing it to determine prices, to support his value testimony.

The dissenting judge distinguishes *Christian v. State*, ultimately concluding that the value testimony in the present case was improperly admitted because Mr. Sprinkle did not have the level of expertise regarding UPC codes, or "even access to the same depth of

[1]The dissenting judge states that we "purport[ ] to rely" on this case. We do not know why she would believe that our reliance is merely professed and less than genuine.

information" as did the UPC clerk in *Christian*. We disagree. The testimony concerning the abilities of the UPC clerk in *Christian v. State* was as follows:

> Debra Young testified that she was employed at Wal-Mart as a UPC (Universal Product Code) clerk. She testified that her duties included checking merchandise prices by conducting a computer inquiry using the merchandise UPC numbers. The computer information reflected the wholesale cost, retail price, and vendor of the merchandise. It also reflected if the merchandise was replenishable and if it was on clearance. She testified that the list of information she obtained from the computer gave the current retail price of the Wal-Mart merchandise. She further testified that the prices had changed or had been reduced since the time of the theft. She did not, however, testify to what the retail prices were at the time of the theft but she did testify to the wholesale price Wal-Mart paid for each piece of merchandise which totaled approximately $239.00.
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> Thus, Ms. Young testified that she knew the value of the items and that it was part of her job to be familiar with the cost and retail price of the items through the records in Wal-Mart's computer system. *See Lee v. State*, 264 Ark. 384, 571 S.W.2d 603 (1978); *Williams v. State*, 29 Ark. App. 61, 781 S.W.2d 37 (1989). Although she did not testify specifically to the retail price of the merchandise at the time of the offense, she did testify to the value of the merchandise based on the cost of the items to Wal-Mart. Thus, we find the evidence sufficient to establish the value of the property and therefore, sufficient to support the appellant's conviction.

Christian v. State, 54 Ark. App. at 194-95, 925 S.W.2d at 430-31.

Like the UPC clerk in *Christian*, Mr. Sprinkle testified that he knew the value of the items and that it was part of his job to check the prices of items recovered from alleged shoplifters by conducting inquiries in Wal-Mart's computer system using the merchandise UPC numbers. Although Mr. Sprinkle did not testify concerning the full extent of the product information returned by his inquiry, we do not think it essential, to establish value, to know an item's wholesale price, the identity of the vendor from whom the item was

procured, whether the item was on clearance, or whether the store was able to obtain additional stocks of the item from its suppliers. The preferable method of determining value for the purpose of establishing the degree of theft is by proof of the market value of the property at the time and place of the offense. Ark. Code Ann. § 5-36-101(12)(A)(i) (Repl. 2006). Mr. Sprinkle's determination of the retail price of the items at the time of the theft was direct proof of their market value. We think that Mr. Sprinkle's testimony was sufficient to permit the trial court to find that he had similar knowledge of and familiarity with the computer system.

Affirmed.

GLADWIN, ROBBINS, KINARD, and GRUBER, JJ., agree.

HART, J., dissents.

HART, J., dissenting. The issue in this case is whether the trial court erred in admitting hearsay to prove the value of a big-screen television. Here, Dallas Sprinkle, the "asset protection associate"who apprehended appellant, testified that when he catches a shoplifter, the "protocol" is to log the merchandise into a cash register in the "training mode" and obtain a void receipt when the register reads the UPC code. There is no dispute that Sprinkle had no independent knowledge of the item's value.

Herein lies the problem. The receipt clearly fits the definition of hearsay, as does Sprinkle's testimony. Rule 802 of the Arkansas Rules of Evidence states that "hearsay is not

admissible except as provided by law or by these rules." The only possibly applicable exception to the hearsay rule lies in 803(6), which allows

> a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness.

Sprinkle is clearly not a records custodian, so the question therefore is whether he is a "qualified witness."

In *Christian v. State*, 54 Ark. App. 191, 925 S.W.2d 428 (1996), which the majority purports to rely on, the court of appeals found such a "qualified witness" in Debra Young, a UPC clerk, who testified not only as to the retail price, but also the wholesale price that Wal-Mart paid for the item in question, and whether the price had changed or had been reduced since the time of the theft. Clearly Sprinkle did not have that level of expertise regarding UPC codes, or even access to the same depth of information as Young did.

Accordingly, I believe the case at bar is controlled by *Lee v. State*, 264 Ark. 384, 571 S.W.2d 603 (1978), where the supreme court found a security guard's testimony regarding value of a shoplifted item was inadmissible hearsay, where the security guard's knowledge of value was based solely on his reading the price shown on the price tags. I am unable to see where Sprinkle's knowledge obtained by merely scanning a UPC code is any different than the knowledge obtained by the security guard in *Lee*. If the supreme court held that it

was inadmissible hearsay in *Lee*, I believe we are bound to hold that it is inadmissible hearsay in the case at bar.