

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2013 IL App (4th) 120239-U  
NO. 4-12-0239  
IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

FILED  
October 30, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
KEETHAN L. SHAFFER,	)	No. 10CF750
Defendant-Appellant.	)	
	)	Honorable
	)	Mark A. Drummond,
	)	Judge Presiding.

---

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.  
Justices Harris and Holder White concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The appellate court affirmed defendant's conviction for unlawful possession of a stolen vehicle (625 ILCS 5/4-103(a)(1) (West 2010)).
- ¶ 2 In February 2011, a jury convicted defendant, Keethan L. Shaffer, of unlawful possession of a stolen vehicle (625 ILCS 5/4-103(a)(1) (West 2010)). In April 2011, the trial court sentenced defendant to 12 years' imprisonment. Defendant filed a motion for a new trial, which he amended in September 2011 to include the claim that his trial counsel was ineffective. Following a November 2011 hearing, the court denied defendant's amended motion.
- ¶ 3 On appeal, defendant argues that (1) his trial counsel was ineffective for (a) conceding that there was no basis for providing a jury instruction on criminal trespass to a vehicle (720 ILCS 5/21-2 (West 2010)); (b) conceding that the State could impeach defendant

with the dispositions of his previous felony convictions; and (c) declining to provide an additional pattern instruction in response to a question from the jury; and (2) the evidence was insufficient to sustain his conviction. We affirm.

¶ 4

## I. BACKGROUND

¶ 5 In December 2010, the State charged defendant with (1) possession of a stolen vehicle (625 ILCS 5/4-103(a)(1) (West 2010)) and (2) theft over \$300 (720 ILCS 5/16-1(a)(1)(A)(b) (West Supp. 2009)). As to the first charge, the information alleged, in pertinent part, as follows:

"[Defendant] committed the offense of unlawful possession of a stolen vehicle, in that he, a person not entitled to possession of said vehicle, possessed a 2005 Ford Taurus \*\*\*, knowing it to have been stolen[.]"

At defendant's arraignment, the trial court appointed assistant public defender Dave Farmer as counsel.

¶ 6

### A. Defendant's Jury Trial

¶ 7 In February 2011, the State dismissed the charge of theft over \$300 and the case proceeded to a jury trial on the charge of possession of a stolen vehicle.

¶ 8

#### 1. *The State's Evidence*

¶ 9 Harold Rudd testified that on the afternoon of December 16, 2010, he drove his maroon 2005 Ford Taurus to his place of employment in Quincy, Illinois. Rudd parked the car on the street and went into work, leaving his car unlocked with the keys in the ignition. Shortly thereafter, Rudd went outside to discover that his car was missing. He had not given anyone

permission to use the car. Rudd made contact with a Quincy police officer and reported that his car had been stolen. He provided the officer a description of the car.

¶ 10 Officer Curtis Werries of the Quincy police department testified that on the evening of December 18, 2010, he responded to a report that Rudd's car had been seen in the drive-through lane of the Taco Bell in Quincy. (The record does not reflect who made that report.)

¶ 11 Werries arrived at the Taco Bell at the same time as Sergeant Jackson of the Adams County sheriff's department. Jackson used his police car to block the drive-through lane of the Taco Bell. Werries and Jackson got out of their cars and walked along the drive-through lane toward Rudd's car. Three occupants were in the car. As the officers approached, the backseat passenger exited the car and ran through a parking lot away from the officers. Jackson gave chase. Werries remained next to the car. Defendant was in the driver's seat and a female was in the front passenger seat. The driver's window was rolled down. Werries grabbed defendant's arm and instructed him to removed the keys from the ignition and hand them to Werries. Defendant complied. The female passenger asked defendant, "What is going on?" Defendant replied, "The car is stolen."

¶ 12 Werries placed defendant under arrest. During a pat-down search of defendant's person, Werries discovered a bottle of men's cologne. Werries placed defendant in the backseat of his police car. Werries testified that, while in the backseat of the police car, defendant "made the spontaneous utterance that the vehicle was unlocked and the keys were in it. Therefore, he was only joyriding."

¶ 13 That evening, Werries went to Rudd's home to inform him that his car had been

located at the Taco Bell. Werries took Rudd to that location and asked him to determine whether anything was missing from the car. Rudd determined that he was missing a bottle of cologne and \$80 cash, which he had kept in an envelope in the glove compartment. He also noticed that his key chain was missing a set of keys for his place of employment and for his home.

¶ 14                    2. *The Discussion Regarding Impeachment of Defendant*

¶ 15                    Following the State's presentation of evidence, defense counsel informed the trial court that defendant would be testifying. The following discussion then took place between the court and the parties:

                          "THE COURT: \*\*\* I believe I need to address this before the defendant testifies, and that is you mentioned priors.

                          And do we have any dispute regarding those?

                          MR. FARMER: No, Judge. Mr. Barnard [(the State's Attorney)] and I have reviewed his priors and I believe we both agree as to what they are.

                          They consist of a burglary, for which he was sent to the Department of Corrections, and a possession of methamphetamine precursors, for which he received a probation sentence.

                          THE COURT: \*\*\* And do you intend to go into that, Mr. Farmer?

                          MR. FARMER: Yes. I do intend to ask [defendant] about his prior record. Specifically, I will directly ask him or state for him that he has the prior burglary conviction and the precursor

conviction and the appropriate sentence for each.

THE COURT: Okay. And there being no objection by the defendant to this and using the balancing test that I'm required to use, I find that those can be used for impeachment purposes.

\*\*\*

Anything else?

\*\*\*

MR. BARNARD: Excuse me, judge. There is. Part of the—part of the admission—or admissible materials is a disposition.

I do note that [defendant] was discharged unsuccessfully from probation and I want to get that out in the open to give Mr. Farmer the opportunity to inquire of that because, if he doesn't, I will.

THE COURT: All right. Mr. Farmer.

MR. FARMER: I really don't entirely see that as relevant, judge. Certainly, if he had failed his probation, we'd be talking about him having received a Department of Corrections sentence.

I think the fact that he failed at probation is, perhaps, a bit too much on the side of—of the affecting his credibility equation. I mean it's bad enough he had the conviction, let alone piling on with, oh, and he failed his probation, too, side of it.

\*\*\*

MR. BARNARD: The disposition is relevant. Certainly, I would expect to hear that he was discharged successfully if that were the case.

THE COURT: All right. Well, once again, I have no idea as to how this is going to shake out, so I've not researched this.

So, Mr. Farmer, unless you have some law on that, I believe Mr. Barnard is correct.

Do you wish time to give me some authority on that proposition?

MR. FARMER: No, your Honor. That's fine.

THE COURT: Okay.

MR. BARNARD: Judge, and just to expand on that, in a logical sense, I do know and would avow to the court, for instance, that if a defendant were placed on probation and his probation was revoked and that he was sent to the Department of Corrections, that would be admissible, as well, because that's a part of the disposition. And that's the basis, in a logical sense, for my position.

THE COURT: All right. Thank you."

¶ 16

### 3. *Defendant's Evidence*

¶ 17

Defendant testified that sometime in the afternoon before 4 or 5 p.m. on

December 18, 2010, he sold his car, a 1994 Eagle Vision ESi, to a friend of his ex-girlfriend. Defendant could not remember that person's name. Later that afternoon, defendant was at a friend's house when his brother, Lucas Shaffer, arrived in Rudd's car. Defendant testified on direct examination, as follows:

"Q. Okay. And your brother provided you that car?

A. Yes.

Q. He didn't sell it to you, right?

A. No. No.

Q. He didn't give you the title to it?

A. No. No.

Q. You just took it on face value that was your brother's car?

A. Either his girlfriend's or a family member of his girlfriend, yeah."

¶ 18 Defendant put fuel in the tank of the car and went to a restaurant. Later that day, defendant, Lucas, and a female passenger were in the car at the drive-through lane of Taco Bell. Defendant was in the driver's seat and Lucas was in the backseat. When the officers approached, Lucas fled. Defendant testified on direct-examination about his thought process once Lucas fled, as follows:

"Q. Prior to that point, did you have any inkling the car was stolen?

A. At that moment, I was then aware of the fact that it was

stolen.

Q. Had you taken that car?

A. No, sir."

¶ 19 Defendant admitted telling the female passenger that the car was stolen. Although defendant testified that he realized the car was stolen when Lucas fled, he also admitted later telling Officer Werries that the keys were in the car, the doors were unlocked, and he was just "joyriding." On cross-examination, defendant gave the following testimony:

"Q. I want to focus on that moment in back of the squad car of Officer Werries. And you, evidently, have no dispute with the fact that out of the blue, you say to him 'the keys were in it and the door was unlocked. Therefore, I'm just joyriding.'

You made that statement, right?

A. Yes. That's one of the statements I made, yes.

Q. Now, I noticed, from what Officer Werries said, that you didn't say to him 'it wasn't me,' did you?

A. I said it in front of him, sir.

Q. You didn't say to him 'this is the first time I've known that this car was stolen,' did you?

A. No, sir. I did not.

Q. You didn't say to him 'this is the first moment in time, ten seconds ago, that I first became aware of this car being stolen,' did you?

A. No, sir. I did not think to say anything like that.

Q. In fact, what you did tell him was, 'hey, the keys are in it, were in it, the door was unlocked, so I'm just joyriding.' That's what you said to him, correct?

A. That is what I said.

Q. And, in fact, you seem to distinguish between, at that moment and in that statement to Officer Werries, 'hey, if the keys were in it and it was unlocked, I'm not guilty of theft.' I assume that's what you meant, wasn't it?

A. That's what I was being accused of as I was put in the car.

Q. And, see, that's why I want to ask you because, you know, it seems like it would have been a better idea to say 'I didn't know anything about this and I just got behind the wheel three minutes ago, or ten minutes ago, not knowing anything about this car being stolen,' wouldn't it?

A. Maybe, from that perspective.

Q. I mean it couldn't have hurt, could it—

A. No, sir.

Q. —if, in fact, you didn't know it was stolen to have shared that little tidbit with Officer Werries, right?

A. I was not thinking good at that time."

Defendant did not testify about his prior convictions on direct examination and the State did not inquire into defendant's prior convictions on cross-examination. On redirect examination, however, defense counsel asked the following questions:

"Q. [Defendant], just so we're totally above board here, you do have some priors, right?

A. Yes. I do.

Q. You have a felony conviction for burglary?

A. Yes. I do.

Q. And you got a DOC sentence for that?

A. Yes. I did.

Q. And you have a felony conviction for possession of meth precursors?

A. Yes

Q. Correct?

A. I do.

Q. And you've been sentenced to probation for that?

A. Yes. I did.

Q. And, ultimately, the sentence to probation was discharged unsatisfactorily, right?

A. That is correct.

Q. We had neglected to mention that on the front end, but you know, the jury's got to know what your priors are and be able

to judge everything. Okay?

A. Okay."

Following defendant's testimony, the defense rested.

¶ 21 *4. The Jury Instruction Conference*

¶ 22 At the jury instruction conference following the presentation of evidence, the State withdrew its proposed instructions relating to criminal trespass to a vehicle as a lesser included offense (Illinois Pattern Jury Instructions, Criminal, (IPI) Nos. 16.09, 16.10, and 26.01Q (4th ed. 2000)). The State explained its decision to withdraw those instructions, as follows:

"MR. BARNARD: In light of the testimony of the defendant, your Honor, I don't think that the lesser included issue is any longer relevant, and I will withdraw those because the defendant's testimony clearly was not only of the tenor, but of the specific statement that he did not know the vehicle was stolen until a moment before the arrest. So there's no relevance to any of those."

Defense counsel responded by saying, "Judge, I think that is consistent."

¶ 23 *5. The Jury's Deliberations and Verdict*

¶ 24 The jury retired to deliberate at 12:30 p.m. At 3:05 p.m., the jury sent a note to the trial court, which read as follows:

"Is there any distinction to be made concerning the amount of time that has lapsed from the time knowledge was gained?  
Example: Seconds, minutes, hours, days, et cetera. Thank you."

After the court read the note aloud to the parties, the following discussion took place:

"MR. BARNARD: Judge, my position is no. However, I want to, as an officer of the court, make the court aware of a pattern instruction that exists with regard to—and it's [IPI] 4.15 [(4th ed. 2000)], definition of a voluntary act—possession as a voluntary act.

And I'm quoting: 'Possession is a voluntary act if the person knowingly procured or received a thing possessed or was aware of his control of the thing for a sufficient time to have been able to terminate his possession.'

There is such an instruction, but I don't believe that it's relevant to this case.

And the answer to the question is possession is—they have a definition of possession [(IPI 4.16 (4th ed. 2000))] which answers the question, and time is not an element of that.

THE COURT: Okay. Mr. Farmer.

MR. FARMER: I would tend to agree, time is not an element.

And, obviously, the facts are for the jury to decide. There's really nothing we can read them as a matter of law or a statutory definition, I think, that would really work here.

THE COURT: So I can—you're in agreement on the

response: 'You already have a definition of possession, and time is not an element'?

MR. BARNARD: Yes, your Honor.

MR. FARMER: Right.

THE COURT: Thank you."

¶ 25 At 4:30 p.m., the jury returned a verdict finding defendant guilty of unlawful possession of a stolen vehicle.

¶ 26 B. Subsequent Proceedings in the Trial Court

¶ 27 In April 2011, following a hearing, the trial court sentenced defendant to 12 years' imprisonment. In May 2011, defendant, through his trial counsel, filed (1) a motion reconsider sentence and (2) a motion for a new trial. Defendant, *pro se*, filed posttrial motions, asserting, in part, that his lawyer "was incompetent and did not perform his duties in a manner I felt was acceptable." Later in May 2011, the trial court referred the matter to the chief public defender, and in June 2011, assistant public defender Todd Nelson filed an entry of appearance as defendant's counsel.

¶ 28 In September 2011, defendant, through assistant public defender Nelson, filed an amended motion for a new trial. In that motion, defendant argued Farmer was ineffective for failing to request a jury instruction on the lesser included offense of criminal trespass to a vehicle and for failing to consult with defendant about whether to tender such an instruction.

¶ 29 In November 2011, the trial court held a hearing on defendant's amended motion for a new trial. At the conclusion of the hearing, the court took the matter under advisement. (Farmer did not testify at the hearing.)

¶ 30 In February 2012, the trial court denied all of defendant's posttrial motions in a five-page written order. The court found that it was a matter of trial strategy for defense counsel to decline to tender a jury instruction on the lesser included offense of criminal trespass to a vehicle. The court explained its conclusion, as follows:

"It would be reasonable for counsel to not expose the defendant to the possibility of conviction on the lesser included offense. The trial strategy of 'all or nothing' on possession of a stolen vehicle was a legitimate choice to make in this case, especially in light of defendant's persistence throughout the case that he did not know the car was stolen until moments after the officer confronted the defendant in the drive-thru at the Taco Bell.

As pointed out by the [S]tate, the decision to offer an instruction on a lesser included offense is one of trial strategy, which has no bearing on the competency of counsel. \*\*\* The defendant has failed to overcome the presumption that the counsel's alleged errors were not trial strategy and has also failed to demonstrate that the result of this trial could have been different, but for counsel's alleged errors."

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 On appeal, defendant asserts his trial counsel was ineffective for (1) conceding that there was no basis for providing a jury instruction on criminal trespass to a vehicle (720

ILCS 5/21-2 (West 2010)); (2) conceding that defendant could be impeached with the dispositions of his prior felony convictions; and (3) declining to provide IPI 4.15 (4th ed. 2000) in response to the jury's question. Defendant argues that these "cumulative ineffective actions at trial were so prejudicial that they undermined confidence in the outcome of the proceedings." Defendant argues further that the evidence was insufficient to sustain his conviction.

¶ 34                   A. Defendant's Ineffective-Assistance-of-Counsel Claims

¶ 35                                   1. *The Two-Pronged Strickland Test for Ineffective-Assistance-of-Counsel Claims*

¶ 36                   In determining whether a defendant was denied the effective assistance of counsel, we apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance resulted in prejudice to the defendant. *Strickland*, 466 U.S. at 687; *People v. Patterson*, 217 Ill. 2d 407, 438, 841 N.E.2d 889, 908 (2005). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219, 808 N.E.2d 939, 953 (2004). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Brown*, 236 Ill. 2d 175, 185, 923 N.E.2d 748, 754 (2010).

¶ 37                   As to the first prong of the test, "in order to establish deficient performance, the

defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *People v. Manning*, 241 Ill. 2d 319, 327, 948 N.E.2d 542, 547 (2011) (citing *People v. Smith*, 195 Ill. 2d 179, 188, 745 N.E.2d 1194, 1200 (2000)). "Evaluation of counsel's conduct cannot properly extend into areas involving the exercise of judgment, discretion or trial tactics even where the appellate counsel or the reviewing court would have acted differently." *People v. Bobo*, 375 Ill. App. 3d 966, 977, 874 N.E.2d 297, 309 (2007). Mistakes in strategy or tactics do not, alone, amount to ineffectiveness of counsel. *People v. Palmer*, 162 Ill. 2d 465, 476, 643 N.E.2d 797, 801-02 (1994).

¶ 38                    2. *Ineffective-Assistance-of-Counsel Claims on Direct Appeal*

¶ 39                    This court has noted the difficulty of resolving ineffective-assistance-of-counsel claims on direct appeal instead of on collateral review when doing so requires consideration of matters outside of the record on appeal. See *People v. Kunze*, 193 Ill. App. 3d 708, 725-26, 550 N.E.2d 284, 296 (1990) (declining to consider the defendant's ineffective-assistance arguments because such claims are better made in a petition for postconviction relief where a complete record can be made and the attorney-client privilege does not apply).

¶ 40                    In *People v. Durgan*, 346 Ill. App. 3d 1121, 1142, 806 N.E.2d 1233, 1249 (2004), this court, quoting the United States Supreme Court's decision in *Massaro v. United States*, 538 U.S. 500, 504-05 (2003), explained why it is preferable that an ineffective-assistance-of-counsel claim be brought on collateral review instead of on direct appeal, as follows:

"When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the

claim and thus often incomplete or inadequate for this purpose. Under [*Strickland*], a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. See [*Guinan v. United States*, 6 F.3d 468, 473 (7th Cir. 1993)] (Easterbrook, J., concurring) ('No matter how odd or deficient trial counsel's performance may seem, that lawyer may have had a reason for acting as he did \*\*\* Or it may turn out that counsel's overall performance was sufficient despite a glaring omission \*\*\* ')." (Internal quotations omitted.)

¶ 41 After thorough review of the record before us, we conclude that the record is not sufficiently complete to allow us to resolve defendant's ineffective-assistance-of-counsel claims. Defendant's claims, the merits of which we express no opinion on, would be more appropriately addressed in proceedings under the Post-Conviction Hearing Act (725 ILCS 5/122–1 through

122–8 (West 2012)).

¶ 42 B. The Evidence Was Sufficient To Sustain Defendant's Conviction

¶ 43 Defendant also argues the evidence failed to establish beyond a reasonable doubt that he knew the car was stolen.

¶ 44 When presented with a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "Under this standard, a reviewing court must allow all reasonable inferences from the record in favor of the prosecution." *People v. Bush*, 214 Ill. 2d 318, 326, 827 N.E.2d 455, 460 (2005). "This standard applies in *all* criminal cases, regardless of the nature of the evidence." *Id.*

¶ 45 In this case, Rudd testified that his car went missing on December 16, 2010, after he left it unlocked on the street with the keys in the ignition. Rudd did not give anyone permission to use the car. Werries testified that he found defendant driving Rudd's car on December 18, 2010. Notably, defendant's testimony was entirely consistent with the account conveyed by Rudd and Werries. Defendant confirmed that (1) he was driving Rudd's car in the Taco Bell drive-through when Werries approached him, (2) he told the female passenger that the car was "stolen," and (3) he told Werries that the keys were in the ignition, the doors were unlocked, and he was just joyriding. Although defendant testified that he did not know the car was stolen until Lucas fled from the backseat, the jury was in the best position to judge the credibility of that testimony. Given defendant's admission that he told Werries the keys were in

the ignition and the doors were unlocked, it was reasonable for the jury to disbelieve defendant's professed ignorance as to the circumstances surrounding the initial taking of the car. The evidence was sufficient to allow the jury to find that (1) defendant was not entitled to possession of the car, (2) defendant possessed the car, and (3) defendant knew the car was stolen.

¶ 46

### III. CONCLUSION

¶ 47 For the foregoing reasons, we affirm defendant's conviction. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 48 Affirmed.