2016 IL App (1st) 133207-U
No. 1-13-3207
March 29, 2016

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	Of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 CR 18594
	)	
ELLIS PARTEE,	)	The Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: When a defendant presents evidence that would permit a rational jury to convict him of a lesser-included offense while acquitting him of a greater, charged offense, due process requires the trial court to grant the defendant's request for a jury instruction on the lesser-included offense.

¶ 2 A jury found Ellis Partee guilty of aggravated vehicular hijacking. The trial court sentenced him to 60 years in prison. In this appeal, Partee contends that the trial court erred by refusing to instruct the jury on the lesser-included offense of possession of a stolen motor vehicle. We hold that the charging instrument here, in main outline, included the elements of

the offense of possession of a stolen motor vehicle, so that offense qualifies as a lesser-included offense of the aggravated vehicular hijacking charge. Partee presented some evidence, in his own testimony, that would permit a rational jury to find him guilty of possession of a stolen motor vehicle and not guilty of aggravated vehicular hijacking. We cannot declare beyond a reasonable doubt that the instructional error did not deny Partee his due process right to a fair trial. Therefore, we reverse the conviction and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 After 5 p.m. on October 5, 2010, Charles Morris drove to the workplace of his wife, Carol Morris, on Rush Street in Chicago. Carol came out of the building a few minutes after Charles arrived. Charles stepped out of the car and hugged Carol. Partee got into the driver's seat of the Morrises' car. Charles and Carol yelled at him and Partee drove off in the Morrises' car.

¶ 5 The yelling drew the attention of Martin and Darrin Osborne, who sat in a van parked on Rush Street. Martin drove off in pursuit of the Morrises' car. Martin caught up with the car a few blocks away, when Partee got stuck in traffic. Martin and Darrin pulled Partee out of the Morrises' car and pummeled him. Police arrived a few minutes later and took Partee into custody. A grand jury indicted Partee on one count of vehicular hijacking, for taking the car from Carol by force, and one count of aggravated vehicular hijacking, for taking the car from Charles by force, when Charles was over 60 years old.

¶ 6 In pretrial proceedings, Partee sought to demand trial immediately. The public defender refused to demand trial because he had not completed his investigation or discovery. Partee then sought to represent himself. The trial court warned Partee that because of his prior convictions, he faced a possible sentence of natural life in prison. Partee insisted that he preferred to represent himself, and the court permitted Partee to proceed *pro se*.

¶ 7 At the jury trial, Partee admitted that he drove off in the Morrises' car without their permission, but he claimed that he did not use force and therefore the jury should find him guilty of possession of a stolen motor vehicle, not aggravated vehicular hijacking.

¶ 8 Charles testified that he and Carol stood on the driver's side of their car as Partee rushed past them into the driver's seat. Charles reached into the car and grabbed Partee. Partee scratched Charles's hand while pushing him off. As Partee drove off, both Charles and Carol fell to the ground. Charles admitted that Partee did not punch or threaten the Morrises.

¶ 9 Carol corroborated Charles's testimony. She added that she grabbed the steering wheel when Partee got in the car. She and Charles both had their hands in the car when Partee hit the gas pedal and took off, throwing Charles and Carol to the ground. Martin confirmed that he saw Charles and Carol wrestling with Partee for control of the car, and he saw the Morrises fall to the ground when the car took off.

¶ 10 A police officer testified that he found out that Carol's employer had a security camera, "but it just captured people from like the knee below and it had no real evidentiary value." The officer did not look at images captured by other security cameras nearby. He

acknowledged that a Chicago Police map showed four other cameras close to the crime scene.

¶ 11 Partee testified that he suffered from a gambling addiction that got him into trouble. On October 5, 2010, he thought he saw someone chasing after him. As he ran away, he noticed a car running, with no one in the driver's seat. He did not punch anyone, push anyone, knock anyone down, or hit anyone in any way. He just jumped into the driver's seat and drove off. He did not see anyone fall to the ground. He saw the Morrises hugging behind the car, but he could not tell that the car belonged to them. They did not reach inside the car window. He heard someone yell "stop," but he took off.

¶ 12 Partee asked the trial court to instruct the jury on the lesser included offenses of possession of a stolen motor vehicle, auto theft, attempted auto theft, and criminal trespass to a vehicle. The trial court denied all of the requests for lesser-included offense instructions. The trial court reasoned that because the State need only prove general intent for vehicular hijacking, and the State must prove specific intent for possession of a stolen motor vehicle, possession of a stolen motor vehicle does not qualify as a lesser-included offense of vehicular hijacking.

¶ 13 The jury found Partee guilty of vehicular hijacking and aggravated vehicular hijacking. In a motion for a new trial, Partee argued that the trial court committed reversible error by refusing to instruct the jury on lesser-included offenses. Partee, *pro se*, cited to the court *People v. Eggerman*, 292 Ill. App. 3d 644, 646 (1997), for the proposition that possession of a stolen motor vehicle is a lesser-included offense of aggravated vehicular hijacking. The

trial court denied the motion for a new trial without commenting on the lesser-included offenses or *Eggerman*. Partee now appeals.

¶ 14 ANALYSIS

¶ 15 Although Partee raises several arguments on appeal, we address only the argument that we find dispositive. Partee argues that the trial court committed reversible error when it refused to instruct the jury on the lesser-included offense of possession of a stolen motor vehicle. The trial court refused the instruction on grounds that possession of a stolen motor vehicle is not a lesser-included offense of aggravated vehicular hijacking. "Whether a charged offense encompasses another as a lesser-included offense is a question of law, which this court reviews *de novo*." *People v. Kolton*, 219 Ill. 2d 353, 361 (2006).

¶ 16 The *Eggerman* court held that "the offense of possession of a stolen motor vehicle is a lesser included offense of vehicular hijacking and aggravated vehicular hijacking. The taking of a motor vehicle, as required in the vehicular hijacking offenses, includes unauthorized possession and knowledge that the vehicle is stolen since the person charged with the hijacking is the one who has taken the vehicle by force or threat of force." *Eggerman*, 292 Ill. App. 3d at 648. The *Eggerman* court rejected the State's argument that the difference between specific intent crimes and general intent crimes made possession of a stolen motor vehicle not a lesser included offense of vehicular hijacking. The *Eggerman* court relied on *People v. Jones*, 149 Ill. 2d 288 (1992), finding that "The *Jones* court held that the specific intent offense of theft is a lesser included offense of a general intent offense of armed robbery despite the differing mental states" because "the armed robbery statute implicitly

includes the mental state of intent to permanently deprive the victim of the property." *Eggerman*, 292 Ill. App. 3d at 649.

¶ 17 *Eggerman* preceded our supreme court's decision in *Kolton*, 219 Ill. 2d at 361-64, which altered somewhat the analysis of whether one offense qualifies as a lesser-included offense of a charged offense. The *Kolton* decision broadened the category of lesser-included offenses. Under *Kolton*, the court

> "looks to the allegations in the charging instrument to see whether the description of the greater offense contains a 'broad foundation' or 'main outline' of the lesser offense. ***
>
> * * *
>
> *** [T]he absence of a statutory element will not prevent us from finding that a charging instrument's description contains a 'broad foundation' or 'main outline' of the lesser offense. [Citation.] It is now well settled that, under the charging instrument approach, an offense may be deemed a lesser-included offense even though every element of the lesser offense is not explicitly contained in the indictment, as long as the missing element can be reasonably inferred." *Kolton*, 219 Ill. 2d at 361-64, *quoting People v. Novak*, 163 Ill. 2d 93, 113 (1994).

¶ 18 The charging instrument here said Partee "knowingly took a motor vehicle *** from the immediate presence of Charles Morris, by the use of force or by threatening the imminent use of force." To prove possession of a stolen motor vehicle, the State would need to show that Partee possessed the car, knowing that it was stolen, when he had no right to possess the car.

Eggerman, 292 Ill. App. 3d at 647-48. When Partee allegedly took the car he possessed it; as he allegedly stole the car knowingly, he also allegedly knew it had been stolen; and by asserting that Partee took the car by force or threat of force, the State implicitly asserted that Partee had no right to possess the car. See *Eggerman*, 292 Ill. App. 3d at 648. Thus, in main outline, the charging instrument here makes possession of a stolen motor vehicle a lesser-included offense of vehicular hijacking and aggravated vehicular hijacking.

¶ 19 The trial court need not instruct the jury on all lesser-included offenses. Instead, once "it is determined that a particular offense is a lesser-included offense of a charged crime, the court must then examine the evidence adduced at trial to decide whether the evidence rationally supports a conviction on the lesser offense." *Kolton*, 219 Ill. 2d at 361. "This evidentiary requirement is usually satisfied by the presentation of conflicting testimony on the element that distinguishes the greater offense from the lesser offense." *People v. Rebecca*, 2012 IL App (2d) 091259, ¶ 60.

¶ 20 Charles and Carol testified that Partee pushed at their hands, scratching Charles, and then drove off, knocking them down. Martin saw something that looked like wrestling, then he saw Partee drive off, knocking down Charles and Carol. Partee elicited Charles's admission that Partee never punched him. Partee testified that Charles and Carol stood behind the car when he saw it, and he never touched either of them. His testimony finds some support in the testimony of the officer who said the security camera showed the persons involved only from the knees down, and the State chose not to use the footage. A rational juror could infer that the camera showed that Charles and Carol remained standing when Partee drove off.

Moreover, the State used none of the images captured by the four police cameras near the scene of the crime. Thus, Partee and the State presented conflicting evidence on the use of force, one of the elements that distinguishes aggravated vehicular hijacking from the lesser-included offense of possession of a stolen motor vehicle.

¶ 21 The State argues that even if the court should have instructed the jury on the offense of possession of a stolen motor vehicle, the court committed only harmless error. When a case presents a credibility conflict concerning an element that distinguishes a greater from a lesser offense, this court usually cannot declare beyond a reasonable doubt that the failure to instruct the jury on the lesser offense did not contribute to the conviction. See *People v. Kidd*, 2014 IL App (1st) 112854, ¶ 53.

¶ 22 Moreover, in this case, Partee admitted that he stole the Morrises' car. His entire defense rested on the distinction between vehicular hijacking and the lesser offenses that do not involve the use of force. The court's rulings, which disallowed instructions on all of the lesser included offenses where some evidence supported the instructions (see *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998)), effectively undercut Partee's presentation of his theory of the case and denied Partee his due process right to a fair trial. See *People v. Jones*, 175 Ill. 2d 126, 132 (1997). Given the due process rights at issue in this case, we cannot find the instructional error harmless.

¶ 23 CONCLUSION

¶ 24 The trial court erred when it refused to instruct the jury on Partee's theory of the case – that he committed possession of a stolen motor vehicle or another theft offense that did not

involve force, instead of aggravated vehicular hijacking. We cannot say beyond a reasonable doubt that the error did not deny him a fair trial. Accordingly, we reverse and remand for a new trial.

¶ 25 Reversed and remanded.