2019 IL App (1st) 161106-U

SIXTH DIVISION
January 18, 2019

No. 1-16-1106

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 2829
	)	
DANZEL SWIFT,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort concurred in the judgment.
Justice Harris concurred in part and dissented in part.

ORDER

¶ 1 *Held*: Defendant's convictions for armed habitual criminal and Class 3 theft are affirmed where the credible testimony at trial was sufficient to prove defendant's guilt beyond a reasonable doubt, the State presented sufficient evidence of both the cost of the firearm and its condition/quality at the time of the theft, and defendant was not prejudiced by the testimony his trial counsel elicited from a state's witness on cross-examination. Additionally, no new trial was warranted where the alleged evidentiary error was harmless.

¶ 2 Defendant, Danzel Swift, appeals his convictions of one count of armed habitual criminal (AHC) and one count of Class 3 theft following a bench trial. On appeal, defendant contends his convictions should be reversed and the cause remanded for a new trial where: 1) the evidence

presented was insufficient to prove beyond a reasonable doubt that he possessed a firearm or that the firearm was valued between $500 and $10,000; 2) he received ineffective assistance of counsel where defense counsel, on cross-examination, elicited hearsay statements of a State witness consisting of an improper prior consistent statement and corroborating testimony prejudicial to defendant; and 3) the trial court erred in admitting a receipt for the stolen firearm because it contained hearsay and the State failed to establish it was a business record. For the following reasons, we affirm defendant's conviction for AHC and Class 3 felony theft.

¶ 3 JURISDICTION

¶ 4 The trial court sentenced defendant on March 24, 2016. A notice of appeal was filed on March 25, 2016. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, §6) and Rule 603 (eff. Oct. 1, 2010) and Rule 606 (eff. Mar. 20, 2009), governing appeals from a final judgment of conviction in a criminal case entered below.

¶ 5 BACKGROUND

¶ 6 Defendant was charged with one count of AHC, two counts of unlawful use or possession of a weapon by a felon, and one count of Class 3 theft, in connection with the theft of an AR-15 rifle belonging to his cousin, David Dardon-Strickland. Defendant waived his right to a jury trial and the case proceeded to a bench trial.

¶ 7 At trial, David testified that he was born in Chicago but has lived in Charlotte, North Carolina "on and off" since 2001. After serving in the army as a military police officer, David became vice-president of a private security firm in Charlotte. For his job, David regularly carried a Smith and Wesson AR-15 rifle which he owned. He bought the rifle in 2014 from a law enforcement supply store in Charlotte, and paid "[a]pproximately 800 and like $67, close to 900"

dollars, including tax. He testified that the rifle was in working condition because he had fired it at a shooting range two weeks prior to the theft.

¶ 8 At the time of the theft, David was driving a rented 2015 Dodge Journey sports utility vehicle (SUV) because his car was in the shop. When not using the rifle, he kept it in a hidden two-foot long compartment in the back of the SUV behind the last row of seats. The compartment door was covered in carpet and when closed it "meshe[d] back together" with all of the carpet so someone "would never even tell it was there." The compartment could be accessed by pulling on "a little strap that snaps down." Although the compartment was long enough to fit the AR-15, there "wasn't enough room for a magazine or ammunition or anything in there." David kept the ammunition in his "duty bag" which was hooked over the passenger seat.

¶ 9 Around January 14, 2015, at approximately 10 p.m., David received a call at work informing him that his grandmother Mable Dardon, who lived in Chicago, was sick. He finished his shift, went home, and packed his bag for a trip to Chicago in the morning. He also told his brother, Joseph Dardon, to pack a bag. Before loading the SUV for the trip, David unhooked his duty bag, "took it inside, [and] locked it up." In his haste to get on the road, he forgot that his rifle was still in the back compartment. On the way to Chicago, David stopped to pick up an aunt in Alabama and another aunt in Indiana. While in Indianapolis, as he was loading his aunt's belongings into the back of the SUV, David discovered that he had left his AR-15 rifle in the compartment.

¶ 10 When the group arrived in Chicago, David and Joseph stayed with Mable at her residence in the south side of the city. Approximately one day after they arrived, David and Joseph took Mable to see their aunt Ruby Jackson and to shop for groceries. Joseph stayed at Aunt Ruby's apartment and their cousin, Earl Mason Jr. (Cousin Bear) went with the group to shop. They

returned around 8 p.m. and David helped to carry groceries to Aunt Ruby's apartment. Joseph and defendant, a second cousin whose mother lived on the first floor of the building, came out to help with the groceries. While they unloaded the groceries, Mable stayed in the passenger seat of the SUV.

¶ 11 Around 8:45 p.m., while David was putting away groceries in Ruby's apartment, he received a call from Joseph. He went out to the SUV and saw that the trunk was open and the compartment door was also open with "nothing [] in there." David testified that he had left the car "closed" with his grandmother inside. David went to defendant's mother's apartment and had a conversation with her. While she made some phone calls, David spoke with Cousin Bear and also called his uncle who was a Chicago police officer. His uncle told him to go to the sixth district police station and report his missing AR-15 rifle, which he did around 11 p.m. David testified that he never saw his rifle again. David never gave defendant or anyone else permission to take the AR-15 out of the compartment.

¶ 12 David identified the State's exhibit #1 as a copy of the sales invoice for the AR-15 rifle he purchased, which he had sent to the assistant state's attorney in preparation for trial. The receipt showed a total sale of $859, which consisted of the cost of the rifle at $791.99, plus $58 tax. When asked whether the receipt "fairly and accurately depict[s] the actual receipt for that AR-15 [he] purchased" in 2014, David answered, "Yes, sir." David stated that he purchased the rifle with ammunition, but did not specify the cost of the magazine. He also identified exhibit #2, a photograph of a "MMP Sport Tactical AR-15," as accurately depicting his rifle as it appeared on January 15, 2015, "except this one has a magazine. Mine doesn't have a magazine with it."

¶ 13 On cross-examination, defense counsel asked David, "It was close to $800 you paid for this assault rifle?" David answered, "Yes, sir." David acknowledged that he had printed a copy

of the receipt because he could not find the original. He also could not find a photograph of his AR-15 that he could bring to court.

¶ 14 David was asked whether he saw his rifle in the compartment for the last time in Indianapolis, and he answered, "Yes." He was then asked whether he saw the rifle again in Chicago and David answered, "No, we seen it again in Chicago once we were taking the stuff out of there and I looked to make sure everything was still there, and I closed, locked my trunk back." David stated that he checked the compartment "[t]hat morning when we got over there to do the groceries."

¶ 15 Joseph testified that he had grown up in Chicago but lived in Charlotte. In January 2015, he and his brother David drove to Chicago because his grandmother, Mable, was sick. Along the way, they picked up two of their aunts. A day after they arrived, David drove him and Mable to their Aunt Ruby's apartment to go shopping. David took Mable, Aunt Ruby, and Cousin Bear grocery shopping while Joseph stayed at Ruby's "chilling and watching TV." When the group returned from shopping, Joseph and defendant went downstairs to help carry the groceries to Aunt Ruby's apartment. Mable stayed in the car while they unloaded the groceries. Before taking the groceries upstairs, Joseph pressed a button that locked the SUV, including the door and the trunk. Mable remained inside the SUV with the keys in the ignition.

¶ 16 After carrying the groceries upstairs, Joseph went back down to the first floor. He saw Cousin Bear and defendant standing by the front of the car talking to Mable. Defendant then went towards the back of the SUV. The back hatch was up and the interior lights were on. Joseph approached the vehicle and saw defendant "fumbling in the back of the truck." He did not pay much attention to defendant until he saw him "running away" with the rifle in his hand. Defendant ran towards his mother's apartment on the first floor. Joseph told him to "bring it back

and we will leave it at that." Defendant, however, kept running although he looked back at Joseph. Joseph testified that when defendant looked back, that was how Joseph "knew it was exactly him."

¶ 17 Joseph ran after defendant but he slipped on the snow and ice. He saw defendant run into his mother's apartment and he called David. Joseph noticed that the compartment of the trunk was open and the AR-15 rifle was gone. Joseph was familiar with the rifle because he had seen it "multiple times" and he had shot it at the range "multiple times." He saw defendant running with the rifle, with "the barrel down and the stock up," so that he could see "the butt of the gun and the barrel." David came downstairs and they went to speak with defendant's mother, Cynthia. Joseph testified that he never gave defendant permission to take the rifle. He never spoke to defendant again although prior to the incident, they were friends and "got along." Joseph identified exhibit #2 as a photograph of the same rifle David owned, except the rifle in the photograph had a magazine attached.

¶ 18 On cross-examination, Joseph stated that he did not know the AR-15 rifle was in the SUV until "about Indiana," when they tried to store comforters in the compartment. When David returned from grocery shopping with his relatives, Joseph took responsibility for watching the SUV. He pressed a button on the door to lock the SUV while his grandmother sat inside. Joseph was at the door of the building when he first observed defendant and Cousin Bear at the front of the SUV. The front door was about 20 feet from the SUV. He thought defendant was getting more groceries but then he saw defendant running away with the AR-15. He started to chase defendant but slipped on the snow and ice. He called David instead of 911.

¶ 19 Joseph spoke with a detective a day or two later, telling him that he had yelled "bring it back" to defendant. Joseph clarified that although he saw defendant flee, he did not know what

direction he took after he had left his mother's house. He also told the detective that he had seen another vehicle in the alley speeding away, and that defendant talked to someone in that car when they were getting the groceries. Joseph stated that the once he locked the doors, the only way to unlock them was from the inside since the keys remained in the ignition. He speculated that Mable may have unlocked the doors but he had no "personal knowledge of that" and only knew that he "locked the doors." Joseph testified that Mable was currently in the hospital.

¶ 20 Detective Fred Marshall testified that from January 15 to January 20 of 2015, he investigated the reported theft of an AR-15 rifle where defendant was the named offender. He interviewed David and Joseph, and also spoke with Mable at her residence. After issuing an investigative alert for defendant, Detective Marshall learned that he was already in custody.

¶ 21 On January 20, 2015, Detective Marshall spoke with defendant with Detective Catherine Crowe present. He gave defendant his *Miranda* rights and defendant made a statement. He told the detective that "his cousin, Joseph, was lying, and his grandmother didn't see anything." He also offered "to try to get the weapon returned." Detective Marshall allowed defendant to make a phone call. Defendant spoke to his girlfriend, Tooty. He spoke in "hushed tones" so that the detective "couldn't hear what he was speaking to her of." Less than five minutes later, defendant hung up and told Detective Marshall "that he couldn't get the weapon back." The AR-15 rifle was never recovered.

¶ 22 On cross-examination, Detective Marshall stated that defendant turned himself in on January 19, 2015. When asked whether defendant denied taking the rifle, Detective Marshall answered, "Well, yes, he did. By – by implication of stating that Joseph is lying and grandmother didn't see nothing." The detective stated that "[defendant] said to me exactly what I wrote down, do what you're going to do. Joseph is lying, and my grandmother didn't see nothing, when I told

him that the grandma saw him with the gun." Detective Marshall acknowledged that he put in his report that defendant denied taking the gun.

¶ 23 Defense counsel also asked the detective about the circumstances of defendant's arrest. Detective Marshall stated that he told defendant "he was witnessed by his – I think it was his second cousin, Joseph, moving a weapon that belonged to Joseph's brother from the rear of the vehicle and running away with the weapon and through a house, and out of sight of Joseph, who could not follow him, according to the grandmother, because Joseph's a big boy and has trouble running, if I remember right." When asked if he told defendant that if he got the rifle, he would be let go, Detective Marshall answered, "Absolutely not."

¶ 24 The State presented certified copies of defendant's prior convictions for manufacture/delivery of a controlled substance in case no. 09 CR 10082, for delivery of a controlled substance in case no. 09 CR 12973, for Class 4 possession of a controlled substance in case no. 14 CR 155701, and for manufacture/deliver of a controlled substance in case no. 09 CR 12976. When the State moved to have all exhibits entered into evidence, defense counsel objected to the admission of exhibit #1, the copy of David's receipt when he purchased the AR-15 rifle. Counsel argued that no foundation had been laid for it as a business record.

¶ 25 The trial court found that "copies are permissible." David testified to purchasing the AR-15 and receiving the sales receipt so "there's sufficient foundation" for its admission. The court subsequently denied defendant's motion to dismiss counts 1-3 based on the absence of the rifle, finding that "the evidence was sufficient to establish that the weapon that was taken was an assault rifle." The trial court also denied defendant's motion for a directed finding. The defense rested without presenting evidence and defendant confirmed that of his "own free will after consulting with [his] attorney" he will not testify.

¶ 26 Before rendering its judgment, the trial court reviewed the evidence at trial. The court acknowledged that defendant did not admit to taking the rifle, but "his actions indicated that he had some, at least some basic knowledge of what occurred. For whatever that's worth, it wasn't an admission he had taken the weapon. But taking all of this evidence into consideration it's circumstantial evidence, but I think the circumstantial evidence was sufficient to show that he took the weapon from the vehicle and possessed the weapon." Noting the State's evidence of defendant's prior convictions, the court found defendant "guilty on all counts."

¶ 27 Defendant filed a motion for a new trial and a supplemental motion for a new trial. He argued that the testimony of David and Joseph was incredible and implausible, and insufficient to support his guilt beyond a reasonable doubt. Defendant also argued that the trial court erred in overruling his objection to the admission of the receipt into evidence. The trial court denied the motion, finding that it "deals with issues of witness testimony and the credibility that I should give to that witness testimony." The court stated that it listened to the witnesses "both on direct and cross-examination," and made its credibility determinations which it believed to be "correct."

¶ 28 The trial court sentenced defendant to 7 years' imprisonment for the AHC count and merged counts 2 and 3 into the AHC count. The court imposed a concurrent sentence of three years' imprisonment for the Class 3 theft conviction. Defendant filed this timely appeal.

¶ 29 ANALYSIS

¶ 30 Sufficiency of the Evidence

¶ 31 Defendant argues that his convictions for AHC and Class 3 theft should be reversed where the State's evidence was insufficient to prove him guilty beyond a reasonable doubt. In a challenge to the sufficiency of the evidence, the relevant question is whether any rational fact

finder, after viewing the evidence in the light most favorable to the State, could find the essential elements of the crime beyond a reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). The fact finder is responsible for resolving conflicts in the testimony, weighing the evidence, and drawing reasonable inferences therefrom. *Id*. at 281. As such, a reviewing court will not substitute its judgment for that of the fact finder on issues involving the credibility of witnesses or the weight given to the evidence. *Id*. at 280-81. Furthermore, "circumstantial evidence meeting this standard is sufficient to sustain a criminal conviction." *Id*. at 281. A reviewing court will reverse a criminal conviction only if the evidence is so improbable that a reasonable doubt as to defendant's guilt exists. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 32 Defendant was found guilty of AHC and theft in connection with the theft of David's AR-15 rifle. One commits the offense of theft when he "knowingly *** [o]btains or exerts unauthorized control over property***." 720 ILCS 5/16-1(a) (West 2016). The offense of AHC is committed when a person possesses "any firearm after having been convicted" of two or more qualifying offenses. 720 ILCS 5/24-1.7 (a) (West 2016). As defendant points out, his possession of the AR-15 rifle is an essential element of both crimes.

¶ 33 Defendant argues that the State failed to prove he possessed the rifle where a weapon was never recovered and the State's evidence consisted solely of the improbable testimony of David and Joseph. Defendant contends the testimony provided by David and Joseph was so conflicting and "contrary to human experience" that there exists reasonable doubt of his guilt. In support, defendant points to David's testimony that they left for Chicago on January 15th, while Joseph stated that they left on January 14th. David's testimony also suggested that they went shopping on the evening of January 15th, but Joseph testified that the shopping trip occurred the day after

they arrived in Chicago. In addition, there was conflicting testimony regarding whether the shopping trip occurred in the morning or in the evening.

¶ 34 "The mere existence of conflicting evidence at trial does not require a reviewing court to reverse a conviction." *People v. Goodar*, 243 Ill. App. 3d 353, 357 (1993). Rather, "it is for the fact finder to judge how flaws in part of the testimony affect the credibility of the whole." *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004). A reviewing court may reverse a conviction if it finds, after consideration of the whole record, that flaws in the testimony made it impossible for any reasonable fact finder "to accept any part of it." *Id*.

¶ 35 Although their testimony regarding the general timeline may have been conflicting, the record shows that David and Joseph testified consistently about the circumstances surrounding defendant's possession of the AR-15 rifle. Joseph knew that David kept his rifle in the compartment of the SUV. He testified that when the group returned from shopping, he helped carry groceries to his aunt's apartment while Mable stayed in the car. He pressed a button that locked the SUV, including the door and the trunk. After carrying the groceries upstairs, Joseph went down to the first floor where he saw Cousin Bear and defendant, his second cousin, standing by the front of the car talking to Mable. Joseph saw defendant go towards the back of the SUV where the hatch was up and the interior lights were on. He saw defendant "fumbling in the back of the truck" and then defendant ran away with the rifle in his hand towards his mother's apartment on the first floor. Joseph noticed that the compartment of the trunk was open and the AR-15 rifle was gone. Joseph was familiar with the rifle because he had seen it "multiple times" and he had shot it at the range "multiple times." Defendant held the rifle with "the barrel down and the stock up" as he ran, so that Joseph could see "the butt of the gun and the barrel." He called his brother David who was still upstairs, and told him what he witnessed. David came

downstairs and they went to speak with defendant's mother, Cynthia. Joseph testified that he never gave defendant permission to take the rifle.

¶ 36 David testified that he had left his AR-15 rifle in the back compartment of his SUV. It remained there as he took his relatives to shop for groceries. When they returned from the shopping trip, Joseph and defendant came out to help with the groceries. As David was putting away groceries in Ruby's apartment, he received a call from Joseph. David went out to the SUV and saw that the trunk was open and the compartment door was also open with "nothing [] in there." David had left the car "closed" with his grandmother inside. After speaking with Joseph, David went to defendant's mother's apartment and had a conversation with her. David testified that he never gave defendant permission to take the AR-15 out of the compartment. The testimony of Detective Marshall indicated that defendant knew of the existence of the rifle. When he spoke with defendant at the police station, defendant offered "to try to get the weapon returned." Defendant made a phone call to his girlfriend, Tooty, but after talking to her he told Detective Marshall "that he couldn't get the weapon back."

¶ 37 The trial court found this testimony credible, and we do not find Joseph and David's description of the crime incredible on its face. A reviewing court will not reverse a conviction based on credible evidence "merely because minor conflicts in the evidence were resolved in favor of the State." *Goodar*, 243 Ill. App. 3d at 358.

¶ 38 Defendant, however, argues that the brothers' testimony was "improbable, unreasonable, and speculative." Defendant points to David's testimony regarding the purpose of the trip to visit Mable, which he argues was improbable because David left her sitting in the SUV even though she was supposedly ill. He also contends that David's testimony that he forgot about his rifle in the compartment was unreasonable where David checked Chicago's handgun laws prior to the

trip. He further argues that David gave no reason as to how defendant knew the rifle was in the compartment or how defendant accessed the vehicle after it was locked.

¶ 39 The fact finder need not " 'be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. It is sufficient if all of the evidence taken together satisfies the trier of fact beyond a reasonable doubt of defendant's guilt.' " *Jackson*, 232 Ill. 2d at 281, quoting *People v. Hall*, 194 Ill. 2d 305, 330 (2000). The fact finder "is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *Id*. Viewing the record as a whole, we find that a fact finder could reasonably conclude that defendant knowingly took possession of David's AR-15 rifle without permission.

¶ 40 Defendant also argues that the State failed to present sufficient evidence to prove beyond a reasonable doubt that the firearm in question was valued between $500 and $10,000, as required to prove a Class 3 felony theft. 720 ILCS 5/16-1(b) (4) (West 2016). Otherwise, "[t]heft of property not from the person and not exceeding $500 in value is a Class A misdemeanor." 720 ILCS 5/16-1(b)(1) (West 2016). When a defendant is charged with theft of property exceeding a specified value, the value of the property is an element of the offense that the trier of fact must determine. *People v. Perry*, 224 Ill. 2d 312, 320 (2007). While the State must provide evidence to show that the value of the rifle exceeded $500 to prove a Class 3 theft, it need only establish the fair cash market value of the property at the time of the theft and need not prove the exact dollar value. *People v. Davis*, 132 Ill. App. 3d 199, 203 (1985). Proof of purchase price alone, however, is insufficient to establish the value of stolen property. *People v. Brown*, 36 Ill. App. 3d 416, 421 (1976). Evidence of cost, along with other proof relating to condition and quality at the time of the theft, may provide a basis for proving value. *Id*.

¶ 41 Here, the record before this court contains evidence of both the cost of the gun and its condition/quality at the time of the theft. As a result, we find that the State presented sufficient evidence to prove the firearm at issue was valued between $500 and $10,000. David testified that the firearm stolen from his vehicle in January 2015 was purchased in January 2014 for "[a]pproximately 800 and like $67, close to 900," including tax. He also testified that the gun was last fired at a firing range a few weeks before it was stolen and that he used the firearm regularly for work. There was no testimony or other evidence to suggest that the firearm had decreased in value, was not in good condition, or was non-functional.

¶ 42 In *People v. Cobetto*, 66 Ill. 2d 488, 491 (1977), our supreme court stated, "The standard for determining whether the value of property at the time and place of the theft exceed the statutory amount *** is the property's fair cash market value." The court in *Cobetto* also recognized that, "Evidence presented may be sufficient, however, to support a conviction for the felony amount, though the testimony of witnesses was not addressed precisely to the 'fair cash market value.' " *Id.* Despite this recognition by our supreme court that testimony need not specifically involve an item's fair cash market value in order to affirm a defendant's conviction, defendant argues that the State did not meet its burden because David did not testify about the value of his firearm at the time of the theft and no evidence of the firearm's fair market value without a magazine was presented. We reject defendant's contentions where our supreme court has said that such a precise type of evidence is not required.

¶ 43 In reviewing the sufficiency of the evidence, our inquiry 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. Davidson*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

All reasonable inferences from the record must be allowed in favor of the State. *Id.* After review of the trial testimony and the record on appeal, we cannot say that no rational trier of fact could have found that the firearm had a value of greater than $500. The State presented David's testimony which established that the firearm cost approximately $867 or $900 (including tax) just one year before it was stolen and David testified that he regularly used the firearm for work and had recently fired it. There was simply no evidence that an operative AR-15 that cost approximately $800 one year prior would be worth less than $500 merely because it was without a magazine.

¶ 44 The trial court determined that the State had proved all requisite elements of Class 3 theft, including the value of the stolen property. "As with any other element of the offense, the trial court's findings of fact on this point will be upheld unless we find that no rational trier of fact could have made this finding beyond a reasonable doubt." *People v. Oglesby*, 2016 IL App (1st) 141477, ¶ 197. Here, defendant's convictions resulted from a bench trial that was conducted before a seasoned criminal court judge who has knowledge in this area beyond what would be possessed by most. The trial court's decision on the valuation of the gun was entirely rational based on the evidence presented. As a result, the evidence was sufficient to affirm defendant's Class 3 theft conviction.

¶ 45 Ineffective Assistance of Counsel

¶ 46 Alternatively, defendant argues that this court should reverse his convictions because his counsel provided ineffective assistance by eliciting inadmissible hearsay statements that corroborated the testimony of the State's witnesses. To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's representation was deficient and that he was prejudiced by counsel's performance. *People v. Albanese*, 104 Ill. 2d 504, 525-27

(1984). Defendant is prejudiced if "there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different." *People v. Moore*, 356 Ill. App. 3d 117, 121 (2005). We may dispose of an ineffective assistance of counsel claim based on the prejudice prong alone. *People v. Caffey*, 205 Ill. 2d 52, 106 (2001).

¶ 47 Defendant contends that his trial counsel, during cross-examination, improperly elicited out-of-court statements from Detective Marshall. First, when asked by defense counsel about the circumstances of defendant's arrest, Detective Marshall stated that he told defendant "he was witnessed by *** Joseph, moving a weapon that belonged to Joseph's brother from the rear of the vehicle and running away with the weapon and through a house, and out of sight of Joseph, who could not follow him, according to the grandmother, because Joseph's a big boy and has trouble running, if I remember right." Second, when asked whether defendant denied taking the rifle, Detective Marshall answered that defendant told him "Joseph is lying, and my grandmother didn't see nothing, when I told him that the grandma saw him with the gun."

¶ 48 Defendant argues that he was prejudiced by these statements because they bolstered Joseph's eyewitness testimony, and Mable's statement corroborated the testimony of both brothers. To establish prejudice, however, defendant must show that the verdict would have been different absent this evidence. *People v. Yancy*, 368 Ill. App. 3d 381, 385 (2005) ("admission of hearsay evidence is harmless and does not warrant reversal if there is no reasonable probability that the verdict would have been different had the hearsay been excluded"). This court has found prejudice where defense counsel elicited, on cross-examination, new evidence which proved a critical element of the State's case and the trial court stated it relied on that evidence to convict the defendant. *People v. Bailey*, 374 Ill. App. 3d 608 (2007).

¶ 49 Here, however, Detective Marshall's testimony about what Joseph witnessed was evidence the State had already presented through Joseph's testimony. Significantly, there is no evidence in the record that the elicited testimony bolstered Joseph's credibility in the eyes of the trial court. Instead, the court indicated it found Joseph credible due to his own testimony, and never mentioned that it considered Detective Marshall's statement as corroboration.

¶ 50 Similarly, the State presented through Detective Marshall's direct testimony that defendant told him that "Joseph is lying" and Mable "didn't see nothing." Although Detective Marshall did not explicitly state that Mable saw defendant with the gun, his testimony implied as much. The record also shows that the trial court did not rely on Mable's statement in making a determination of defendant's guilt. In finding that "the circumstantial evidence was sufficient to show that [defendant] took the weapon from the vehicle and possessed the weapon," the trial court noted that defendant's actions indicated "he had some, at least some basic knowledge of what occurred." The trial court was referring to Detective Marshall's direct testimony that defendant offered "to try to get the weapon returned" and after defendant spoke with his girlfriend Tooty, he hung up and told Detective Marshall "that he couldn't get the weapon back." The trial court thus relied on defendant's own statements to police, not on hearsay statements made by Mable, in finding the evidence sufficient to support defendant's conviction.

¶ 51 Furthermore, the court below conducted a bench trial. When the trial court is the fact finder, "a reviewing court presumes that the trial court considered only admissible evidence and disregarded inadmissible evidence in reaching its conclusion." *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). This presumption may be rebutted where the record affirmatively establishes the contrary. *Id*. at 603-04. However, as we discussed, there is no indication in the record that the trial court considered or relied on the hearsay statements elicited by defense counsel during

Detective Marshall's cross-examination. Since we find that there is no reasonable probability the outcome of defendant's trial would have been different without the elicited testimony, defendant has not established prejudice and his claim of ineffective assistance of counsel cannot stand.

¶ 52 Admission of the Receipt

¶ 53 Defendant argues that the trial court abused its discretion in admitting the State's exhibit 1, a receipt stating that David purchased an AR-15 at a specific price on a specific date, because the State did not lay a proper foundation for admitting the receipt under the business records exception to the hearsay rule.

¶ 54 When the State moved exhibit 1 into evidence, the defense objected, stating, "that is an invoice. And I would argue that no foundation was laid for that. It's a business record, it's a receipt. It's got the date of ***. It says it was printed on -- in the right-hand, middle of the page, 10/23/15." The State responded that David was cross-examined on the receipt, and that he already testified that he had printed it out in anticipation of court. The defense then re-asserted that there was no foundation for the receipt as a business record, and added an objection based on the best evidence rule. The court overruled the State's objection, finding that the best evidence rule did not apply because copies are permissible. Additionally, the court found, "This indicates that it's a sales invoice, which the person who testified to the purchase of the weapon in receiving the sales receipt, so I believe there's a sufficient foundation, so I'm going to -- that will be admitted."

¶ 55 "The admission of evidence is within the sound discretion of the trial court, and a reviewing court will not reverse unless there is a showing of abuse of discretion." *People v. Coleman*, 2014 IL App (5th) 110274, ¶ 157. "An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable

person would agree with it." *People v. Rivera*, 2013 IL 112467, ¶ 37. "Evidentiary error may be considered harmless if the properly admitted evidence in the case is so overwhelming that no fair-minded fact finder could reasonably have found the defendant not guilty." *Id*. ¶ 159.

¶ 56 We do not find that the trial court's decision to admit the receipt was arbitrary, fanciful, or unreasonable. However, even assuming *arguendo* that the trial court erred when it admitted the State's exhibit 1, we find any error harmless. We have already rejected defendant's claim that the State failed to present sufficient evidence of his guilt. Although defendant makes much of the inconsistencies in the testimony of David and Joseph, it is apparent that their testimony was consistent regarding defendant's possession of the AR-15 rifle. Joseph witnessed defendant holding the gun and quickly told David what he had seen. Further, Joseph was familiar with the gun because he had fired it at the range multiple times and was able to provide detail as to how he observed defendant holding the gun—"the barrel down and the stock up." Additionally, Detective Marshall's testimony established that defendant knew of the gun and had even offered "to try to get the weapon returned," but that after defendant spoke with his girlfriend, he informed the detective "that he couldn't get the weapon back." Most significantly, prior to being shown the State's exhibit 1, David's own testimony established his ownership of the gun as of January 2014 and that he paid $867 or close to $900 for it, including tax, at a law enforcement supply store called Lawmen's in Charlotte, North Carolina. David also testified that he had recently fired the rifle at a firing range and that he regularly used it for work. Defendant never objected to any of this testimony and did not rebut this testimony. Thus, David's testimony, without the receipt, established that his AR-15 was approximately a year old, its cost well-exceeded $500, and it was recently in good working condition. The trial court found the foregoing testimony credible and we have already determined that said testimony

was not incredible. Based on the foregoing, it is clear to this court that the properly admitted and credible evidence established defendant's guilty beyond a reasonable doubt.

¶ 57 CONCLUSION

¶ 58 For the foregoing reasons, we find that the State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt of AHC and Class 3 theft, and affirm his convictions. We also find that defendant's claim for ineffective assistance fails because he cannot show prejudice. Finally, we find that any error in the admission of the receipt was harmless.

¶ 59 Affirmed.

¶ 60 JUSTICE HARRIS, concurring in part and dissenting in part:

¶ 61 I concur with the majority's determination that the evidence presented was sufficient to prove that defendant possessed a firearm, and that his trial counsel did not provide ineffective assistance. I disagree that the evidence supported a finding, beyond a reasonable doubt, that David's firearm was valued between $500 and $1,000 at the time of the theft.

¶ 62 To prove a Class 3 felony theft, the State must present evidence that the stolen property was valued between $500 and $10,000. 720 ILCS 5/16-1(b) (4) (West 2016). Otherwise, "[t]heft of property not from the person and not exceeding $500 in value is a Class A misdemeanor." 720 ILCS 5/16-1(b)(1) (West 2016). When a defendant is charged with theft of property exceeding a specified value, the value of the property is an element of the offense that the trier of fact must determine. *People v. Perry*, 224 Ill. 2d 312, 320 (2007).

¶ 63 In order to prove all of the elements of Class 3 felony theft, the State must establish that the fair market value of the rifle at the time of the theft was over $500. Although David testified several times that he purchased his rifle for approximately $800, he never testified about the

value of his rifle at the time of the theft. He stated only that his rifle was in firing condition because he had recently used it at a firing range. While this testimony may be sufficient to prove that the value of his rifle with a magazine attached, its condition at the time of purchase, was over $500, David's rifle did not have a magazine when it was stolen. No evidence was presented regarding the fair market value of his AR-15 rifle without a magazine, nor was evidence presented on the cost of ammunition for a semi-automatic rifle.

¶ 64 The State argues that nothing in the record "suggests that an operative AR-15 that cost nearly $800 would be worth less than $500 without a magazine." However, although courts may take judicial notice of value "which everyone knows to be true" (for example, that the value of a large tractor and trailer is worth more than $150), courts are "reluctant to take notice of any specific value." *People v. Tassone*, 41 Ill. 2d 7, 12 (1968). Whether an AR-15 rifle without a magazine is worth more than $500 is not within our common knowledge, and we should not attribute a specific value to such a rifle without some evidence to support it.

¶ 65 Due process "requires that a person may not be convicted in state court 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004), quoting *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368, 375 (1970). With no evidence to establish the value of David's AR-15 rifle without a magazine, I do not agree that any rational trier of fact could have found the essential elements of Class 3 felony theft beyond a reasonable doubt. Since I agree that the evidence was sufficient to find defendant guilty of the unauthorized taking of David's rifle, I would reduce his conviction from felony theft to misdemeanor theft. See *People v Burks*, 304 Ill. App. 3d 861, 863-4 (1999) (reducing the defendant's theft conviction to a misdemeanor where no evidence was presented that the value of 120 T-shirts exceeded $300,

and the court found that the value of the T-shirts was not common knowledge). Therefore, I respectfully dissent from the majority's determination to affirm defendant's conviction of Class 3 felony theft.