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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10-CF-1368
	)	
REGINALD R. MOORE,	)	Honorable
	)	Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE ZENOFF delivered the judgment of the court.  
Justices Hudson and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) The trial court did not abuse its discretion in refusing to instruct the jury on criminal trespass to a vehicle as a lesser included offense of unlawful possession of a stolen motor vehicle: because the facts did not support a reasonable inference that defendant took the vehicle other than by stealing it, the jury could not have acquitted defendant of unlawful possession and convicted him of criminal trespass; (2) the trial court erred in refusing to excise “or converted” from the instructions on unlawful possession of a stolen motor vehicle, as defendant was not charged with knowing that the vehicle had been converted (and thus the court properly refused to define that term), but the error was harmless, as there was no reasonable probability that the jury convicted defendant of knowing that the vehicle was converted rather than stolen; (3) although defendant committed a Class 2 felony, he was subject to Class X sentencing; thus, his MSR term was properly a Class X term.

¶ 2 Defendant, Reginald R. Moore, was charged with theft (720 ILCS 5/16-1(a)(1)(A) (West 2010)) and unlawful possession of a stolen motor vehicle (UPSMV) (625 ILCS 5/4-103(a)(1) (West 2010)). During his jury trial, defendant sought to have the jury instructed on criminal trespass to a vehicle (720 ILCS 5/21-2 (West 2010)). Although the court found that this was a lesser included offense of UPSMV, the court also found that the evidence did not support giving instructions for that offense. Moreover, the court denied defendant's request to excise "or converted" from the UPSMV instructions and did not define that term for the jury. The jury ultimately found defendant guilty of theft and UPSMV. The court sentenced defendant to 10 years' imprisonment for UPSMV, noting that it was not entering a conviction on the theft offense. In imposing the sentence, the court observed that, even though UPSMV is a Class 2 felony (625 ILCS 5/4-103(b) (West 2010)) and defendants sentenced for Class 2 felonies usually serve only a two-year term of mandatory supervised release (MSR) (730 ILCS 5/5-4.5-35(1) (West 2010)), the court had to impose a three-year term of MSR given that defendant was sentenced as a Class X offender (see 730 ILCS 5/5-4.5-95(b) (West 2010) (sentencing as a Class X offender); 730 ILCS 5/5-4.5-25(1) (West 2010) (three-year term of MSR applies to Class X felonies)). On appeal, defendant argues that (1) the jury should have been given instructions on criminal trespass to a vehicle so that the jury could have found him guilty of that offense and not UPSMV; (2) the court should have removed from the UPSMV instructions the verbiage "or converted" or defined that term for the jury; and (3) defendant's MSR term should be reduced to two years. For the reasons that follow, we affirm.

¶ 3 The facts relevant to resolving this appeal are as follows. At trial, Ricardo Sanchez, who testified through a Spanish interpreter, stated that he was looking to sell his Chevrolet Suburban in the spring of 2010. On April 26, 2010, defendant went to Sanchez's home in North Chicago at

around 5:30 p.m. to inquire about buying the vehicle. Sanchez, who knows “quite a bit of English” and tells people when he does not understand something that is said, told defendant that he was selling the vehicle for \$2,500. After attempting to negotiate a better price, defendant agreed to buy the car from Sanchez for the asking price. However, because defendant did not have any money, he asked Sanchez if he could borrow Sanchez’s cell phone so that he could call a friend who could lend him some money. Sanchez gave defendant his cell phone, defendant appeared to make a call, and, once he ended his phone conversation, Sanchez gave defendant the keys to the vehicle so that defendant could drive it around the block one time.

¶ 4 After approximately three minutes, defendant returned to Sanchez’s home in the vehicle. Defendant told Sanchez that he would get the \$2,500 from his friend, whose “house was in the area[.]” However, claiming that his friend needed change, defendant asked Sanchez for \$50. Sanchez gave defendant \$50, and defendant left in the vehicle. Approximately seven minutes later, Sanchez checked his cell phone and discovered that, when defendant allegedly made his phone call, he had dialed only six numbers. Defendant never returned the vehicle to Sanchez, and Sanchez reported the vehicle stolen. Although Sanchez claimed that he also reported that defendant took \$50 from him, the officer who wrote up the report indicated that Sanchez had made no such statement.

¶ 5 When Sanchez was asked about whether he and defendant had agreed to a time frame by which defendant needed to return the vehicle, Sanchez repeatedly indicated that he never explicitly told defendant that he could have the vehicle for a long period of time. Rather, Sanchez stated on direct examination that “[defendant] told me that he was just going to go around, go around and he was going to get the money from his friend.” On cross-examination, Sanchez asserted that “[defendant] told me that he was going to go for a ride around, talk to his friend and come back right

away.” Sanchez testified he never told defendant that he could have the vehicle for an “undetermined test drive” and that defendant “[d]efinitely” exceeded “what [Sanchez] thought the understanding was in terms of the amount of time [defendant] could have the car.” Additionally, Sanchez made clear that at no time did he ask defendant to sell the vehicle for him.

¶ 6 The next day, at approximately 5:30 p.m., defendant went to the Waukegan home of James Wheeler, who works as a pretrial bond supervisor for the probation department in Lake County. Defendant was with Roger Koreba, who was staying at Wheeler’s house. Koreba told Wheeler that defendant was selling the vehicle. Defendant, who implied that the vehicle belonged to him, wished to sell the vehicle to Wheeler who then would have given it to Koreba. Wheeler stated that he would have given the vehicle to Koreba because Koreba was down on his luck and could have used the vehicle to get back on his feet.

¶ 7 Defendant told Wheeler that he would sell the vehicle to him for \$450. Wheeler, who had never met defendant before, asked to see the title. Defendant told Wheeler that he did not have it. Wheeler told defendant to go get the title, but, instead of doing so, defendant repeatedly asked Wheeler if he wanted to purchase the vehicle. Eventually, because Wheeler insisted on seeing the title, defendant told Wheeler that his mother had the title, and Wheeler agreed to go with defendant to retrieve it.

¶ 8 Defendant drove around to various residences, ultimately stopping at an apartment complex where his mother allegedly lived. When the men were unable to locate defendant’s mother in the apartment complex, they returned to the vehicle.

¶ 9 At about 6:30 p.m. that night, Officer Dan Shepherd received a dispatch about a stolen vehicle. Officer Shepherd proceeded to the parking lot of the apartment complex where the vehicle

was spotted and discovered that defendant was driving Sanchez's Suburban. Wheeler was in the vehicle with defendant. Defendant told Officer Shepherd that he was test driving the vehicle, that he had been test driving the vehicle since the day before, that he was going to buy the vehicle for \$2,500, and that he was then going to sell the vehicle to Wheeler.

¶ 10 During the jury instructions conference, defendant sought to have the jury instructed on criminal trespass to a vehicle. Specifically, defendant proposed that the jury be given Illinois Pattern Jury Instructions, Criminal, No 16.09 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 16.09) and Illinois Pattern Jury Instructions, Criminal, No. 16.10 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 16.10). As relevant here, IPI Criminal 4th No. 16.09 provided that “[a] person commits the offense of criminal trespass to a vehicle when he, knowingly and without authority, [operates] any [vehicle].” IPI Criminal 4th No. 16.10 delineated the elements of the offense, namely that, in order for the jury to find defendant guilty of criminal trespass to a vehicle, the jury had to find that “defendant knowingly [operated the vehicle]” and also that “defendant did so without authority.” The court found that, even though criminal trespass to a vehicle is a lesser included offense of UPSMV, the evidence did not support giving the jury instructions on criminal trespass to a vehicle. That is, the court found:

“The difference between criminal trespass and [UPSMV] is essentially that when the defendant had [the vehicle], he knew it was stolen or converted. Either way, he possesses it, and either way, it's without authorization as the defense knows. That's why the Court finds it is lesser included.

But based on how the facts played out in this case, if the defendant possessed [the vehicle] without permission, it's because he stole it or took it without permission. There's

no rational way the jury could find the defendant possessed the car without authority having not [*sic*] taken it himself.”

¶ 11 When defendant’s challenge proved to be unsuccessful, he asked the court to strike the “or converted” language contained in the instructions covering UPSMV. In response, the State suggested that the jury be given an instruction defining “converted.”<sup>1</sup> The trial court refused to do either.

¶ 12 The jury found defendant guilty of UPSMV and theft, and defendant filed a posttrial motion, arguing, among other things, that the trial court erred when it refused to instruct the jury on criminal trespass to a vehicle and that the court should have excised the term “or converted” from the UPSMV instructions. The trial court denied the motion and sentenced defendant. In imposing a 10-year sentence for UPSMV, the court advised defendant that, because he was being sentenced as a Class X offender, the court had to impose the MSR term that applies to those who commit Class X felonies, *i.e.*, a three-year term of MSR. Defendant never challenged his MSR term in the trial court. This timely appeal followed.

¶ 13 Three issues are raised in this appeal. Specifically, we are asked to consider whether (1) the jury should have been instructed on criminal trespass to a vehicle so that it could have found defendant guilty of that offense and not UPSMV; (2) the court should have excised or defined the

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<sup>1</sup>It is not exactly clear from the record which party proposed giving the jury an instruction defining the term “converted.” However, given that, at trial, defendant argued that “converted” was less burdensome for the State to prove, that defendant indicates in his statement of facts that the State proposed the definition, and that the State does not object to that representation in its brief, we presume that the State proposed that instruction.

term “or converted” from the UPSMV instructions given to the jury; and (3) defendant’s MSR term must be reduced to two years, because defendant was convicted of a Class 2 felony, not a Class X felony. We address each issue in turn.

¶ 14 The first issue we consider is whether the jury should have been given the instructions for criminal trespass to a vehicle so that the jury could have found defendant guilty of that offense and not UPSMV. Generally, a defendant may not be convicted of an offense with which he was not charged. *People v. Washington*, 375 Ill. App. 3d 243, 248 (2007). However, a defendant may be convicted of an uncharged offense if (1) the uncharged offense is identified by the charging instrument as a lesser included offense of the one charged and (2) the evidence adduced at trial rationally supports a conviction of the lesser included offense. *Id.*

¶ 15 An “[i]ncluded offense” is one “established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged.” 720 ILCS 5/2-9(a) (West 2010). “The offense of unlawful possession of a stolen vehicle is committed when a person not entitled to the possession of a vehicle possesses it knowing it to be stolen.” *People v. Owens*, 205 Ill. App. 3d 43, 45 (1990), *rev’d on other grounds* *People v. Thomas*, 171 Ill. 2d 207 (1996); see also 625 ILCS 5/4-103(a)(1) (West 2010). On the other hand, a person commits criminal trespass to a vehicle “when [the] person knowingly and without authority enters any part of or operates any vehicle.” *Owens*, 205 Ill. App. 3d at 45; see also 720 ILCS 5/21-2 (West 2010). As can be seen, the difference between UPSMV and criminal trespass to a vehicle is that the former offense additionally requires that the defendant possess the vehicle knowing that it has been stolen.

¶ 16 Here, the indictment charging defendant with UPSMV provided:

“[D]efendant, on or about April 26, 2010, in the County of Lake and State of Illinois, committed the offense of **UNLAWFUL POSSESSION OF [A] STOLEN [MOTOR] VEHICLE**, in that the said defendant, a person not entitled to possession of said vehicle, possessed a 1993 Chevrolet Suburban, with an Illinois registration number of G170872, knowing it to have been stolen, in violation of 625 ILCS 5/4-103(a)(1)[.]”

¶ 17 Given that the indictment need present only the “ ‘ “main outline” ’ ” or a “ ‘ “broad foundation” ’ ” of the lesser offense and that missing elements of the lesser offense may be inferred from the indictment when possible (*People v. Rebecca*, 2012 IL App (2d) 091259, ¶ 58, quoting *People v. Miller*, 238 Ill. 2d 161, 166 (2010), quoting *People v. Kolton*, 219 Ill. 2d 353, 361 (2006))), we, like the trial court and the parties, conclude that criminal trespass to a vehicle is a lesser included offense of UPSMV (see *Owens*, 205 Ill. App. 3d at 45; see also *People v. Cook*, 279 Ill. App. 3d 718, 722 (1995)).

¶ 18 Having determined that criminal trespass to a vehicle is a lesser included offense, we turn now to the second tier of the analysis. That is, we must consider whether the evidence adduced at trial rationally supported a conviction of the lesser included offense. *People v. Ceja*, 204 Ill. 2d 332, 360 (2003).

¶ 19 It is under this second tier of the analysis that the parties disagree. Defendant claims that the evidence supported giving the jury the instructions on criminal trespass to a vehicle because the evidence indicated that defendant was merely test driving the Suburban, though perhaps for longer than Sanchez intended. The State argues that the evidence did not support giving the instructions on criminal trespass to a vehicle, as nothing in the record established that defendant believed that he could take the vehicle for an extended test drive and intended to return the vehicle after completing that extended test drive. When the issue on appeal concerns whether the court erred in refusing to

give an instruction under the second prong of the test, we review the claim under an abuse-of-discretion standard. See *In re Matthew M.*, 335 Ill. App. 3d 276, 284 (2002). “The trial court abuses its discretion when it refuses to give an instruction that is supported by the evidence introduced at trial.” *Id.*

¶ 20 Under the second prong of the test, the issue is whether the evidence would permit the fact finder to rationally find the defendant guilty of the lesser included offense, but acquit the defendant of the greater offense. *People v. Jones*, 175 Ill. 2d 126, 135 (1997). The defendant is entitled to an instruction on the lesser offense if there is “some foundation” for the instruction in the evidence. *In re Matthew M.*, 335 Ill. App. 3d at 284. That is, “[v]ery slight evidence supporting a defendant’s theory of the case will justify the giving of an instruction.” *Id.*

¶ 21 For purposes of this appeal, then, if there was some evidence, even if very slight, to allow a jury to rationally find that defendant did not know that the Suburban was stolen, he was entitled to instructions on the lesser included offense of criminal trespass to a vehicle. In considering that, we note that proof of knowledge need not be direct. *People v. Jasoni*, 2012 IL App (2d) 110217, ¶ 20. Rather, knowledge is a state of mind that usually is proved by circumstantial evidence. See *id.*

¶ 22 Here, we determine that the trial court did not abuse its discretion in refusing to instruct the jury on criminal trespass to a vehicle, as no rational jury could find that defendant possessed the vehicle without knowing that he stole it from Sanchez. Specifically, the evidence presented at trial revealed that, when defendant took the vehicle the second time, he told Sanchez that he was going to drive the car around a little longer and get money from the friend he had called. Defendant told Sanchez that the friend lived nearby. When defendant had not returned after about seven minutes, Sanchez checked his cell phone, which defendant had used to make his call, and learned that defendant never actually called anyone when he used it. Sanchez, who made clear that he

understands a great deal of English and clarifies anything said to him that he does not understand, repeatedly indicated that he never gave defendant permission to take the car for, as defendant claims, an extended test drive.

¶ 23 Further, the evidence revealed that, the day after taking the vehicle from Sanchez, defendant wished to sell the Suburban to Wheeler. This is something Sanchez never asked defendant to do. Despite the fact that defendant agreed to buy the vehicle from Sanchez for \$2,500, defendant was going to sell the vehicle to Wheeler, a man whom he had never met before, for \$450, which would have been a significant loss to defendant if in fact he paid Sanchez for the vehicle. While Wheeler was considering buying the vehicle, which defendant implied he owned, Wheeler repeatedly asked defendant for the title. Instead of explaining to Wheeler that he was buying the vehicle from another person and did not have the title at that point, defendant, after continually attempting to steer the conversation away from that topic and asking Wheeler to buy the car without having the title, eventually told Wheeler that the title was at his mother's home. Then, rather than driving directly to the apartment complex where defendant's mother allegedly lived, defendant drove Wheeler to various other places. Once the men arrived at the apartment complex, defendant never made contact with his mother, who allegedly had the title. All of this evidence indicates that defendant took the vehicle from Sanchez, never was going to pay Sanchez for the vehicle, and, thus, possessed the vehicle knowing that he stole it when he tried to sell it to Wheeler. Therefore, we conclude that the trial court did not err when it found that the evidence adduced at trial did not rationally support a conviction of criminal trespass to a vehicle and an acquittal of UPSMV.

¶ 24 The second issue we address is whether the court should have excised "or converted" from the UPSMV instructions given to the jury. As an ancillary argument, defendant also claims that the

trial court should have, at a minimum, defined “converted” when it instructed the jury on UPSMV, because, by not defining the term, “the court could very well have confused the jury and caused it to find the defendant guilty of an offense with which he had not been charged—that being possession of converted property.” Because a trial court has discretion to determine the appropriate jury instructions, we will reverse the trial court only if its determination constituted an abuse of discretion. *Compton v. Ubilluz*, 353 Ill. App. 3d 863, 870 (2004).

¶ 25 Turning to defendant’s claim that “or converted” should have been removed from the UPSMV instructions given to the jury, the instructions with which defendant takes issue are the ones based on Illinois Pattern Jury Instructions, Criminal, No. 23.35 (4th ed 2000) (hereinafter, IPI Criminal 4th No. 23.35) and Illinois Pattern Jury Instructions, Criminal, No. 23.36 (4th ed 2000) (hereinafter, IPI Criminal 4th No. 23.36). The instruction based on IPI Criminal 4th No. 23.35 provided that “[a] person commits the offense of possession of a stolen motor vehicle when that person possesses a vehicle when not entitled to possession of the vehicle and when knowing it to have been stolen or converted.” Similarly, the instruction based on IPI Criminal 4th No. 23.36 provided that, in order to find defendant guilty beyond a reasonable doubt of UPSMV, the jury must find that “the defendant possessed the vehicle[,]” that “the defendant was not entitled to possession of the vehicle[,]” and that “the defendant knew that the vehicle was stolen or converted.”

¶ 26 It is true that these instructions tracked the IPI instructions, which do not indicate, by way of brackets or otherwise, that the phrase “or converted” should be excised if the defendant is not charged with possession of a converted motor vehicle. Nevertheless, where an IPI instruction does not state the law that applies to a given case, it should not be used. See Ill. S. Ct. R. 451(a) (eff. July 1, 2006); see *Rebecca*, 2012 IL App (2d) 091259, ¶ 69. Here, the State charged defendant with

possessing a vehicle knowing it to have been stolen only. It did not charge defendant with knowing that it had been converted. Indeed, this was the precise basis on which the trial court declined to define that term for the jury. For the same reason, however, the trial court erred in instructing the jury that it could convict defendant if it were to find that defendant knew that the vehicle had been converted.

¶ 27 That said, we agree with the State that the error was harmless. “[I]nstructional errors are deemed harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed.” *People v. Washington*, 2012 IL 110283, ¶ 60. Here, as noted above, the evidence that defendant stole the vehicle was very strong. Further, the State made no argument to suggest that an issue of conversion was actually before the jury. Finally, we observe that the legal definition of conversion, and especially the difference between converting and stealing, “is virtually unknown to nonlawyers.” Bryan A. Garner, *A Dictionary of Modern Legal Usage* 221 (2d ed. 1995). Thus, it is virtually inconceivable that, despite the evidence and arguments pertaining to stealing, the jury seized on the term “converted” in the instructions, defined that term for itself, and found defendant guilty of knowing only that the vehicle had been converted.

¶ 28 Defendant next suggests that, having given issues instructions that included the term, the trial court should have gone on to define it. See Illinois Pattern Jury Instructions, Criminal, No. 23.35A (4th ed. 2000 (hereinafter, IPI Criminal 4th No. 23.35A (providing definition for converted)). We first note that it was the State, not defendant, that requested the definition instruction. By not requesting that instruction himself, defendant forfeited this contention. See *People v. Theis*, 2011 IL App (2d) 091080, ¶ 38 (failure to tender instruction results in forfeiture). Of course, defendant had good reason not to request the instruction, as it would have placed the conversion issue squarely

before the jury, increasing the likelihood of defendant's conviction. In any event, the committee comments to IPI Criminal 4th No 23.35 demonstrate that IPI Criminal 4th No. 23.35A should be given only when the defendant is charged with unlawful possession of a converted motor vehicle. See IPI Criminal 4th No. 23.35, Committee Note. As defendant was not so charged, the trial court properly refused to compound its error on the issues instructions by giving the definition instruction.

¶ 29 The last issue defendant asks us to consider on appeal is whether his three-year term of MSR must be reduced to two years, because, even though defendant was sentenced as a Class X offender (730 ILCS 5/5-4.5-95(b) (West 2010)), the offense for which he was given a term of MSR, *i.e.*, UPSMV, is a Class 2 felony (see 625 ILCS 5/4-103(b) (West 2010) (UPSMV is a Class 2 felony); 730 ILCS 5/5-4.5-35(1) (West 2010) (the MSR term for Class 2 felonies is two years)). Defendant claims that, because he was convicted of a Class 2 felony, that term of MSR, and not the three-year MSR term imposed on Class X felonies (see 730 ILCS 5/5-4.5-25(1) (West 2010)), must be applied here. Defendant's argument is premised on (1) our supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000), and (2) a construction of the statute governing sentencing as a Class X offender. Because we do not need to defer to the trial court in deciding this issue, our review is *de novo*. See *People v. McCreary*, 393 Ill. App. 3d 402, 406 (2009).

¶ 30 In addressing this issue, we note that defendant failed to preserve the issue below and does not argue that his claim should be reviewed under the plain-error doctrine. Rather, defendant contends only that imposing a three-year term of MSR renders that portion of his sentence void and that, as a result, this court may correct it now. Although it is true that a void order may be attacked at any time and in any court (see *People v. Permanian*, 381 Ill. App. 3d 869, 873 (2008)), this court has already addressed the same arguments defendant advances here and made clear that a defendant convicted of a Class 2 felony, yet sentenced as a Class X offender because of his criminal history,

must receive the term of MSR applicable to Class X felonies, *i.e.*, three years (*People v. McKinney*, 399 Ill. App. 3d 77, 81 (2010); see also *People v. Holman*, 402 Ill. App. 3d 645, 652-53 (2010) (reaffirming this court's decision in *McKinney*)). Accordingly, we reject defendant's request to reduce his MSR term from three to two years.

¶ 31 For these reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 32 Affirmed.