

NOTICE
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2014 IL App (5th) 120292-U

NO. 5-12-0292

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Washington County.
)	
v.)	No. 11-CF-29
)	
YVONNE KELENA CACIOPPO,)	Honorable
)	Dennis G. Hatch,
Defendant-Appellant.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in failing to construe the bill of sale where there was no dispute that the defendant was a co-owner of the property at issue. The trial court did not err in giving Illinois Pattern Jury Instruction, Criminal, 13.34A because the instruction is to be given where the defendant claims an interest in the property, it is not misleading, and it correctly communicates to the jury the principles of law relating to the evidence presented.

¶ 2 Following a jury trial, the defendant, Yvonne Kelena Cacioppo, was convicted of one count of theft in violation of section 16-1(a)(1)(A) of the Criminal Code of 1961 (Code) (720 ILCS 5/16-1(a)(1)(A) (West 2010)) and was sentenced to 18 months of probation. She filed a timely notice of appeal. We affirm.

¶ 3

BACKGROUND

¶ 4 On May 16, 2011, the defendant was charged with theft of money and a restaurant coffee maker having a value in excess of \$500 but less than \$10,000, and intending to deprive AOK Smokin BBQ and/or Thomas Dahncke permanently of the use of the property in violation of section 16-1(a)(1)(A) of the Code.

¶ 5 At the jury trial, the evidence revealed that the defendant and Aaron Dahncke were involved in a romantic relationship and were co-owners of a business known as AOK Smokin BBQ, Inc. Aaron testified that he originally funded the business using money from his investments to buy a barbeque trailer. He stated that in the fall of 2010, they "needed a place to go inside with the business." He approached his parents, Thomas and Katherine Dahncke, about loaning them money to purchase the contents of a coffee house. Aaron testified that a couple of days prior to purchasing the contents of the coffee house, he spoke to the defendant about obtaining a loan from his parents. He stated that she was cooperative and wanted to borrow the money from his parents. His parents loaned them money, and they rented the location of the coffee shop and established AOK Smokin BBQ, Inc., as a sit-down restaurant. They kept the original trailer to use to barbecue meat.

¶ 6 Thomas testified that he and his wife lent AOK Smokin BBQ, Inc., \$15,000 to buy the contents of a coffee shop and \$10,000 for operating capital. Thomas testified that he loaned the money to AOK Smokin BBQ, Inc., not to the defendant and Aaron personally.

¶ 7 Aaron stated that there was a verbal agreement for the loan. After the loan was made, a note was signed. Aaron stated that he signed the note, but that the defendant

refused to sign it. Aaron testified that when the bill of sale was signed for the contents of the coffee shop, he understood that he and the defendant "had purchased it through the corporation."

¶ 8 The bill of sale for the contents of the coffee shop was introduced into evidence. The first paragraph of the bill of sale states that the owner sells to "AOK Smokin BBQ Aaron Dahncke and Kelen Cacioppo," a list of personal property which included the coffee maker. The bill of sale is signed by the defendant as president of AOK Smokin BBQ, Inc., and by Aaron and the defendant as purchasers.

¶ 9 Thomas testified that when the business started to fail, he filed a civil suit, along with his wife and Aaron, against AOK Smokin BBQ, Inc., and the defendant. On May 4, 2011, the court in that case entered judgment in favor of Thomas and Katherine Dahncke and against AOK Smokin BBQ, Inc., in the amount of \$25,000. It also ordered the defendant to immediately cease operation of AOK Smokin BBQ, Inc., and, within seven days, to provide the court with a complete accounting of AOK Smokin BBQ, Inc.'s financial affairs from January 1, 2011, to the date of the judgment. It further provided that the assets of AOK Smokin BBQ, Inc., be liquidated, the proceeds therefrom be used to pay the creditors, and any remainder be paid to the shareholders, all under the control and direction of the court. It ordered that AOK Smokin BBQ, Inc., be dissolved. The order was stayed until May 11, 2011. In the jury trial, the court took judicial notice of the May 4 and May 11, 2011, orders.

¶ 10 On May 11, 2011, the stay on the May 4, 2011, order was lifted and the defendant was ordered to turn over a Dodge truck, the keys to the business, a computer, and some

other minor pieces of equipment by 5 p.m. that day. Thomas was granted "a period of time until June 13, 2011, to advertise and solicit offers for the purchase of all the corporation assets." Any offers received were to be brought to the court for approval.

¶ 11 Thomas testified that as soon as court was adjourned, he and Aaron went to the site of the restaurant. When they arrived, the restaurant was in operation. Shortly after they arrived, the defendant came into the restaurant and emptied the contents of the cash register into a bank bag. He stated that he did not give her permission to take money from the cash register. Thomas testified that the money taken from the cash register on May 11, 2011, was never deposited into any of the business bank accounts. Thomas testified that he advised Aaron to videotape the contents of the restaurant site and the barbecue trailer.

¶ 12 Aaron testified that on May 11, 2011, he went to the restaurant after court. The defendant entered the restaurant, opened the cash register, and took all the money, checks, and receipts from it. She never returned the money to him, and the money was not deposited into any business accounts.

¶ 13 Aaron testified that he made a video inventory of the trailer and the restaurant. On May 11, 2011, he saw the coffee maker, which was the property of AOK Smokin BBQ, Inc., in the barbecue trailer. The coffee maker is shown on the videotape. The videotape was played for the jury.

¶ 14 Thomas testified that on the morning of May 12, 2011, he went to the trailer site at around 8 a.m. to evaluate how to proceed with the sale of the business assets. He noticed that the coffee maker was missing. Aaron arrived a few minutes later. Thomas asked

him where the coffee maker was and he did not know. Thomas testified that he never gave the defendant permission to remove the coffee maker or to sell it to someone else. Aaron also testified that he did not give the defendant permission to remove it. Thomas testified that Aaron looked around the trailer and noticed that food, including hamburger and cooked racks of ribs, was missing from the refrigerator. Thomas stated that they called the Nashville police department.

¶ 15 Gary Wright testified that he is a police officer for the Nashville police department. On May 12, 2011, he was dispatched to a property dispute involving the defendant, Thomas, and Aaron. Thomas and Aaron were at the defendant's house trying to obtain a coffee maker and some ribs that they claimed the defendant had taken that belonged to AOK Smokin BBQ, Inc. He stated that he asked the defendant about the items. Officer Wright testified that the defendant told him she sold the coffee maker to her grandmother for \$5,000. Officer Wright asked the defendant if he could check her home for the meat, and she granted him permission. He found ribs in her refrigerator. She told him that the ribs were her personal property. He went outside and asked Aaron how the missing ribs were packaged. The ribs he found in the defendant's refrigerator were packaged in exactly the same way as the missing ribs. The defendant admitted that the ribs were the ones from AOK Smokin BBQ, Inc. She gave them to Thomas. She also told Officer Wright that she had the coffee maker in her garage.

¶ 16 Brian Fletcher testified that he was the chief of police for the Nashville police department. He stated that Thomas is his uncle and Aaron is his cousin. He stated that on May 12, 2011, he received a complaint that the defendant had some meat that was

used for the barbecue business that she had not returned pursuant to a court order to freeze all business assets. He went to the defendant's residence to inquire about the meat. The defendant turned over two boxes of pork butt that were in her vehicle. He delivered the pork to Thomas and Aaron. Thomas and Aaron told him that there should have been more meat. He went back to speak to the defendant. She told him that she was not going to give the rest of the meat back unless Thomas and Aaron took her back to court. After a lengthy discussion, the defendant gave Chief Fletcher the rest of the meat. He delivered the meat to Thomas and Aaron.

¶ 17 Chief Fletcher testified that on May 13, 2011, he received another complaint from Thomas and Aaron that they had discovered guest checks from the business for May 10 and May 11, 2011, and that there was \$506 in unaccounted-for money that went with the checks. Thomas and Aaron told Chief Fletcher that after the court froze all the business assets, they went to the restaurant and the defendant came in and emptied the contents of the cash register drawer into bank bags and then left. They also told him that they had videotaped the assets in the barbecue trailer and the coffee maker was now missing.

¶ 18 Chief Fletcher stated that Thomas and Aaron told him that the defendant told them that she sold the coffee machine for \$5,000 and the buyer had picked it up. They checked with Michelle Heckert, the accountant for AOK Smokin BBQ, Inc., who said that she could not find anything in her records that showed a deposit of \$5,000 for the sale of a coffee maker. Chief Fletcher checked with Ms. Heckert who told him the same thing. Ms. Heckert testified that she never saw any deposits for the sale of equipment.

¶ 19 Chief Fletcher testified that he went to the defendant's house to speak with her. She was sitting outside with two bank bags. He inquired about the contents of the cash register and advised her that there was unaccounted-for money. She told him that she used the money to pay an employee and to pay business bills. The defendant voluntarily gave Chief Fletcher the bank bags.

¶ 20 Chief Fletcher testified that when he recovered the bank bags one bag contained \$74 and the other bag contained miscellaneous credit and debit card tapes, receipts, statements, and bills from companies with whom he assumed AOK Smokin BBQ, Inc., did business. The amount of the guest checks from May 10 and May 11, 2011, totaled \$506.50. The credit and debit card receipts found in the bag totaled \$250 for those days. Chief Fletcher testified that he did not remember if he talked to the employee to verify if she was paid from the receipts from May 10 and 11, 2011, and he did not investigate to find out what bills the defendant paid from those receipts or the amounts.

¶ 21 Chief Fletcher testified that when he was at the defendant's house on May 12, 2011, he saw the coffee maker sitting in her garage. On May 13, 2011, it was no longer there. He asked the defendant about the coffee maker. He said that she told him that her grandmother had written a check for \$5,000 for it and that she had deposited the money into the AOK Smokin BBQ, Inc., account. He stated that the defendant changed her story several times. She told him that she deposited the money into one account, that she deposited it into four different business accounts, that her grandmother paid her in cash, that her grandmother made the check out to the defendant's mother who "deposited the money into the account," and that she deposited the check in her personal account.

¶ 22 Chief Fletcher testified that on Monday, May 16, 2011, he obtained a search warrant to recover the coffee maker. He went to the defendant's house, recovered it from her detached garage, and transported it to the Nashville police department. The coffee maker was later released to the business for liquidation. He stated that he received permission from the State's Attorney to release the coffee maker to Thomas as overseer of the business. Thomas testified that he purchased the coffee maker at the business liquidation auction for \$2,138 and then resold it for \$2,250.

¶ 23 The defendant did not testify.

¶ 24 At the instruction conference, the defendant objected to the giving of instruction number 10, Illinois Pattern Jury Instructions, Criminal, No. 13.34A (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 13.34A), and for allowing the jury to construe the bill of sale. The court allowed the instruction and allowed the jury to construe the bill of sale.

¶ 25 The jury found the defendant guilty of theft of property exceeding \$500 in value. The defendant filed a motion for a new trial, which the court denied. The court sentenced the defendant to 18 months probation. The defendant filed a notice of appeal.

¶ 26 ANALYSIS

¶ 27 The defendant argues that the trial court erred by having the jury construe the bill of sale, a document of title, to decide ownership of the coffee maker because that issue was a question of law appropriate only for the trial court. The defendant bases her argument on *Cook v. Burnley*, 78 U.S. 659 (1867). *Cook* is not applicable to the facts in the instant case.

¶ 28 The State acknowledged that the defendant had an ownership interest in the coffee maker. In closing argument the State made numerous references to the fact that the defendant was an owner of the coffee maker along with AOK Smokin BBQ, Inc., and Aaron. The defendant did not argue that she was the only owner of the coffee maker. The construction she wanted the trial court to adopt regarding the bill of sale was the construction that the State acknowledged in its closing argument. Because there was no dispute that the defendant was an owner of the coffee maker, the construction of the bill of sale was not at issue.

¶ 29 The defendant argues that the trial court erred in giving the jury IPI Criminal 4th No. 13.34A because it misled and confused the jury.

¶ 30 Jury instructions convey the legal rules applicable to the evidence presented at trial and guide the jury's deliberations toward a proper verdict. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). It is within the trial court's discretion to determine whether an instruction should be given. *Id.* If an instruction is not supported by either the law or the evidence, it should not be given. *Id.* This court employs the abuse of discretion standard when reviewing the propriety of giving an instruction. *Id.* at 66. A trial court's ruling is an abuse of discretion only where it is arbitrary, fanciful, or unreasonable, or where no reasonable person could take the view adopted by the trial court. *People v. Rodriguez*, 387 Ill. App. 3d 812, 821 (2008).

¶ 31 In determining whether a trial court abused its discretion in giving an instruction, we examine whether the instructions given, when taken as a whole, fairly, fully, and comprehensively apprised the jury of the relevant law. *People v. Cook*, 2014 IL App

(1st) 113079, ¶ 27. An instruction accurately conveys the applicable law when it conveys to the jury the law that applies to the facts so it can reach a correct conclusion. *Id.* While jury instructions should not be misleading or confusing, their correctness depends not upon whether defense counsel can imagine a problematic meaning, but whether ordinary people acting as jurors would fail to understand them. *Id.*

¶ 32 Illinois Supreme Court Rule 451(a) (eff. July 1, 2006) requires trial courts to use Illinois Pattern Jury Instructions that are both applicable to the facts and law of the case and a correct statement of the law. *Rodriguez*, 387 Ill. App. 3d at 822. "Although pattern instructions are not themselves law and are open to challenge if they are inaccurate statements of the law, the instructions are mandatory, if applicable and accurate." *Id.*

¶ 33 IPI Criminal 4th No. 13.34A provides:

"It is not a defense to the charge of theft that the defendant has an interest in the property when another person also has an interest in the same property to which the defendant is not entitled."

The defendant argues that the phrase "to which the defendant is not entitled" misled the jury into thinking she was not entitled to the coffee maker. The defendant contends that she was a purchaser/owner of the coffee maker and that the May 4 and May 11, 2011, orders never extinguished her title and interest in it. She alleges that as an owner, with vested title, she was entitled to the coffee maker. She argues that IPI Criminal 4th No. 13.34A informed the jury that she was not entitled to it.

¶ 34 IPI Criminal 4th No. 13.34A, if read as a whole, is not misleading. The phrase "to which the defendant is not entitled" refers not to the property but to the interest held by

the other person. Contrary to what the defendant asserts, the instruction does not inform the jury that she was not entitled to the coffee maker.

¶ 35 The committee note to IPI Criminal 4th No. 13.34A instructs the trial court to give the "instruction when a defendant claims an interest in the property." A partner, shareholder, or co-owner claiming an interest in the subject property may be found guilty of theft. *People v. Day*, 2011 IL App (2d) 091358, ¶ 29. In the instant case, the defendant was charged with theft, the largest item being the coffee maker. Her defense was that she had an ownership interest in the coffee maker. The purpose of jury instructions is to communicate to the jury the correct principles of law relating to the evidence presented to enable it to reach a correct conclusion regarding the defendant's guilt or innocence based on the law and evidence. *People v. Nash*, 2012 IL App (1st) 093233, ¶ 26. IPI Criminal 4th No. 13.34A correctly states the law by explaining to the jury that the fact that the defendant has an interest in the property she is accused of stealing is not a defense if there are other owners to whose interest she is not entitled. The trial court did not abuse its discretion in giving this instruction.

¶ 36 The trial court did not err in giving IPI Criminal 4th No. 13.34A or in failing to have the trial court construe the bill of sale as a matter of law. There was no dispute that the defendant was an owner of the coffee maker. She owned it along with AOK Smokin BBQ, Inc., and Aaron. IPI Criminal 4th No. 13.34A is given when a defendant claims an interest in the property. The instruction is not misleading and correctly states the law. The trial court did not abuse its discretion in giving Instruction 13.34A.

¶ 37

CONCLUSION

¶ 38 For the reasons stated, we affirm the judgment of the circuit court of Washington County.

¶ 39 Affirmed.