No. 123318

IN THE

SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellant,<br><br>-vs-<br><br>DARREN JOHNSON<br><br>Defendant-Appellee | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Appellate Court of Illinois, No. 3-15-0352.<br><br>There on appeal from the Circuit Court of the Fourteenth Judicial Circuit, Whiteside County, Illinois, No. 14-CF-254.<br><br>Honorable John Hauptman, Judge Presiding. |

**BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE**

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## POINTS AND AUTHORITIES

Page

## ISSUE PRESENTED FOR REVIEW

Where Darren Johnson entered an open retail store and never entered an area of the store that was off-limits to the public, whether the appellate court correctly concluded that under *People v. Bradford*, 2016 IL 118674, Johnson could not be found guilty of burglary because he never exceeded the scope of his physical authority as a member of the public to be in the store.

## STANDARD OF REVIEW

As in *Bradford*, the only question in this case is whether the undisputed facts may satisfy the elements of the burglary statute, which is a question of statutory construction this Court reviews *de novo*. *People v. Bradford*, 2016 IL 118674, ¶¶ 14-15. Where the undisputed facts cannot satisfy the elements of the charged offense, the State has failed to prove the defendant's guilt beyond a reasonable doubt and the conviction must be reversed. *Id*. ¶¶ 12, 34.

## ARGUMENT

**Darren Johnson entered a retail store that was open for business and never entered an area of the store that was off-limits to the public. The appellate court correctly concluded that under *People v. Bradford*, 2016 IL 118674, such facts cannot support a conviction for burglary because Johnson, like the *Bradford* defendant, never exceeded the scope of his physical authority as a member of the public to be in the store.**

In order to obtain a conviction for burglary, the State must prove not only that the defendant either entered or remained in a building with an intent to steal, but that he did so "without authority." 720 ILCS 5/19-1(a) (West 2014).[1] In *Bradford*, this Court held that where the building at issue is a retail establishment, a defendant does not act without authority where he never exceeds his "physical authority as a member of the public to be in the store." *People v. Bradford*, 2016 IL 118674, ¶ 32. The *Bradford* defendant, who was charged with unlawful-remaining burglary, entered an open store, shoplifted several items, then left the store. Because he never entered an area that was "off-limits to the public," however, he did not act without authority and thus could not be found guilty of burglary. *Id*. Rather, such conduct is governed by the retail theft statute, as the legislature intended. *Id*. ¶¶ 27-28.

This case presents the opportunity to clarify that the logic of *Bradford* applies equally to unlawful-entry burglary. Here, Darren Johnson entered an open retail establishment, never entered an area of the store that was off-limits to the public, and left while the store was still open. That is, Johnson never exceeded the scope

[1] These two forms of burglary will be referred to as "unlawful-entry burglary" and "unlawful-remaining burglary," respectively.

of his physical authority as a member of the public to be in the store. While Johnson was charged with unlawful-entry burglary, the appellate court found that the question under *Bradford* is not when Johnson decided to shoplift, but whether he exceeded his physical authority to be in the store. *People v. Johnson*, 2018 IL App (3d) 150352, ¶¶ 33-35. Because he did not, the appellate court reversed his burglary conviction. *Id*. ¶ 36.

*Bradford*'s central holding regarding "physical authority" to be in a retail store applies with equal force here. Affirming the appellate court's judgment would merely clarify what was already strongly implied by *Bradford* – that regardless of when the intent to steal was formed, shoplifting is "retail theft," not "burglary." 2016 IL 118674, ¶ 28.

There is no legal or logical justification for allowing a defendant to be prosecuted for burglary, a Class 2 felony, based solely on the fact that he had crossed the threshold of the store when he decided to shoplift. Such a notion runs counter to the legislative intent behind the retail theft statute and this Court's reasoning in *Bradford*, which found that such a scheme would create the potential for absurd and unjust results. 2016 IL 118674, ¶ 25. This Court should affirm the appellate court's judgment.

### A. The appellate court correctly found that *Bradford* applies with equal force to unlawful-entry burglary.

Darren Johnson entered the Rock Falls Wal-Mart during regular business hours on the evening of July 22, 2014. While inside, he remained in areas open to the public, then left the store while it was still open. The State alleged that Johnson stole several items of girls' clothing offered for sale inside the store, valued

at less than $80. Based on this, the State charged Johnson with the Class 4 felony of retail theft of merchandise valued under $300, though he was found not guilty of that offense. C9-10, 222-23. According to the State, the same factual allegations also supported a charge of unlawful-entry burglary, a Class 2 felony with a prison sentence of three to seven years, but which carried a prison term of six to thirty years here because the court was required to impose a Class X sentence. C9-10; R1279-80; *see* 730 ILCS 5/5-4.5-95(b) (West 2014) (Class X sentence mandatory for third Class 2, or greater, felony). Johnson was found guilty of burglary and the trial court sentenced him to eight years in prison. C252.

The State's decision to charge this $76 shoplifting case as, essentially, Class X burglary stems from this Court's decision in *Weaver*, which affirmed a burglary conviction for a defendant who entered an open laundromat and stole coins by breaking into a locked change machine. *People v. Weaver*, 41 Ill. 2d 434, 435-36 (1968). *Weaver* held that the State met its burden to prove the defendant entered the laundromat "without authority" because "authority to enter a business building, or other building open to the public, extends only to those who enter with a purpose consistent with the reason the building is open," which does not include those who enter "with intent to commit a theft." *Id*. at 439.

While *Weaver* involved an open business, it did not involve a *retail* establishment. Several appellate court decisions, however, have applied *Weaver* to shoplifting cases where the defendant entered an open retail establishment and stole items for sale without entering, breaking into, or reaching into any space not open to the public, such as the locked change machine in *Weaver*. *See People*

*v. Johnson*, 2018 IL App (3d) 150352, ¶ 28 (collecting cases). Importantly, the burglary in such cases was complete upon *entry*, regardless of whether the intended theft was actually committed. *People v. Bridgewater*, 388 Ill. App. 3d 787, 801 (4th Dist. 2009). The trial court here, likewise, instructed the jury that Johnson entered Wal-Mart "'without authority' if, at the time of entry," he had an intent to commit theft inside, regardless of whether Wal-Mart consented to his entry. C194-95.

Applying *Weaver* to shoplifting cases allows a defendant who intends to steal a candy bar from an open convenience store to be convicted of a Class 2 felony the moment he enters the store, even if he never steals the candy bar. This reading of the burglary statute thus right away collides with the presumption that the legislature did not intend absurd or unjust results. *Bradford*, 2016 IL 118674, ¶ 25. But there are at least two other reasons why *Weaver* is not "controlling" in shoplifting cases, (St. Br. 10-12) – the legislature enacted the retail theft statute several years after *Weaver*, and *Bradford* rejected the application of *Weaver* to unlawful-remaining burglary.

First, seven years after *Weaver*, the legislature enacted an entirely separate statute defining the crime of "retail theft" – in essence, taking something offered for sale by a merchant open for business without paying full price. Ill. Rev. Stat.1975, ch. 38 ¶¶ 16A-3, 16A-4. That statute punishes retail theft according to the value of the stolen merchandise and the defendant's criminal history, among other factors. *See* 720 ILCS 5/16-25(f) (West 2014) (current retail theft statute, punishing offense as a Class A misdemeanor up to a Class 2 felony). The legislature plainly intended

that this specific, multi-layered statute govern cases of shoplifting, rather than the general burglary statute that – when applied to shoplifting – punishes an *intent* to steal merchandise in *any* amount as a Class 2 felony. *Cf. People v. Christy*, 139 Ill. 2d 172, 180 (1990) (allowing "prosecutorial discretion" to charge greater offense under general armed violence statute "will effectively nullify" statute defining specific lesser offense of aggravated kidnaping, and this Court will not presume the legislature intended the aggravated kidnaping statute to be a nullity). This Court should reject the State's endorsement of a criminal-justice system that allows a first-time shoplifter to be sentenced as a Class 2 felon merely for forming an intent to steal an item from an open store before he entered, where that same defendant could only be guilty of a misdemeanor if he decided to steal up to $300 of merchandise after he entered, *then actually stole that merchandise*. 720 ILCS 5/16-25(f)(1) (West 2014).

In *Bradford*, this Court recognized that the creation of the retail theft statute is central to the question of whether shoplifting may be charged as burglary. 2016 IL 118674, ¶¶ 13-32. *Bradford* cited legislative debates demonstrating that the retail theft statute was drafted to address the specific offense of shoplifting and would punish that crime according to enumerated factors. *Id.* ¶ 27. By contrast, the burglary statute "does not consider any of these proportionality factors" and defines all burglaries as Class 2 felonies punishable by three to seven years in prison. *Id*. *Bradford* found that because the retail theft statute was enacted several years after the unlawful-remaining provision was added to the burglary statute, "it strains logic to presume that the legislature intended most incidents of retail

theft to be prosecuted as burglaries." *Id.* ¶¶ 27-28.

Further, *Bradford*'s central holding did not hinge on a distinction between the two forms of burglary. The appellate court in *Bradford* held that *Weaver*'s definition of "without authority" should apply to both unlawful-entry burglary and unlawful-remaining burglary. *Bradford*, 2016 IL 118674, ¶ 24. That is, during the *Bradford* defendant's multiple criminal acts inside the store, his purpose for remaining in the store was inconsistent with its purpose for being open, as was the *Weaver* defendant's entry to an open laundromat with an intent to steal from the change machine. *Id.* The appellate court thus held that "just as a defendant's *entry* is 'without authority' if it is accompanied by a contemporaneous intent to steal, so too must a defendant's *remaining* be 'without authority' if it also is accompanied by an intent to steal." *Id.* (quoting *People v. Bradford*, 2014 IL App (4th) 130288, ¶ 28) (emphases in appellate court opinion). This holding was logical because being in a store with the intent to steal is always inconsistent with the store's purpose for being open to the public. So if *Weaver* applies to unlawful-entry burglary, it would seem to apply equally to unlawful-remaining burglary, and "[t]o determine otherwise would be legally inconsistent with *Weaver*." *Bradford*, 2014 IL App (4th) 130288, ¶ 28.

This Court, however, rejected that reasoning. And it did so, *not* because of some logical distinction between the two forms of burglary that justified the *Weaver* rule in one context and not the other, but because it is the *Weaver* rule *itself* that is legally inconsistent with the retail theft statute and should not apply to shoplifting cases at all. *Bradford* made this clear when it defined "authority"

in shoplifting cases in terms of "physical authority," rather than *Weaver*'s constructive withdrawal of authority:

> Defendant entered the store during regular hours, never entered areas of the store which were off-limits to the public, shoplifted several items, then left while the store was open. *Defendant did not exceed the scope of his physical authority as a member of the public to be in the store.*

2016 IL 118674, ¶ 32 (emphasis added). *Bradford* thus limited unlawful-remaining burglary to cases where the defendant enters a space where he is not supposed to be, such as an employee-only area, or remains after the store explicitly revokes his authority to be present. *Id.* ¶ 31. By contrast, a defendant who never "exceeds his physical authority to be on the premises," but instead enters an open store, shoplifts merchandise for sale, then leaves during business hours, "is guilty of ordinary retail theft." *Id.*

*Bradford* favorably cited *McDaniel*, where the appellate court reversed an unlawful-remaining burglary conviction in a shoplifting case. *Bradford*, 2016 IL 118674, ¶¶ 18-19, 31 (citing *People v. McDaniel*, 2012 IL App (5th) 100575, ¶¶ 3-19). *McDaniel* found that a member of the public, including the defendant, has "authority" to enter an open retail establishment:

> [T]he area entered by defendant is not a home or an employee-only area, but rather the general customer area of a retail store which permits and, in fact, encourages members of the public ... to enter .... The facts indicate ... that *defendant had authority to be within the building.*

2012 IL App (5th) 100575, ¶ 11 (emphasis added). And because the defendant had authority to be in the store, *McDaniel* concluded that the retail theft statute controlled and the defendant could not be found guilty of burglary. *Id.* ¶ 19.

The *Bradford* appellate court questioned the "soundness" of *McDaniel* in light of *Weaver*. 2014 IL App (4th) 130288, ¶ 24. But after this Court rejected the appellate court's reasoning in *Bradford* and fully endorsed *McDaniel*, it is the soundness of *Weaver*'s applicability to shoplifting cases that must now be questioned.

*Bradford*'s reasoning as to unlawful-remaining burglary applies seamlessly to unlawful-entry burglary. After *Bradford*, facts constituting ordinary shoplifting may not support an unlawful-remaining burglary conviction. In every such case, the defendant was in the store at some point with an intent to steal, which of course is contrary to the purpose of the store being open. But what *Bradford* stands for is that being in an open store, even with an intent to steal, does not remove one's *authority* to be in the store. The defendant only loses authority to be in the store when he goes somewhere off-limits to the public or remains after being told to leave. If he does none of those things and merely steals from the public area of the store, he "is guilty of ordinary retail theft." *Bradford*, 2016 IL 118674, ¶ 31. As the appellate court found in this case, under *Bradford* it cannot possibly matter *when* the defendant developed the intent to steal:

> Under either manifestation of burglary, the offender must lack "authority." If forming the intent to shoplift does not revoke one's authority to remain in a store, then it cannot logically revoke one's authority to enter either.

*Johnson*, 2018 IL App (3d) 150352, ¶ 33.

Any theory that the burglary statute applies when the defendant has an intent to steal before entering the store is undermined by the retail theft statute itself, which expressly contemplates defendants who intend to steal before entering the store. For example, the retail theft statute makes it a Class A misdemeanor

to possess "any theft detection shielding device," such as a "laminated or coated bag," with the intent to steal merchandise. 720 ILCS 5/16-25(a)(7), (e), (f)(1) (West 2014). Because this provision will usually apply to cases where the defendant brought such a device with him into the store, it plainly demonstrates the legislature's intent to prosecute shoplifting offenses under the retail theft statute, even where the intent to steal existed before the entry to the store. *See Johnson*, 2018 IL App (3d) 150352, ¶ 31 (these provisions show that the "statute contemplates all manifestations of retail theft, regardless of whether shoplifters form the requisite intent before or after entering the store").

Finding that *Weaver* applies to shoplifting would also lead to precisely the kind of "absurdity" *Bradford* warned against. 2016 IL 118674, ¶ 25. In *Bradford*, this Court rejected the notion – a hypothetical, but logical, result of the State's theory – that the legislature intended stealing a single item to be misdemeanor retail theft, while stealing multiple items with the same total value could be unlawful-remaining burglary, a Class 2 felony. *Id.* ¶ 26. Here, it would be equally absurd to find, for example, that the legislature intended the theft of a $299 jacket to be misdemeanor retail theft if the defendant decided to steal it *after* he entered the store, but intended the theft of a candy bar to be a *Class 2 felony* if the defendant decided to steal it when he was standing outside a convenience store, looking at it through the window. The potential results only grow more absurd in light of the fact that the burglary statute criminalizes mere intent, such that a Class 2 burglary is complete even if the theft never occurs. Thus, that defendant standing outside a convenience store would be guilty of burglary if he told an undercover

police officer on the sidewalk that he intended to steal a candy bar, then entered the store. That would be a Class 2 felony the moment he walked inside, even if the defendant never stole the candy bar, or *even if he paid for it*. And if the defendant had done that exact same thing three times, he would have to be sentenced to a Class X prison term of six to thirty years.

While certainly absurd, each of these results logically follows from applying *Weaver* to shoplifting cases. *See People v. Hanna*, 207 Ill. 2d 486, 498 (2003) (even where a given construction is "within the letter of the statute," if that construction produces an absurd result, the statute "must be so construed as to avoid the absurdity" and align the statute with the legislature's intent). This Court need not rely upon prosecutorial discretion to avoid such absurdities. Instead, it need only recognize that the legislature intended that shoplifting be governed by the retail theft statute, which, presumably, is not a nullity. *Christy*, 139 Ill. 2d at 180; *see Johnson*, 2018 IL App (3d) 150352, ¶ 30 (declining to read burglary and retail theft statutes so as to allow State the discretion to charge one first-time shoplifter with a misdemeanor while charging another first-time shoplifter with a Class 2 felony). This Court should find that *Weaver* has no application to shoplifting and hold that all such cases are controlled by the retail theft statute. In short, this Court should apply *Bradford* to the other form of burglary.

Finally, just as unlawful-remaining burglary may still occur in a retail establishment where, for example, the defendant enters an unauthorized area of the store, *Bradford*, 2016 IL 118674, ¶ 31, so too may unlawful-entry burglary occur where the State can prove the defendant had the intent to steal from an

unauthorized area before he entered the store, such as an employees' lounge or a cash register. *See, e.g., People v. Hopkins*, 229 Ill. App. 3d 665, 671-72 (4th Dist. 1992) (affirming burglary conviction where evidence showed defendant planned to steal money from cash register before he entered store). This, in fact, is *Weaver*. In that case, the defendant not only entered the laundromat with an intent to steal, but what he intended to steal from was a *locked change machine*, which the public had no authority to enter. 41 Ill. 2d at 435-36. That was burglary. Insofar as *Weaver* went beyond that to find that a defendant who enters any open business with an intent to steal any item is guilty of burglary, that rule simply does not apply to open retail stores after the enactment of the retail theft statute and after this Court's decision in *Bradford*.

In this case, the State had evidence that Darren Johnson entered an open store with a plan to steal some girls' clothing because his girlfriend would not allow him to see their daughter unless he brought her some new clothes. R1142. Johnson never entered an unauthorized area and there was no evidence that he ever intended to do so. Rather, Johnson entered the store during regular hours, never entered an area that was off-limits to the public, then left while the store was open. Regardless of whether Johnson took merchandise without paying for it – an alleged theft for which the jury acquitted him – he never exceeded "the scope of his physical authority as a member of the public to be in the store." *Bradford*, 2016 IL 118674, ¶ 32. Instead, this was a run-of-the-mill shoplifting case that the legislature intended to be controlled by the retail theft statute. Because the State failed to prove beyond a reasonable doubt that Johnson entered the open

store "without authority," this Court should affirm the appellate court's judgment reversing Johnson's burglary conviction.

### B. The State offers no reasonable basis for allowing shoplifting to be prosecuted as unlawful-entry burglary after the legislature created the offense of retail theft.

Applying *Bradford* to unlawful-entry burglary would establish a simple rule: where the "building" at issue is an open "retail mercantile establishment," and where the defendant never enters an area off-limits to the public, any theft of merchandise is governed by the retail theft statute and may not be prosecuted as burglary. 720 ILCS 5/19-1(a) (West 2014); 720 ILCS 5/16-25(a) (West 2014).

The State, by contrast, asks this Court to endorse a bifurcated scheme for punishing shoplifters, where an enormous difference between the two sentencing ranges – Class A misdemeanor versus Class 2 felony – would be based *solely* on whether the defendant formed his intent to steal before he crossed the threshold of the store. (St. Br. 12). The State argues that this unworkable scheme, with its unacceptable risk for absurd and unjust results, is dictated by *Weaver*, and that this Court must overrule *Weaver* in order to affirm the appellate court's judgment in this case. (St. Br. 10-12, 20).

The State is incorrect on both points. Applying *Bradford*'s reasoning to unlawful-entry burglary would merely recognize that when the legislature created the retail theft statute seven years after *Weaver*, it intended that shoplifting be punished according to that nuanced, specific statute rather than the general burglary statute. *See, e.g., People v. Christy*, 139 Ill. 2d 172, 180 (1990) (where legislature created statute defining and punishing specific offense of aggravated kidnaping,

State may not prosecute such conduct under the general armed violence statute). In other words, as *Bradford* indicated, *Weaver* is not controlling because the legislature removed open retail establishments from the burglary statute's purview. 2016 IL 118674, ¶ 28. Following *Bradford* in this way would not require this Court to overrule *Weaver*, but instead merely find that *Weaver* and the burglary statute do not apply to the specific conduct defined by the legislature as "retail theft."

And because affirming the appellate court does not require this Court to overrule *Weaver*, the State's invocation of *stare decisis* is a red herring. Nothing in the State's brief, or in the appellate court precedent upon which it relies, shows why the simple application of *Bradford* to unlawful-entry burglary is less true to the legislature's intent than the State's complicated proposed rule that will almost certainly produce unjust results.

**1. The legislature removed shoplifting from *Weaver*'s purview when it enacted the retail theft statute.**

According to the State, *Bradford* "rested on the unique history of the burglary statute's 'remains within' language," and thus raises no concerns about applying *Weaver* in a case where the defendant entered an open retail store with an intent to steal, as opposed to a case where the defendant decided to steal only after he entered the store. (St. Br. 12); *see also People v. Burlington*, 2018 IL App (4th) 150642, ¶ 27 ("*Bradford* does not affect the holding of *Weaver* and its progeny" because *Bradford* "specifically only addressed" unlawful-remaining burglary), *petition for leave to appeal pending* No. 123405. The State asserts that "[n]othing" in *Bradford* is pertinent to the question of whether shoplifting may be prosecuted as unlawful-entry burglary. (St. Br. 13).

Insofar as the State claims *Bradford* was entirely, or even primarily, concerned with factors unique to unlawful-remaining burglary, the State is wrong. This Court discussed three reasons for rejecting the State's proposed rule in *Bradford*: 1) it was unworkable and would lead to absurdly disproportionate sentences for similar conduct; 2) it would essentially nullify the retail theft statute; and, 3) "it is at odds with the historical development of the burglary statute." 2016 IL 118674, ¶¶ 26-30. This analysis applies equally to unlawful-entry burglary.

While *Bradford* did analyze the history of unlawful-remaining burglary, that was merely an "additional reason" to reject the State's argument in that case, not the only reason, or even the primary reason. 2016 IL 118674, ¶¶ 29-30. And, as the State itself notes, *Bradford* found that the history of unlawful-remaining burglary "necessarily implie[d]" that a defendant must be in a "building or area" that was "closed to him or the public" to be prosecuted for that offense. (St. Br. 17) (quoting *Bradford*, 2016 IL 118674, ¶ 30). If a defendant must be found in a building or area that is off-limits to the public to be prosecuted for unlawful-*remaining* burglary, it would be incongruous, to say the least, to find that a defendant may be prosecuted for unlawful-*entry* burglary if he never entered a building or area that is similarly off-limits.

The State acknowledges the wide disparities in sentencing for similar conduct under its proposed rule, but argues that such disparities – based solely on *when* each defendant decided to steal – are "justified by the fact that one who enters a store with a preconceived plan to steal merchandise is at least arguably more culpable than one who, once inside a store, impulsively takes merchandise." (St.

Br. 15) (quoting *People v. Moore*, 2018 IL App (2d) 160277, ¶ 24, *petition for leave to appeal pending* No. 123736). But this assumes as fact that the legislature intended such a distinction at all, which is the precise question at issue. It also indicates that the State is essentially asking this Court to apply rational-basis review, as if this were a constitutional challenge instead of a question of statutory construction.

Most importantly, *Bradford* rejected the notion that the legislature intended the kind of sentencing disparities that would occur under the State's reasoning. As an example, *Bradford* found the legislature did not intend that shoplifting one item would be a misdemeanor while shoplifting two items totaling the same value would be a Class 2 felony. 2016 IL 118674, ¶ 26. This Court should likewise reject the notion that the legislature intended that an impulsive shoplifter who actually steals items valuing $299 only be charged with a misdemeanor, but that someone who merely intends to steal a candy bar commits a Class 2 felony the moment he walks into the store. The State is wrong when it claims that allowing shoplifters to be charged with unlawful-entry burglary "creates no ... arbitrary distinctions" like those described in *Bradford*. (St. Br. 15).

Likewise, *Bradford* found that allowing shoplifting to be charged as unlawful-remaining burglary also "conflicts with the legislative intent in enacting the retail theft statute." 2016 IL 118674, ¶ 27. *Bradford* emphasized that the legislature crafted the retail theft statute to combat the specific problem of shoplifting, defining the offense as anything from a Class A misdemeanor to a Class 2 felony according to the value of the stolen merchandise and the defendant's criminal history. *Id*. The burglary statute, on the other hand, "does not consider any of these

proportionality factors" and defines every person who violates the statute as a Class 2 felon. *Id*. All of this remains true, regardless of which form of burglary is at issue.

As *Bradford* noted, the legislature created the offense of retail theft after it created the offense of unlawful-remaining burglary. 2016 IL 118674, ¶ 28. The retail theft statute was also enacted after the legislature created unlawful-entry burglary and after this Court's decision in *Weaver*. If it strained logic to find the legislature intended shoplifting to be prosecuted as unlawful-remaining burglary after it enacted the retail theft statute, logic is equally strained by the notion that the legislature intended shoplifting to be prosecuted as unlawful-entry burglary. *Id*. And again, this is especially true given that the retail theft statute itself contemplates prosecuting shoplifters who formed an intent to steal before entering the store. 720 ILCS 5/16-25(a)(7), (e), (f)(1) (West 2014).

The State tries to defend its proposed rule in this case by comparing it favorably with its own "amorphous" theory in *Bradford*. Using its own prior argument as a foil, the State assures this Court that lower courts are more familiar with determining "intent at the time of ... entry" than what constitutes an "act of remaining." (St. Br. 14). The State also assures this Court that "there is no cause for concern" in adopting its construction because not *all* retail thefts could be prosecuted as burglaries, only those where the State can show the defendant had an intent to steal before entry. (St. Br. 16-17). According to the State, this means that the *Johnson* court's concerns over allowing prosecutors to continue to charge shoplifters with burglary are "unfounded." (St. Br. 23-24) (citing *Moore*, 2018 IL

App (2d) 160277, ¶ 27 (*Johnson*'s concerns over prosecutorial discretion "are policy arguments best directed to the legislature")).

All of these arguments are straw men because they say nothing about the question before this Court – whether the legislature actually *intended* that shoplifting be prosecuted as unlawful-entry burglary. Contrary to *Moore*, the legislature did, in fact, address these policy considerations after this Court's decision in *Weaver* when it created the offense of retail theft. As *Bradford* plainly implied, the very existence of that statute demonstrates the legislature's intent that shoplifting no longer be charged as burglary. 2016 IL 118674, ¶¶ 27-28.

The State's reliance upon the pre-1961 version of unlawful-entry burglary is similarly misplaced. The State notes that the unlawful-entry burglary statute prior to 1961 did not require that the defendant enter "without authority." The State claims this shows unlawful-entry burglary is not incompatible with the limited authority doctrine. (St. Br. 18). This again begs the question. If *Weaver*'s limited authority doctrine applies to open retail stores, then of course charging shoplifting as unlawful-entry burglary is compatible with the limited authority doctrine. But the question here is whether that doctrine even *applies* to shoplifting. The fact that the legislature created the separate offense of retail theft after adding the "without authority" element to unlawful-entry burglary, and after this Court's decision in *Weaver*, shows it did not intend that *Weaver*'s limited authority doctrine apply to shoplifting.

Any doubt that *Bradford*'s reasoning applies equally to unlawful-entry burglary is dispelled by its central holding – language the State entirely omits

from its brief. After discussing the reasons why it rejected the State's arguments, *Bradford* made the following holding:

> [A]n individual who enters a building lawfully, shoplifts merchandise within areas which are open to the public, then leaves during business hours, is guilty of ordinary retail theft.

2016 IL 118674, ¶ 31. By its plain terms, this holding is not limited to unlawful-remaining burglary. Applying this rule to the *Bradford* defendant, who entered an open store and never entered an area that was off-limits, this Court reversed his burglary conviction because he "did not exceed the scope of his physical authority as a member of the public to be in the store." *Id.* ¶ 32. Because Johnson likewise never exceeded the scope of his physical authority to be in the store, the appellate court was correct to follow *Bradford* and reverse his burglary conviction.

**2. This case raises no *stare decisis* concerns.**

The State traces the history of the burglary statute and court cases since *Weaver* that have applied the limited authority doctrine to shoplifting, and argues that *Weaver* and its progeny implicate *stare decisis* because the legislature "has made no effort to undo *Weaver*" through an amendment to the burglary statute. (St. Br. 9, 18-19). The State's appeal to *stare decisis* ignores one crucial fact: the legislature created the offense of retail theft *after Weaver*. The legislature did not have to amend the burglary statute or "undo *Weaver*," (St. Br. 19), to enact a statute that, by its plain language, governs the specific act of shoplifting and thus removes that conduct from the scope of the burglary statute. *C.f. People v. Blair*, 2013 IL 114122, ¶ 21 (legislature's amendment to one statute cured constitutional defect in a *different* statute). The very existence of the retail theft statute belies the State's

assertion that the legislature "has never acted" in this domain since *Weaver*. (St. Br. 19). The State urges this Court to defer to *Weaver* and to the appellate court decisions that have applied *Weaver* to shoplifting even after the retail theft statute went into effect. But if anything deserves deference here, it is the legislature's plain intent that shoplifting be prosecuted under the retail theft statute, which this Court recognized in *Bradford* – a decision that, significantly, has also drawn no legislative response. 2016 IL 118674, ¶¶ 27-28.

The State first notes that this Court and the appellate court have applied *Weaver* in various other contexts. (St. Br. 18-19). But this Court's 1972 *Blair* decision, like *Weaver*, pre-dated the retail theft statute and involved a defendant who entered an unauthorized area of an open business with an intent to steal – again, a locked change machine. (St. Br. 18) (citing *People v. Blair*, 52 Ill. 2d 371, 374 (1972)). Likewise, the fact that Illinois courts have applied the limited authority doctrine to home invasion and residential burglary says nothing about whether that doctrine applies to open retail establishments. (St. Br. 18) (citing *People v. Bush*, 157 Ill. 2d 248, 253-54 (1993); IPI Criminal Nos. 11.53A, 14.13). The general vitality of the limited authority doctrine is not at issue here, only its applicability to shoplifting in light of the retail theft statute. That is, this Court need not "overrule" *Weaver* at all to affirm the judgment of the appellate court. (St. Br. 20). The State's assertion that applying *Bradford* to unlawful-entry burglary will unsettle the law with respect to home invasion and residential burglary is a red herring. (St. Br. 20-21).[2]

[2] As is the *Burlington* court's fear that applying *Bradford* to unlawful-entry burglary would "eliminate[] many types of burglary that do not involve retail theft." 2018 IL App (4th) 150642, ¶ 29 (citing *People v. Drake*, 172 Ill. App.

There is no question that even after the enactment of the retail theft statute, several appellate court decisions have affirmed convictions for unlawful-entry burglary where the defendant's conduct consisted only of shoplifting. *See People v. Johnson*, 2018 IL App (3d) 150352, ¶ 28 (collecting cases). But those opinions have no *stare decisis* effect in this Court. *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 393 n.2 (2005).

And perhaps more importantly, those opinions should carry little weight – either because the defendant did not raise the issue presented here, or because the appellate court did not address it. *See, e.g., People v. Rudd*, 2012 IL App (5th) 100528, ¶ 16 (shoplifting defendant conceded he could be convicted of burglary); *People v. Bridgewater*, 388 Ill. App. 3d 787, 795 (4th Dist. 2009) (citing *People v. Hopkins*, 229 Ill. App. 3d 665, 671 (4th Dist. 1992)) (both affirming burglary convictions where defendants did not challenge "without authority" element, but noting that charging a shoplifter with burglary raises "serious questions" about "his lack of authority to enter"); *People v. Szydloski*, 283 Ill. App. 3d 274, 278-79 (3d Dist. 1996) (defendant apparently challenged "without authority" element, but court only addressed intent to steal); *People v. Smith*, 264 Ill. App. 3d 82, 86-88 (3d Dist. 1994) (affirming burglary conviction for shoplifter despite the "analytical and conceptional difficulties" underlying the limited authority doctrine, but with

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3d 1026, 1028 (4th Dist. 1988)). *Drake* is irrelevant here because the conduct at issue in that case was not shoplifting, but rather defendant's attempt to cash a stolen check – that is, to steal money from a cash register that was off-limits to the public. 172 Ill. App. 3d at 1027-28. Applying *Bradford* to this case would only ratify the legislature's intent that *shoplifting* be governed by the retail theft statute. It would not "eliminate" any other form of burglary.

no discussion of how retail theft statute affects applicability of that doctrine); *People v. O'Banion*, 253 Ill. App. 3d 427, 429 (3d Dist. 1993); *People v. Durham*, 252 Ill. App. 3d 88, 93 (3d Dist. 1993) (in both cases, defendants argued shoplifting could not be prosecuted as burglary, but courts never reached issue because convictions reversed on other grounds); *People v. Stager*, 168 Ill. App. 3d 457, 459 (2d Dist. 1988) (defendant conceded *Weaver* applied to shoplifting).

The State is equally incorrect in implying that this Court's decision in *Miller* resolved the question here. (St. Br. 21-23) (citing *People v. Miller*, 238 Ill. 2d 161, 163, 173 (2010)); *see also Burlington*, 2018 IL App (4th) 150642, ¶ 28 (citing *Miller*). In *Miller*, this Court determined whether retail theft is a lesser-included offense of burglary under the "abstract elements" test, and found that it was not. 238 Ill. 2d at 175-76. Because each statute contains elements the other does not, *Miller* held that the State may obtain a conviction for both burglary and retail theft in the same case. *Id*. at 176. *Miller* was not presented with the question this Court faced in *Bradford*: whether, in light of the legislative intent behind the retail theft statute, a defendant who never entered an area off-limits to the public, and whose only criminal conduct was shoplifting, may be prosecuted for burglary. *Bradford* answered that question in the negative as to unlawful-remaining burglary, and strongly implied the same would be true for unlawful-entry burglary. Insofar as *Miller* conflicts with *Bradford*, *Bradford* should control because *Miller* did not address this specific question. And in any event, applying *Bradford* to this case would not call *Miller* into question because it would still be true that a defendant could be found guilty of both burglary and retail theft in a given case. Only now,

under *Bradford*, there would have to be some additional conduct beyond shoplifting in an open store to support the burglary conviction, such as entering an off-limits area in order to steal or commit a felony. *Bradford*, 2016 IL 118674, ¶ 31.

It appears that no Illinois court before *McDaniel* and *Bradford* addressed the specific question of whether *Weaver* applies to shoplifting after the enactment of the retail theft statute. Because this is not "a question [that] has been deliberately examined and decided," the pre-*Bradford* case law should have no *stare decisis* effect. *People v. Espinoza*, 2015 IL 118218, ¶ 26.

**C. Conclusion**

The central holding of *Bradford* is that forming an intent to steal does not constructively remove one's authority to be inside an open retail establishment, and that "an individual who enters a building lawfully, shoplifts merchandise within areas which are open to the public, then leaves during business hours, is guilty of ordinary retail theft," not burglary. *People v. Bradford*, 2016 IL 118674, ¶ 31. Nothing about this holding is logically limited to unlawful-remaining burglary. Rather, this reasoning applies seamlessly to unlawful-entry burglary. Indeed, applying *Bradford* to the other form of burglary is necessary to avoid the absurd and unjust outcomes that will inevitably result from the State's proposed rule, which would establish a bifurcated scheme governing shoplifting where an enormous disparity in punishment would be based solely on when the intent to steal was formed.

Instead, this Court should hold that regardless of when the defendant formed an intent to shoplift, he may only be prosecuted for retail theft, and not burglary,

if he never "exceed[ed] the scope of his physical authority as a member of the public to be in the store." *Bradford*, 2016 IL 118674, ¶ 32. Because Johnson, like the *Bradford* defendant, never exceeded the scope of his physical authority to be inside the open retail establishment at issue, this Court should affirm the appellate court's judgment reversing his burglary conviction.

In the alternative, as the State notes, if this Court reverses the appellate court's judgment, it should remand to the appellate court with instructions to consider the other issues Johnson raised below. (St. Br. 11 n.6).

## CONCLUSION

For the foregoing reasons, Darren Johnson, Defendant-Appellee, respectfully requests that this Court affirm the judgment of the appellate court. In the alternative, if this Court reverses the judgment of the appellate court, Johnson respectfully requests that this Court remand this cause to the appellate court with instructions to consider the merits of his remaining claims.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I, Gilbert C. Lenz, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 25 pages.

/s/Gilbert C. Lenz
GILBERT C. LENZ
Assistant Appellate Defender

## APPENDIX TO THE BRIEF

# INDEX

PEOPLE OF THE STATE OF ILLINOIS vs DARREN JOHNSON 14 CF 254

**Common Law Record**

# INDEX

PEOPLE OF THE STATE OF ILLINOIS vs DARREN JOHNSON 14 CF 254

**Common Law Record**

# INDEX

PEOPLE OF THE STATE OF ILLINOIS vs DARREN JOHNSON 14 CF 254

**Common Law Record**

# INDEX

PEOPLE OF THE STATE OF ILLINOIS vs DARREN JOHNSON 14 CF 254

**Common Law Record**

# INDEX

PEOPLE OF THE STATE OF ILLINOIS vs DARREN JOHNSON 14 CF 254

**Report of Proceedings**

2018 IL App (3d) 150352

Opinion filed January 29, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois. |
| Plaintiff-Appellee, | ) | |
| v. | ) | Appeal No. 3-15-0352 Circuit No. 14-CF-254 |
| DARREN JOHNSON, | ) | |
| Defendant-Appellant. | ) | Honorable John L. Hauptman, Judge, Presiding. |

JUSTICE SCHMIDT delivered the judgment of the court, with opinion.
Presiding Justice Carter and Justice Holdridge concurred in the judgment and opinion.

**OPINION**

¶ 1 On July 22, 2014, Rock Falls police arrested defendant, Darren Johnson, for shoplifting $76.91 worth of clothing from a local Wal-Mart. The State charged defendant with retail theft and burglary. After his first trial resulted in a hung jury, a second jury acquitted defendant of retail theft but convicted him of burglary. The Whiteside County circuit court sentenced defendant to eight years in prison. We reverse.

¶ 2 BACKGROUND

¶ 3 The State charged defendant by information with burglary and retail theft on July 23, 2014. Defendant waived his right to counsel on August 26. His first trial resulted in a hung jury

on October 22. His second trial began on November 18. Before opening statements, the trial court prohibited the jury from taking notes. The judge told the jury: "I do not allow note taking ***. I am a firm believer *** in the collective memory of the jury. *** [A]nd I do not want you to be distracted by note taking."

¶ 4 During the State's case, Amanda Peppers testified that she saw defendant and another man inside the Rock Falls Wal-Mart on July 22, 2014, while she was shopping with her nephew. The two men "were kind of walking around with a bunch of stuff in their hands," and "they would kind of veer off in other directions" when Peppers approached them. As she left the store and walked to her car, Peppers saw the two men retrieve backpacks from behind vending machines outside the store's entrance. The men removed stolen items that they concealed in their clothes and placed them in the backpacks. Peppers called the police.

¶ 5 Before police arrived, Peppers saw the men walk toward a Coinstar machine in the store's vestibule. After the men briefly reentered the store without their backpacks, Peppers saw defendant exit the store, retrieve his backpack, and walk toward the parking lot.

¶ 6 Officer James Hollaway of the Rock Falls Police Department testified that he responded to Peppers's call with Sergeant John Worcester and Officer Jarrett Ludwig at 7:16 p.m. While Worcester and Ludwig walked toward the store's entrance, Hollaway sat in the parking lot and observed defendant retrieve his backpack from atop the Coinstar machine before he walked toward the parking lot. Hollaway stopped defendant to ask him if he took items from the store without paying for them; defendant lowered his head and answered "yes."

¶ 7 Ludwig testified that he escorted defendant to the manager's office inside the store. He read defendant his *Miranda* rights with Worcester and Donna Courtney, the Wal-Mart manager,

present. Ludwig searched defendant and found 14 items of girls' clothing in his backpack and on his person.

¶ 8 Courtney testified that defendant told her he took the clothes because his ex-girlfriend prohibited him from seeing their daughter unless he bought her school clothes. Courtney described defendant as "very distraught." He offered to clean the windows, clean the floor, or provide whatever labor necessary to repay the store for the stolen clothes. Courtney processed a receipt showing the stolen items' retail value totaled $76.91.

¶ 9 She also copied footage from six surveillance cameras onto a digital versatile disc (DVD). None of the cameras covered the girls' clothing section. The State played portions of the DVD that contained footage from four of the six cameras. In relevant part, the video showed defendant entering the vestibule area, placing a backpack on the Coinstar machine, and retrieving his backpack when he left the store. Defendant elected not to testify on his own behalf.

¶ 10 During the first day of deliberations, the jury sent the court four notes. The first note requested to see Peppers's written police statement (which the State did not admit into evidence) and to review Courtney's DVD. With the parties' consent, the court declined the jury's requests. The second note requested Ludwig's police report. The court declined the jury's request without objection. The third note reported that the jury reached a verdict on one charge but remained split on the other.

¶ 11 The jury's final note reported that the jury reached an impasse; the jury again requested to review Courtney's DVD to help resolve the deadlock. Without objection, the court again declined the jury's request to review the DVD. The court also issued a *Prim* instruction (see *People v. Prim*, 53 Ill. 2d 62, 71-76 (1972)). At 10:20 p.m. on November 19, the court sent the jury home.

¶ 12 Proceedings resumed at 9 a.m. the following morning. At 10:30 a.m., the jury returned its verdict. It found defendant not guilty of retail theft but guilty of burglary. The court appointed posttrial counsel pursuant to defendant's request.

¶ 13 The court denied defendant's posttrial motion before his sentencing hearing on March 27, 2015. Although burglary is a Class 2 felony with a three-to-seven-year sentencing range (720 ILCS 5/19-1(b) (West 2014); 730 ILCS 5/5-4.5-35(a) (West 2014)), the court sentenced defendant as a Class X offender because his criminal record contained prior theft and burglary felony convictions within 20 years. 730 ILCS 5/5-4.5-95(b) (West 2014). The court sentenced defendant to eight years in prison. It denied defendant's motion to reconsider his sentence on May 13, 2015.

¶ 14 On appeal, defendant raises four challenges. The first two challenges attack the sufficiency of the State's evidence on both burglary elements—entering the store without authority and intending to commit theft therein (720 ILCS 5/19-1 (West 2014)). Defendant also seeks a new trial because the court violated section 115-4(n) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-4(n) (West 2014)) when it prohibited jurors from taking notes during trial. Finally, he seeks to reduce his monetary assessments from $557 to $490 because the trial court "failed to grant the mandatory $5-per-day credit against three [assessments]." We address the relevant issues below.

¶ 15 ANALYSIS

¶ 16 I. Sufficiency of the Evidence

¶ 17 Defendant does not dispute the facts underlying his conviction. Instead, he claims that they cannot support a burglary conviction as a matter of law. The crux of his argument is that he *could not* enter Wal-Mart "without authority" because he entered and exited the store during

business hours and remained in designated public areas. This argument presents a question of statutory construction that we review *de novo*. *People v. Bradford*, 2016 IL 118674, ¶¶ 14-15.

¶ 18 The burglary statute identifies two ways in which a person commits the offense: "A person commits burglary when without authority he or she knowingly enters or without authority remains within a building, *** or any part thereof, with intent to commit therein a felony or theft." 720 ILCS 5/19-1(a) (West 2014). To commit either manifestation of burglary, the offender must lack authority to be present within the building.

¶ 19 Defendant relies on *Bradford*, 2016 IL 118674, where our supreme court held that an offender commits "burglary by remaining" only if "he exceeds his physical authority to be on the premises." *Id.* ¶ 31. Defendant claims *Bradford* applies to either manifestation of burglary: "[A]n individual who enters a building lawfully, shoplifts merchandise within areas which are open to the public, then leaves during business hours, is guilty of ordinary retail theft." *Id.*

¶ 20 The State argues that defendant never entered the building lawfully; therefore, *Bradford* does not require reversal. The State relies on the "limited-authority doctrine," which states that "one's otherwise valid authority to be in certain premises is vitiated when that individual acts in a manner inconsistent with the authority originally granted." *People v. Wilson*, 155 Ill. 2d 374, 378 (1993). According to the State, shoplifters who form the intent to steal before entering a store lack authority to enter. They commit burglary the instant they cross the building's threshold.

¶ 21 A. The Limited Authority Doctrine

¶ 22 The limited authority doctrine, relied upon by the State, took shape before Illinois passed its retail theft statute in 1975 (720 ILCS 5/16-25 (West 2014)). In *People v. Schneller*, 69 Ill. App. 2d 50 (1966), the State charged defendant with burglary after he stole antique guns from a

public museum's showcase. Police responded to an alarm at the museum. They found a screwdriver, long-nosed pliers, sunglasses, a handkerchief, a flashlight, an automatic pistol, and the previously displayed antique guns in a duffle bag on the floor. A museum employee testified that he encountered the defendant after working hours two days prior—in a restricted area where the museum stored "prized possessions." Although defendant attempted the heist during working hours, the court held that "it would be contrary to reason and ordinary human understanding" to conclude the defendant possessed authority to enter the museum for "unlawful or criminal" purposes. *Id.* at 54. For clarity's sake, we make clear that we are not questioning the holding in *Schneller*, as there the court addressed materially different facts.

¶ 23 Two years later, our supreme court applied the doctrine in *People v. Weaver*, 41 Ill. 2d 434 (1968). In *Weaver*, police discovered the defendant standing near an open laundromat vending machine. Police found keys to the vending machine inside the defendant's vehicle and $50 worth of coins in his pockets. The court held that "authority to enter a business building, or other building open to the public, extends only to those who enter with a purpose consistent with the reason the building is open." *Id.* at 439. Notably, the defendants in *Schneller* and *Weaver* both used burglary tools to access nonpublic areas—a locked museum display and a vending machine. These facts distinguish those cases from the one before us.

¶ 24 B. *Bradford* and Retail Theft

¶ 25 The supreme court recently held that the limited authority doctrine does not apply in "burglary by remaining" shoplifting cases. *Bradford*, 2016 IL 118674. In *Bradford*, the defendant walked into a Wal-Mart with another man and immediately stole two DVDs from a display near the cash registers. He took these DVDs to the customer service desk and "exchanged" them for a Wal-Mart gift card. Next, he walked to the men's clothing department

where he selected a hat, removed the price tag, and wore it. He then retrieved a pair of shoes from the shoe department and placed them in a Wal-Mart bag that he concealed in his pocket—presumably to represent that he already purchased the shoes. He wore the hat and carried the shoes to the cash registers, where he rejoined the other man. He paid for the man's merchandise with the gift card he received in exchange for the DVDs and exited the store without paying for the hat or shoes.

¶ 26 The appellate court, citing *Weaver*, applied the limited authority doctrine and held that the defendant remained in the store without authority once he formed the intent to shoplift. *People v. Bradford*, 2014 IL App (4th) 130288, ¶¶ 31, 33-34. The supreme court reversed the appellate court's decision.

¶ 27 The court emphasized that the legislature enacted the retail theft statute in 1975, 14 years after enacting the burglary statute and 7 years after *Weaver*. Based on this timeline, "it strains logic to presume that the legislature intended most incidents of retail theft to be prosecuted as burglaries." *Bradford*, 2016 IL 118674, ¶ 28. The court reasoned that charging every shoplifter with burglary by remaining would "effectively negat[e] the retail theft statute." *Id.* ¶ 27. Because stores are often "building[s]" or trailers (720 ILCS 5/19-1(a) (West 2014)), virtually every retail theft would also constitute a burglary if one's "authority" hinged on whether he or she intended to shoplift merchandise.

¶ 28 To be fair, a long line of cases supports the State's position that one who intends to commit retail theft lacks authority to enter a store. See, e.g. *People v. Rudd*, 2012 IL App (5th) 100528, ¶ 13; *People v. Bridgewater*, 388 Ill. App. 3d 787, 801 (2009); *People v. Szydloski*, 283 Ill. App. 3d 274, 278 (1996); *People v. Smith*, 264 Ill. App. 3d 82, 87 (1994); *People v. Hopkins*, 229 Ill. App. 3d 665, 670-71 (1992); *People v. Stager*, 168 Ill. App. 3d 457, 459 (1988); *People*

*v. Boose*, 139 Ill. App. 3d 471, 473 (1985). As explained below, we feel that *Bradford* changes the law and effectively overrules the law upon which the State relies.

¶ 29 The retail theft statute's punishments range from a Class A misdemeanor to a Class 2 felony. 720 ILCS 5/16-25 (West 2014). The statute considers several factors, including the value and nature of the stolen merchandise, the defendant's criminal history, and how the defendant stole the property. *Id.*; *Bradford*, 2016 IL 118674, ¶ 27. A first-time minor shoplifting offense under the retail theft statute could warrant up to 364 days in jail.

¶ 30 On the other hand, the burglary statute "does not consider any of these proportionality factors." *Bradford*, 2016 IL 118674, ¶ 27. Thus, the limited authority doctrine provides a prosecutor discretion to charge and convict a first time offender who enters a store with intent to steal a candy bar with burglary, a felony, or retail theft, a misdeameanor. Courts should not interpret criminal statutes to provide prosecutors unbridled discretion to arbitrarily charge some shoplifters with Class 2 felony burglary and others with Class A misdemeanor retail theft under similar circumstances; " 'prosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes.' " *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 633 (2012) (quoting *Abuelhawa v. United States*, 556 U.S. 816, 823 n. 3 (2009)).

¶ 31 Another reason not to "give improbable breadth" to our burglary statute in retail theft cases is that the retail theft statute occupies the field of shoplifting crimes. Particularly relevant to this case, the statute covers situations where shoplifters knowingly transfer merchandise "to any other container with the intention of depriving the merchant of the full retail value." 720 ILCS 5/16-25(a)(3) (West 2014). It also covers situations where shoplifters knowingly use a "theft detection shielding device," which is "any laminated or coated bag or device designed and intended to shield merchandise from detection by an electronic or magnetic theft alarm sensor."

*Id.* § 16-25(a)(7), (e). Obviously, persons who enter a store with any of these items formed the intent to commit theft before entering. The statute contemplates all manifestations of retail theft, regardless of whether shoplifters form the requisite intent before or after entering the store.

¶ 32 C. *Bradford*'s Application to the Instant Case

¶ 33 The State claims that this case is distinguishable from *Bradford* because the State charged defendant with "burglary by entering," whereas *Bradford* addressed "burglary by remaining." This attempt to distinguish *Bradford* does not logically follow the supreme court's rationale. Under either manifestation of burglary, the offender must lack "authority." If forming the intent to shoplift does not revoke one's authority to remain in a store, then it cannot logically revoke one's authority to enter either. We suspect that it is a miniscule percentage of shoplifters who form the intent to steal only after entering a store.

¶ 34 The State's position also ignores the purpose for criminalizing burglary. The "crime of burglary reflects a considered judgment that especially severe sanctions are appropriate for criminal invasion of premises under circumstances likely to terrorize occupants." Model Penal Code § 221.1 (Explanatory Note). In other words, burglary aims to punish circumstances where a trespass and unwelcomed criminal intent combine to harm the victim more than either individual crime; the whole is greater than the sum of its parts.

¶ 35 Applying the limited authority doctrine to shoplifting cases disregards the purpose of criminalizing burglary, negates the retail theft statute, and conflicts with *Bradford*. We hold that *Bradford*'s physical authority test applies to all retail theft cases, regardless of when the defendant forms the intent to shoplift.

¶ 36 In this case, the State alleged that defendant stole $76.91 worth of merchandise from Wal-Mart. Defendant entered the store during its business hours, remained in public areas while

inside, and left the store before it closed. He never exceeded his physical authority. We reverse his burglary conviction.

¶ 37 II. Juror Note Taking

¶ 38 Although we need not decide the other issues presented, we feel compelled to briefly address defendant's claim regarding juror note taking. Before opening statements, the trial court told the jury:

> "I, I do not allow note taking and I have a, I have a reason for this. I am a firm believer in the ability of jurors to remember the testimony and I, I am a firm believer in the collective memory of the jury. That's why we have 12 people, I mean it's, it's meant to be give and take and that sort of thing, and my concern about taking notes is that sometimes people are so busy concentrating on taking, on writing down what was said that they may miss something else that was said. Or, somebody might be worried that, well, this lady or this man took better notes than me. Well that's what the whole process is about, is to work through these things collectively, and I do not want you to be distracted by note taking."

¶ 39 Section 115-4(n) of the Code states, *inter alia*: "The members of the jury *shall* be entitled to take notes during the trial, and the sheriff *** shall provide them with writing materials for this purpose." (Emphasis added.) 725 ILCS 5/115-4(n) (West 2014). This statutory provision is mandatory. *People v. Strong*, 274 Ill. App. 3d 130, 135-37 (1995). It is a measure to protect defendants' constitutional rights to fair trials. It is also the jurors' right. See *People v. Layhew*, 139 Ill. 2d 476, 492-93 (1990). Trial courts lack discretion to ignore this direct mandate.

¶ 40 CONCLUSION

¶ 41 For the foregoing reasons, we reverse the judgment of the circuit court of Whiteside County.

¶ 42 Reversed.

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
WHITESIDE COUNTY, ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS | ) | |
| | ) | |
| vs. | ) | NO. 14CF254 |
| | ) | |
| DARREN JOHNSON, | ) | |
| Defendant. | ) | |

FILED
CIRCUIT COURT WHITESIDE COUNTY
DATE 5-19-15
CLERK

NOTICE OF APPEAL

An appeal is taken from the judgment described below:

1. Court to which appeal is taken:
   Appellate Court of Illinois, Third Appellate District

2. Name and address of appellant:
   DARREN JOHNSON
   Illinois Department of Corrections

3. Name and address of attorney for appellant:
   Appellant is indigent, has no attorney and requests the appointment of an attorney.

4. Date of judgment or order being appealed:
   November 20, 2014 - Finding of Guilty; and
   March 27, 2015 - Denial of Motion for New Trial
   March 27, 2015 - Sentence; and
   May 13, 2015 - Denial of Motion to Reconsider

5. Offense of which convicted or nature of order:
   Finding of Guilty for offense(s) of Burglary
   Denial of Motion for New Trial
   Sentencing Order - March 27, 2015
   Denial of Motion to Reconsider - May 13, 2015

6. Sentence:
   Burglary - 8 years DOC + 2 MSR

DARREN JOHNSON, Defendant

By: _____
James F. Heuerman
Public Defender

Dated: May 19, 2015

James F. Heuerman
Public Defender
Whiteside County Courthouse
Morrison, IL 61270
(815) 772-5191



A-8 C-258

No. 123318

IN THE

SUPREME COURT OF ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellant,<br><br>-vs-<br><br>DARREN JOHNSON<br><br>Defendant-Appellee | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Appellate Court of Illinois, No. 3-15-0352.<br><br>There on appeal from the Circuit Court of the Fourteenth Judicial Circuit, Whiteside County, Illinois, No. 14-CF-254.<br><br>Honorable John Hauptman, Judge Presiding. |

**NOTICE AND PROOF OF SERVICE**

Ms. Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. David J. Robinson, Acting Deputy Director, State's Attorneys Appellate Prosecutor, 628 Columbus, Suite 300, Ottawa, IL 61350, 3rddistrict@ilsaap.org;

Mr. Darren Johnson, C/O Heidi Alexander, 519 Illinois Route 2, Lot 60, Dixon, IL 61021

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On January 9, 2019, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Joseph Tucker
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