FIRST DIVISION
September 30, 2016

No. 1-14-2095
2016 IL App (1st) 142095-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
	)	Circuit Court of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	13 CR 10277
	)	
DEON HILLIARD,	)	
	)	Honorable Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.
	)	

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justice Harris and Justice Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* There was sufficient evidence to prove defendant guilty beyond a reasonable doubt of aggravated possession of a stolen motor vehicle even though the State did not match the VIN number of the stolen vehicle to the VIN number of the vehicle defendant was observed driving; defendant was not denied a fair trial where he stated he did not recall giving the statement the officers testified to but the jury was not provided the bracketed language of IPI Criminal No. 3.06-3.07; defendant was not denied a fair trial where even if hearsay testimony was admitted, other properly admitted evidence established the "stolen" element of the offense and the evidence overwhelmingly favored the State; affirmed; mittimus corrected.

¶ 2 After a jury trial, defendant, Deon Hilliard, who represented himself *pro se*, was found guilty of aggravated and simple possession of a stolen motor vehicle and sentenced to eight years' imprisonment. Defendant appeals his conviction, arguing that the State failed to prove him guilty beyond a reasonable doubt. He also asserts that he was denied a fair trial when the State tendered an improper jury instruction regarding his statement to the police and when the State used hearsay testimony to establish that the vehicle in question was stolen. Finally, defendant contends, and the State concedes, that the mittimus should be corrected to reflect a single count of aggravated possession of a stolen motor vehicle. For the following reasons, we affirm the judgment of the trial court and order the mittimus corrected.

¶ 3 BACKGROUND

¶ 4 On May 22, 2013, defendant was indicted by grand jury for possession of a stolen motor vehicle (PSMV) (625 ILCS 5/4-103(a)(1) (West (2012)) and aggravated PSMV(625 ILCS 5/4-103.2(a)(7) (West 2012)). On June 12, 2013, when defendant appeared in court for the first time in this case, the public defender's office was appointed as his counsel, his bond was set, and he was taken into custody. Approximately one month later, the next time this case was before the court, defendant sought, and was granted, leave to proceed *pro se*. Defendant subsequently filed two motions to dismiss on July 19, 2013. One motion argued that defendant's due process rights were violated due to substantial delay and the other argued for dismissal under principles of double jeopardy. Both motions were denied.

¶ 5 Defendant's jury trial took place on October 15 and 16, 2013. Prior to jury selection, defendant asked the court to appoint stand-by counsel and his request was denied, thus he proceeded *pro se*. Specifically, the court stated, "[w]e have the jury in the hall, this case is set for jury trial, and you're just now bringing this to the Court's attention, and it's within my

discretion if I'll appoint standby counsel or not. In looking at the charges and giving it all due consideration, your motion for standby counsel is denied."

¶ 6 After both sides presented opening statements, the State called Officer Paul Gentile, who testified that just before 1:30 a.m. on April 1, 2013, he was on patrol with Officer Ruiz in a marked police car when he observed a gray Chevy SUV roll through a stop sign near the intersection of 64th and Aberdeen. Officer Gentile testified that he then ran the license plate of the vehicle, Illinois plate 170048, through the Chicago Police Department database. He also noticed that it was a handicapped plate. Regarding the plate information, he stated that "[o]nce we inputted it, it took a second, you hear a beep, you click the page button and it pops up. It alerted us of a stolen vehicle on the hot file and told us how it was stolen." Officer Gentile testified that once he learned the vehicle was stolen, he got on the radio, read the plate over the air, and requested backup, because "[s]ince it's a stolen car, they usually try to flee or run." He further stated that as he followed the SUV, there were no other cars or things obstructing the view in between them. Officer Gentile stated he observed one person in the SUV, the driver, who he identified in open court as defendant. After calling out over the radio, Officer Gentile then turned the lights and sirens on. As to what happened next, he stated "[a]t that time the car pulled over the left, like any other traffic stop, he pulled to the left, put the car in park. I said, okay, we got the vehicle parked, we're going to approach the vehicle." Then, Officer Ruiz opened her door and Officer Gentile opened his, and he testified that "as soon as [the defendant] saw our doors open, the car took off, accelerated to attempt to flee away from us."

¶ 7 The officers then pursued defendant in their patrol car. Officer Gentile stated that backup officers' cars were coming from behind and one of the cars was a "real big over-sized van" that was parked blocking the road in the 6100 block of Aberdeen. However, defendant "squeezed

right past the van and then continued northbound." Officer Gentile testified that he continued to follow defendant approximately four car-lengths away, nothing blocked his view of defendant's SUV, and he never lost sight of him. When defendant approached the viaduct between 59th and 58th streets, he lost control of the SUV and started fish-tailing on loose gravel. Officer Gentile stated that after losing control, the front of the SUV crashed into thick metal poles in a vacant lot. He also testified that the passenger door was stuck and could not open because the poles were against the door.

¶ 8 As Officer Gentile exited his vehicle, he saw "the driver side door of the stolen vehicle fly open, and the defendant took off running westbound." Officer Gentile pursued defendant on foot for two-and-a-half blocks without ever losing sight of him, and stated that eventually "[defendant] pretty much gave up. He slowed down, and at that time we placed him into custody." Officer Gentile stated that during his pursuit of defendant Officer Ruiz stayed with the SUV. Other responding officers then transported defendant to the seventh district police station. At the seventh district police station, Officer Gentile read defendant his *Miranda* rights from a pre-printed card and then interviewed defendant. Officer Ruiz was also present. Officer Gentile testified, "I asked [defendant] if he knew, or if he knew why we tried to attempt to approach him, and he said because the vehicle was stolen. I said you knew it was stolen? He said, yes, I knew it was stolen. I said, how's that? He said, I was told to pick up the vehicle at the 8700 block of South Morgan. At that place, the vehicle would be unlocked and the keys would be inside. I was then supposed to take the stolen vehicle to the 5200 block of South Honore, whereupon delivery of the vehicle I would receive a thousand dollars cash."

¶ 9 Next, the State called Myrtelina Rodriguez to testify. She stated that on March 30, 2013, she was the registered owner of a 2012 Chevy Equinox. She testified that she only gave her

grandson, Esteban Marcelo De La Osa, permission to drive her vehicle on March 31 and April 1, 2013. She did not know anyone by the name of "Deon Hilliard" and she did not give anyone with that name permission to drive her car. Rodriguez also testified that her vehicle had handicapped plates. Finally, the following exchange occurred:

"MS. MIEHLICH [Assistant State's Attorney]: Do you recall the license plate? Would it have been an Illinois license plate 170048?

RODRIGUEZ: Correct. Yes."

¶ 10 Esteban De La Osa was called next to testify by the State. He stated that on March 29 into March 30, 2013, he had a 2012 dark gray Chevy Equinox that his grandmother, Myrtelina Rodriguez, gave him permission to drive. The following exchange occurred during his testimony:

"MS. MIEHLICH: And what type of license plate did that car have?

DE LA OSA: It had a handicapped plate. I'm not exactly sure of the number on it.

MS. MIEHLICH: Was it license plate number, Illinois license plate 170048?

DE LA OSA: Yeah, that's it."

De La Osa stated that on March 29 and March 30, 2013, the Chevy Equinox was parked on the opposite side of the street out in front of his residence at 6034 South Knox in Chicago. He testified that the last time he saw his grandmother's vehicle was on March 29, 2013, at approximately 10 p.m. The next morning, he woke up at about 7:50 a.m., went outside to take his fiancé to the train station, and his vehicle was not there. De La Osa testified that he assumed it may have been towed and called "the Chicago tow phone number." He also called the company on the building across the street and was informed they did not have the vehicle.

Thereafter, De La Osa and Rodriguez went to the police station and filed a report for the stolen vehicle. De La Osa stated that on March 29 and March 30, 2013, he was the only person authorized to be driving the vehicle and he did not give anyone permission to drive the vehicle.

¶ 11 De La Osa further testified that after he reported the Equinox as stolen he did not see the vehicle until about two weeks later at a police impound at 103rd and Doty. De La Osa stated that when he last saw the SUV on March 29, 2013, it was "[n]early new. It was less than a year old, if that, and it was [in] perfect condition. No damage." When he saw the vehicle at the police impound, he stated that it was damaged on three sides. Like Rodriguez, De La Osa also testified that he did not know anyone by the name of "Deon Hilliard" and he never gave anyone with that name permission to drive the vehicle. On cross examination, De La Osa testified that to his knowledge, he did not leave the keys in the vehicle. Also, when asked by defendant if there was any damage inside the vehicle, De La Osa responded "[o]ther than dog excrement in my back seat and water from the broken window, no, not to the inside of the vehicle." De La Osa further stated that the key lock was not pulled.

¶ 12 The State then rested its case-in-chief. When asked if he had any witnesses to present, defendant told the court he intended to call someone named Detective Blackburn. Defendant stated that he had told someone from the State's Attorney's Office that he wanted to call Detective Blackburn at trial when the case was before a different judge in a different courtroom. The State responded that it did not have any record of a request for specific officers in the notes from the court date defendant was referencing. Thereafter, defendant and the State agreed to enter a stipulation regarding Detective Blackburn's testimony. The stipulation defendant read to the jury stated:

"It is hereby stipulated that Detective Blackburn Star # 20427 of the Chicago Police Department was assigned to this matter.

That Detective Blackburn has no independent knowledge of the arrested [*sic*] and charging of the offender in regards to this investigation. All information that Detective Blackburn learned through available approved reports.

So stipulated."

¶ 13 Defendant testified on his own behalf. In his statement to the jury, defendant stated that on April 1, 2013, he was the passenger of the vehicle that was stolen from Rodriguez and De La Osa. He stated that on the night in question he paid a "cab" to bring him from the 95th/ Dan Ryan CTA red line station to his home in Englewood around 12 a.m. or 1 a.m. Defendant testified that he was asleep in the vehicle because he had been working for a carpentry business that night. He stated that he had money on him to either pay for the CTA or a cab, and he chose to get in the vehicle in question with someone he did not know. Specifically, defendant stated: "And I made a mistake, an honest mistake to get in their vehicle not knowing this is not the owner of the vehicle and the vehicle at the time was stolen, due to the fact there was nothing wrong with the car." Defendant further testified that the key was in the vehicle, so he "had no idea this car was stolen at the time." Defendant went on to state that he was "absolutely innocent." He testified that he and the driver were the only two people in the vehicle and that the driver did not get caught. Defendant also testified, "I did state to the officer that I did not know the gentleman, that, well, I paid him for a cab, and he fled from the police while I was sleep [*sic*]."

¶ 14 On cross examination defendant stated that he had already purchased a ticket for the CTA when he heard a man saying "cab, cab, anybody need a cab?" Defendant testified that people

"walk back and forth up there, asking people do they want a livery cab from 95th to the south suburbs because they, at that time of night, the PACE bus don't run service to certain south suburban areas over there." Defendant further testified that he had "no idea" how he got to the area of 64th and Aberdeen because he was asleep in the passenger seat, having fallen asleep shortly after being picked up. He stated, "at the time when I woke up and seen that we were being chased, this is at the time when the car had lost control. I was thrown, so I woke up like, what's going on?" When asked about when the vehicle was initially curbed by the officers, defendant testified that he did not know anything about that because he was sleeping. He stated the vehicle hit the pole "split seconds" after he woke up. Defendant testified that he did not know where the driver went, but that he ran out of the car. Defendant stated that he was asked to exit the vehicle and placed in custody by a male officer who was not Officer Gentile. He stated that it was this officer to whom he stated that he was the passenger, not the driver. Defendant testified that this male officer told him that his name was "Ruiz." Defendant also stated that he did not recall giving Officer Gentile the statement that he "was going to pick up a car somewhere." After presenting his own testimony, defendant rested his case.

¶ 15 In rebuttal, the State called Officer Ruiz[1] to testify. She testified that at approximately 1:30 a.m. on April 1, 2013, she was on patrol with her partner, Officer Gentile. Officer Ruiz identified defendant as the driver of the darkish-colored small SUV that she observed on the night in question. Officer Ruiz testified that there was no one else in the vehicle and she only observed defendant exit the vehicle after it crashed. She stated that after arriving at the seventh district police station, she and Officer Gentile had a conversation with defendant in the processing room wherein defendant stated that he was picking up the car and "was going to get a certain amount of money for delivery of the vehicle." When asked if defendant indicated that he

[1] The transcript of Officer Ruiz's trial testimony does not reflect her first name.

knew the vehicle was stolen, Officer Ruiz testified that, "[a]t that time, if I remember correctly, he did state that he knew he was picking up a stolen vehicle because he was going to get money for it."

¶ 16 The State entered certified copies of two of defendant's previous convictions—a conviction for burglary in case number 08 CF 548 and a conviction for manufacturing or delivery of a controlled substance in case number 07 CR 04764-01. The State then rested in rebuttal.

¶ 17 The jury instructions conference took place on the record. Defendant requested that an instruction be given for the lesser included offense of criminal trespass to motor vehicle, which the court allowed over the State's objection. The parties and the court went through the State's proposed jury instructions. The defendant did not object to any of the instructions. Thereafter the parties presented their closing arguments. After approximately 30 minutes of deliberations, the jury returned a verdict of guilty for simple and aggravated PSMV.

¶ 18 On October 23, 2013, the next court date, defendant requested that the public defender be reappointed as his counsel, which was granted. Defendant, through counsel, filed a motion for a new trial on October 29, 2013, and an amended motion for new trial on December 19, 2013. After a hearing on December 30, 2013, the trial court denied defendant's amended motion for a new trial. On June 11, 2014, after considering factors in aggravation and mitigation, the court sentenced defendant to eight years' imprisonment. On that same day, defendant filed his notice of appeal.

¶ 19 ANALYSIS

¶ 20 On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that the vehicle in question was stolen and who, if anyone, had an interest in the vehicle superior

to defendant. Defendant also argues that he was denied a fair trial due to the State's improperly drafted jury instruction and the use of hearsay testimony that established one of the elements of the offense. Defendant finally argues that the mittimus should be corrected to reflect a single count of aggravated possession of a stolen motor vehicle. We affirm the trial court on all issues except correction of the mittimus, which the State concedes is necessary. We address each of defendant's arguments in turn.

¶ 21 Failure to Prove Vehicle Stolen Beyond a Reasonable Doubt

¶ 22 Defendant first contends that the State failed to prove a requisite element of aggravated PSMV beyond a reasonable doubt, namely, that the vehicle in question was stolen. When a defendant challenges the sufficiency of the evidence supporting his conviction, the reviewing court must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Pollock*, 202 Ill. 2d 189, 217 (2002). A conviction will not be reversed on grounds of insufficient evidence "unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt." *Id.* In order to show that a defendant committed the offense of aggravated PSMV, the State must prove that defendant was the driver or operator of a vehicle that he was not entitled to possession of and that he knew was stolen. 625 ILCS 5/4-103.2(a)(7) (West 2012). Also, the State must prove that defendant was given a signal by a peace officer directing him to bring the vehicle to a stop, which he failed or refused to obey. *Id.*

¶ 23 To meet its burden, "the State need not prove specific ownership of the vehicle, but only that someone other than defendant had a superior interest in the property, and this factor may be established by circumstantial evidence and the reasonable inferences therefrom." *People v.*

Fernandez, 204 Ill. App. 3d 105, 109 (1990). Defendant argues that the State failed to show who, if anyone, had a superior interest in the vehicle. Defendant specifically contends that the State failed to match the VIN number of the vehicle stopped by Officers Gentile and Ruiz to the vehicle owned by Rodriguez. Defendant points out that the State merely matched the license plates of the two vehicles but that the match rested on Rodriguez's and De La Osa's answers to leading questions. Defendant also finds fault with De La Osa's identification of the vehicle at the impound lot because no chain of custody links the vehicle stopped by the officers to the vehicle in the impound lot. The State responds that it clearly established that Rodriguez was the owner of the vehicle, and that defendant ignores "the testimony of half of the People's witnesses." The State emphasizes that both Rodriguez and De La Osa testified that neither of them knew defendant, nor gave him permission to drive the Chevy Equinox in question.

¶ 24 We agree with the State and find the testimony establishes that defendant drove Rodriguez's stolen vehicle and knew it was stolen. The testimony of Rodriguez and De La Osa shows that both of them had a superior interest in the vehicle than defendant. Rodriguez testified that she only gave De La Osa permission to drive the car and De La Osa testified that he did not give anyone permission to drive the car. Both of them unequivocally stated that they did not know defendant or give him permission to drive the car. Thus, there is no doubt an interest in the vehicle superior to defendant's was established through their testimony.

¶ 25 Likewise, we find that the State sufficiently showed that the vehicle that De La Osa identified at the impound lot was his grandmother's vehicle. Defendant does not point to, and we cannot find, any case law that requires the State to match the VIN numbers of the vehicles in order to prove its case. Defendant also makes much of the fact that neither Rodriguez nor De La Osa recited the license plate number from memory. However, we do not find this fatal to the

State's case. When asked on direct examination if the license plate of the stolen vehicle was Illinois plate 170048, both responded that it was. Also, both Rodriguez and De La Osa testified that the vehicle had handicapped plates without being prompted by the State. Officer Gentile testified that the vehicle he observed on the night in question was a gray Chevy SUV with handicapped plates with Illinois license plate number 170048. Defendant argues that license plates are movable and thus unreliable. However, there is nothing in the record that evidences that the license plate from the vehicle stopped by Officers Gentile and Ruiz was somehow removed and placed on the vehicle that De La Osa identified at the impound lot. Such a conclusion is illogical and totally unsupported by the evidence. As the State argues in its response, the Illinois Supreme Court has expressly held that the "reasonable hypothesis of innocence standard is no longer viable in Illinois." See *People v. Pintos*, 133 Ill. 2d 286, 291 (1989). Further, the State's witnesses testified to similar damage on the front and passenger side of the vehicle in question. Officer Gentile stated that the car was badly damaged on the front and passenger side and De La Osa testified that went he last saw the car it was in near perfect condition but that when he saw it in the impound lot it had damage on three of four sides.

¶ 26 The State's witnesses' testimony as a whole also establishes that it was reasonable for the jury to find that defendant was driving Rodriguez's vehicle and knew it was stolen. Officers Gentile and Ruiz both identified defendant in open court as the man they observed driving Rodriguez's stolen SUV on April 1, 2013, at approximately 1:30 a.m. Although defendant testified that he was merely the passenger in the vehicle, it was not unreasonable for the trier of fact to find the officers' testimony more credible, especially since defendant's statement was uncorroborated by any evidence. It is well established that "[t]he testimony of one witness is sufficient to convict, even if contradicted by the defendant, so long as the witness is credible and

witnessed the defendant under such circumstances as to permit positive identification." *People v. Posey*, 83 Ill. App. 3d 885, 889 (1980). Here, not one, but two officers identified defendant as the driver of the vehicle and nothing in the record calls their credibility into doubt. Officer Gentile testified that he never lost sight of defendant. Thus, the circumstances of defendant's pursuit and eventual arrest lend themselves to permit positive identification.

¶ 27 Additionally, there was sufficient evidence for the jury to reasonably determine that defendant knew the vehicle was stolen. Direct proof of the element of knowledge is not necessary, "and where possession has been shown, an inference of defendant's knowledge can be drawn from the surrounding facts and circumstances." *People v. Ferguson*, 204 Ill. App. 3d 146, 151 (1990). In addition to stating that they saw defendant driving the stolen vehicle, both officers testified that defendant told them that he knew the SUV was stolen because he was paid to transport it from one location to another. In fact, Officer Gentile specifically stated that defendant told him he was paid one thousand dollars to drive the vehicle. Defendant did not deny making this statement to the officers. Rather, he testified: "I don't recall" when asked about the statement. Also, defendant claimed that he was merely a passenger who slept through the majority of the pursuit by Officer Gentile's patrol car. "The trier of fact is not required to accept defendant's version of the facts, but may consider its probability or improbability in light of the surrounding circumstances." *Id.* Looking at the officer's and defendant's version of the events on April 1, 2013, it would not have been unreasonable for the jury to believe the officers' testimony over defendant's.

¶ 28 Finally, defendant emphasizes that the steering column was not "peeled" in the vehicle that De La Osa identified at the impound lot. Defendant also points to defendant's testimony that the key was in the ignition of the SUV when he was the passenger as support for this position

that he did not know the vehicle was stolen. We do not find this evidence to be particularly impactful. Defendant cites to *People v. Ferguson*, 204 Ill. App. 3d 146 (1990), as support for this evidence's relevance. In *Ferguson*, the court found the fact that the steering column of the vehicle in question was visibly "peeled" was "most important[]" in its review of the sufficiency of the evidence. *Id.* at 151-52. However, *Ferguson* did not announce a blanket rule requiring that a visibly "peeled" steering column be present in every successful PSMV prosecution. Rather, in that case, it was merely the most important piece of evidence establishing the defendant's guilt that was before the court. Thus, we find the facts of *Ferguson* to be different from the case at bar. Here, when asked by defendant on cross-examination whether he left "like keys or anything like that" in the vehicle, De La Osa responded, "[n]ot to my knowledge." There were no follow-up questions on this issue from which to glean any other information, rendering this testimony vague, at best. It is not as if De La Osa definitively stated that there was only one set of keys and that he still had that set of keys in his possession. He was not asked any questions regarding the location of his keys. De La Osa's only testimony regarding the keys was the statement: "Not to my knowledge." Thus, in light of all the other testimony, it was certainly reasonable for the jury to find in the State's favor.

¶ 29 There is nothing about the sufficiency of the evidence or the testimony of Rodriguez, De La Osa, Officer Gentile, or Officer Ruiz that leads this court to find that the trier of fact should be reversed here. Viewing the evidence in the light most favorable to the State, it is clear to this court that a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt of aggravated PSMV.

¶ 30 Jury Instruction

¶ 31 Defendant next argues that he was denied a fair trial due to the State's improperly-drafted jury instructions. Specifically, defendant contends that the court was required to give the italicized, bracketed language of Illinois Pattern Jury Instructions (IPI), Criminal No. 3.06-3.07 (4th ed. Supp. 2009), which reads:

> "You have before you evidence that [(the)(a)] defendant made [a] statement[s] relating to the offense[s] charged in the [(indictment)(information)(complaint)]. It is for you to determine [*whether the defendant made the statement[s] and if so,*] what weight should be given to the statement[s]. In determining the weight to be given to a statement, you should consider all of the circumstance under which it was made." (Emphasis added.)

¶ 32 Defendant admits that this issue was not preserved for appeal but argues that failure to provide the bracketed language was plain error. The State responds that this court may not review this issue for plain error, and even if it did, defendant was afforded a fair trial where the jurors were properly instructed regarding their ability to determine the credibility of and weight to be given to defendant's statement.

¶ 33 To preserve an issue for review, a defendant must both contemporaneously object at trial and include the specific alleged error in a written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988). However, the plain error doctrine allows a reviewing court to consider unpreserved error when: "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 34 Our first step, therefore, is to determine whether a clear or obvious error occurred. A defendant is entitled to have the jury instructed on his theory of the case if there is some foundation for the instruction in evidence. *People v. Simms*, 192 Ill. 2d 348, 412 (2000). Similarly, a committee note to IPI Criminal No. 3.06-3.07 states: "The bracketed phrase in the second sentence should be deleted only when the defendant admits making all the material statements attributed to him." In *People v. Richmond*, 341 Ill. App. 3d 39, 52 (2003), this court found that the trial court erred when the defense's cross-examination could support the inference argued by defense counsel that all or part of the defendant's statement was fabricated. The court found that "[w]hile the inference drawn by defense counsel rested on a thin foundation, it contained enough vitality for presentation to the jury." *Id.* Although there, unlike here, defense counsel objected to the jury instruction at trial and preserved the issue for appeal, we still find the court's logic to be instructive. Here, defendant testified that he told an officer that he "did not know [the driver], that well, I paid him for a cab, and he fled from the police while I was sleep [*sic*]." When asked on cross-examination if he told the officer "something about *** going to pick up a car somewhere," defendant replied, "I don't recall." We note that although defendant did not unequivocally deny telling the officer that he was receiving money to transport the stolen vehicle from one place to another, a thinly-founded inference that defendant did not make the statement could be drawn, similar to that in *Richmond*. As a result, we find the trial court here committed error in failing to provide the jury with the bracketed language of IPI Criminal No. 3.06-3.07.

¶ 35 Even if we were to assume, *arguendo*, that a clear and obvious error took place, we would not find that the evidence was closely balanced; thus, defendant's argument fails under the first prong of plain error review. The evidence at trial heavily favored the State. Two officers

testified that it was defendant whom they saw driving the stolen vehicle on the night in question and that he told them he was paid to transport the vehicle from one place to another. Additionally, both officers testified that defendant not only attempted to flee in the stolen vehicle, but also on foot. Rodriguez's and De La Osa's testimony established that neither knew defendant nor gave him permission to drive their vehicle. The only evidence supporting defendant's version of the events was his own self-serving testimony. Further, the jury considered all the testimony, assessed credibility as they saw fit, and found in favor of the State. See *People v. Matthews*, 2012 IL App (1st) 102540, ¶ 19 (recognizing the function of the jury is to assess credibility of witnesses, determine the weight to be given their testimony, and resolve any conflicts or inconsistencies). It is clear to this court that the balance of evidence was not close.

¶ 36 Similarly, we also find that defendant's claim fails under the second prong of plain error, because the failure to include the bracketed language was not so serious as to affect the fairness of defendant's trial or to challenge the integrity of the judicial process. See *Piatkowski*, 225 Ill. 2d at 565. Our supreme court has held that "a jury-instruction error rises to the level of plain error only when it creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." (Internal quotation marks omitted.) *People v. Herron*, 215 Ill. 2d 167, 193 (2005).

¶ 37 Defendant argues that without the bracketed language of IPI Criminal No. 3.06-3.07, the instruction presented defendant's statement as fact, asking the jurors to only weigh its value. We disagree. Although the instruction at issue did direct the jurors to "to determine what weight should be given to the statement," it did not instruct the jurors that they were to take as fact the officers' testimony regarding defendant's statement. The instruction also did not require the

jurors to disregard defendant's conflicting testimony that he actually told an officer that he was merely a sleeping passenger in the stolen vehicle. The jurors were instructed to determine the weight to afford to the defendant's statement but they were not required to accept either version of defendant's statement as fact. We further find that the jury instruction error here did not rise to the level of plain error because there is no evidence that the jurors incorrectly convicted the defendant because they did not understand the applicable law. The jurors did not ask any questions about the instructions and there is no indication in the record that they were confused by or did not understand the instructions they were given. See *Richmond*, 341 Ill. App. 3d at 51-53 (court holding that any error in omitting the bracketed language from IPI Criminal No. 3.06-3.07 was harmless even where jury submitted a note during deliberations asking the court whether the defendant was given an opportunity to write out his statement). We believe that had the jury been given the bracketed language of the instruction, the result of the trial would not have been different, because as set forth above, the evidence here overwhelmingly favored defendant's conviction. We disagree with defendant's arguments regarding the jury instructions and find defendant was not denied a fair trial.

¶ 38 Hearsay Testimony

¶ 39 Similar to his argument above, defendant admits this issue was not properly preserved for appeal but argues it should be reviewed under the plain error doctrine. Defendant asserts that the State prejudiced him by using hearsay testimony to establish an element of aggravated PSMV. Specifically, defendant takes issue with Officer Gentile's testimony that prior to stopping defendant's vehicle, he received a database report describing the vehicle as "stolen." The State responds that Officer Gentile's testimony was entirely proper because it was not offered for the truth of the matter asserted. Also, the State contends that the fact that vehicle was stolen was

proven through the testimony of Rodriguez and De La Osa. We agree with the State and find that because other properly admitted evidence proved the same matter, *i.e.*, the fact that the vehicle was stolen, it is irrelevant whether Officer Gentile's statement was hearsay.

¶ 40 "Hearsay is the in-court testimony of an out-of-court statement offered to prove the truth of the matter asserted." *People v. Cordero*, 244 Ill. App. 3d 390, 392 (1993). "The admission of hearsay is not reversible error if there is no reasonable probability that the jury would have acquitted the defendant if the hearsay testimony had been excluded, such as where properly admitted evidence proves the same matter, or there is overwhelming evidence of the defendant's guilt." (Internal quotation marks omitted.) *Id.* Here, we find both of these scenarios present. First, the testimony of Rodriguez and De La Osa sufficiently proved the element establishing that the vehicle defendant possessed was stolen. Both Rodriguez and De La Osa stated that they did not know defendant and did not given him permission to drive the vehicle. De La Osa had also reported the vehicle as stolen. Second, as previously discussed at length, the evidence here overwhelmingly favored the State's case. Outside of defendant's self-serving testimony, there was no evidence that supported defendant's version of the events on the night in question. Defendant could not identify the officer to whom he allegedly gave the exculpatory statement. He also failed to provide any information regarding the alleged "cab" driver who picked him up in the stolen vehicle. This is not to say that defendant bore the burden of proving his innocence. Rather, we point out these shortcomings in his case only to support our finding that the evidence here was not closely balanced. Therefore, we find that any alleged hearsay testimony by Officer Gentile did not deny defendant a fair trial.

¶ 41 Mittimus Correction

¶ 42 Defendant argues and the State rightly concedes that the mittimus should be corrected to reflect a conviction for a single count of aggravated PSMV with one eight-year sentence rather than two convictions—one for PSMV and one for aggravated PSMV—each with an eight-year sentence. At the conclusion of defendant's sentencing hearing, the trial court stated: "Count [t]wo merges into [c]ount [o]ne. Your sentence is on [c]ount [o]ne." "Because we have the authority to correct the mittimus at any time without remanding the matter to the trial court (*People v. Pryor*, 372 Ill. App. 3d 422, 438 (2007)), we order the correction of the mittimus to reflect a single conviction of aggravated PSMV with a sentence of eight years' imprisonment.

¶ 43 CONCLUSION

¶ 44 Based on the foregoing, we find that the State proved defendant guilty beyond a reasonable doubt and defendant was not denied a fair trial. Therefore, we affirm the judgment of the circuit court and direct the clerk to correct the mittimus to reflect that defendant was convicted on a single count of aggravated possession of a stolen motor vehicle with a sentence of eight years' imprisonment.

¶ 45 Affirmed; mittimus corrected.