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2014 IL App (3d) 120909-U

Order filed September 30, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0909
	)	Circuit No. 11-CF-2121
IRA D. CUNNINGHAM,	)	Honorable
Defendant-Appellant.	)	Sarah F. Jones Judge, Presiding.

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PRESIDING JUSTICE LYTTON delivered the judgment of the court.  
Justices O'Brien and Schmidt concurred in the judgment.

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**ORDER**

¶ 1 *Held:* (1) Defendant received effective assistance of trial counsel; and (2) the trial court did not abuse its discretion in issuing Illinois Pattern Jury Instruction, Criminal, No. 3.14 (4th ed. 2000).

¶ 2 After a jury trial, defendant, Ira D. Cunningham, was found guilty of residential burglary (720 ILCS 5/19-3(a) (West 2010)), theft (720 ILCS 5/16-1(a)(4) (West 2010)) and obstructing justice (720 ILCS 5/31-4(a) (West 2010)). The trial court sentenced defendant to a total of 16 years' imprisonment. Defendant argues that: (1) he was denied the effective assistance of trial

counsel; and (2) the trial court committed reversible error when it *sua sponte* issued Illinois Pattern Jury Instruction, Criminal, No. 3.14 (4th ed. 2000) (IPI 3.14). We affirm.

¶ 3

### FACTS

¶ 4

Defendant was charged by indictment with residential burglary, theft, and obstructing justice. Specifically, it was alleged that: (1) on October 27, 2011, defendant and William Jenkins committed residential burglary in that they entered the residence of Michelle Trinh with intent to commit theft; and (2) defendant and Jenkins committed theft in that they knowingly obtained control over property stolen from Ha Lam. Prior to trial, the court granted a motion to sever defendant's case from that of Jenkins.

¶ 5

The evidence at trial established that Debra Phillips lived with her daughter, Melissa, on Linden Drive in Frankfort. On October 27, 2011, around 11:20 a.m., Debra and Melissa saw an African-American man talking on a cellular telephone on the sidewalk near their home. The man made some hand gestures until a light-colored Impala drove up. The man approached the passenger window of the Impala and spoke to the driver. Shortly thereafter, the man walked to Michelle Trinh's home, located at 224 Linden Drive. Melissa noted the man was unfamiliar and called 911. The man rang the doorbell, knocked on the window, and attempted to force his way into the home. Eventually, the man broke a window in the door, reached inside, and unlocked the door. The man was inside the home for a few minutes when Debra heard police sirens. At that time, the man left the home and walked toward the Impala. Before he reached the Impala, a police car pulled up. The man ran from the scene, and the driver of the Impala put his hands out the driver-side window. A police officer approached the Impala with his gun drawn, and the driver was eventually removed from the car.

¶ 6 On the date of the incident, Officer Matt Skanberg responded to a burglary report at 224 Linden Drive. At the scene, Skanberg saw an Impala parked in the road south of the residence in question. Skanberg also observed a man walking toward the Impala. Skanberg ordered the man to stop walking, but the man fled on foot and was later apprehended. The man was not defendant.

¶ 7 Upon arriving at the scene, Officer Nicholas Giordano saw an Impala that was mentioned in the burglary dispatch. Giordano approached the driver's side of the Impala with his gun drawn. The engine of the Impala was running, and defendant was sitting in the driver's seat. Giordano directed defendant to put his hands out the window. After backup arrived, Giordano placed defendant under arrest. Defendant identified himself as James Akins.

¶ 8 After defendant's arrest, an inventory search of the Impala uncovered a backpack, a laptop computer, 55 watches, a cellular telephone, and a Game Boy.

¶ 9 At the Frankfort police station, detective Michael Jaicomo conducted a patdown search of defendant. The search uncovered a watch in defendant's pocket. Jaicomo also interviewed defendant. Defendant said his name was James Akins and identified the other suspect as Ryan Richardson. A driver's license search identified defendant as Ira Cunningham and the second suspect as Williams Jenkins.

¶ 10 On October 25, 2011, Ha Lam's home in Chicago was burglarized, and various items were missing. Lam identified the watches, computer, backpack, cellular telephone and Game Boy recovered from defendant and the Impala as his property. Lam had not given anyone permission to take the property, and he did not know defendant.

¶ 11 Michelle Trinh lived at 224 Linden Drive, Frankfort. On October 27, 2011, Trinh's home was burglarized while she was at work. Trinh had not given anyone permission to enter her home, and she did not recognize defendant.

¶ 12 During the jury instruction conference, the court inquired if it should give IPI 3.14, which addresses other crimes evidence. The State explained that it had submitted the instruction but was not seeking to use it because no evidence was presented that defendant was involved in the October 25 burglary. The State only sought to use evidence of the October 25 burglary as evidence that defendant should have known that the property in his possession was unlawfully obtained. Defense counsel initially objected to the use of IPI 3.14. However, after the court noted that evidence had been received that defendant may have been involved in conduct other than the offenses charged in the indictment, defense counsel agreed that the issue needed to be addressed, and the instruction was the best way to address it.

¶ 13 During closing arguments, the State argued, in regards to the theft charge, that evidence of the October 25 burglary gave rise to the inference that it was unreasonable for defendant to believe that he had lawfully obtained the items Lam had identified as his property. Thereafter, the court instructed the jury:

"Evidence has been received that the defendant has been involved in conduct other than that charged in the indictment. This evidence has been received on the issue of the defendant's knowledge and may be considered by you only for that limited purpose. It is for you to determine whether the defendant was involved in that conduct; and if so, what weight should be given to this evidence on the issue of knowledge."

¶ 14 The jury found defendant guilty of residential burglary, theft, and obstructing justice. The trial court sentenced defendant to a total of 16 years' imprisonment. Defendant appeals.

¶ 15 ANALYSIS

¶ 16 I

¶ 17 Defendant argues that he was denied effective assistance of trial counsel because counsel failed to move to sever the theft charge from the residential burglary charge. Defendant argues if the charges had been severed, the jury would not have heard evidence that defendant was in possession of stolen property taken in an unrelated and uncharged residential burglary.

¶ 18 To establish ineffective assistance of counsel, a defendant must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Henderson*, 2013 IL 114040; *Strickland v. Washington*, 466 U.S. 668 (1984). The failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 217 Ill. 2d 407 (2005).

¶ 19 Two or more offenses may be charged in separate counts of the same indictment if they are based on the same act or are part of the same comprehensive transaction. 725 ILCS 5/111-4(a) (West 2010). Factors indicating that two or more offenses are part of the same transaction include: (1) proximity in time and location; (2) identity of evidence needed to demonstrate a link between the offenses; (3) whether there was a common method; and (4) whether the same or similar evidence would establish the elements of the offenses. *People v. Walston*, 386 Ill. App. 3d 598 (2008).

¶ 20 Here, defendant has not satisfied the prejudice prong of the *Strickland* ineffective-assistance analysis. Defendant was convicted of residential burglary on an accountability theory. 720 ILCS 5/19-3(a), 5-2 (West 2010); see also *People v. Taylor*, 164 Ill. 2d 131 (1995) (to be found guilty on an accountability theory, a defendant need not act affirmatively so long as there

is a common plan or purpose). Substantial evidence of defendant's involvement in the Trinh residential burglary was presented at trial. Debra and Melissa observed Jenkins wave toward the Impala defendant was driving and engage in conversation with defendant before Jenkins broke into Trinh's home. When Jenkins exited Trinh's home, he walked toward the Impala but fled the scene after the police arrived. Defendant was captured at the scene. When questioned, he gave false names to police, telling them that his name was James Akins and Jenkins was Ryan Richardson. This evidence was sufficient to establish defendant's guilt. Therefore, defendant has not demonstrated that if the charges had been severed, the outcome of the proceedings would have been different.

¶ 21

## II

¶ 22

Defendant argues the trial court erred in *sua sponte* instructing the jury that it could consider evidence that defendant had been involved in other criminal conduct on the issue of knowledge because no evidence had been presented that defendant was involved in the other misconduct. The State responds that defendant has forfeited review of this issue.

¶ 23

From our review of the record, we agree with the State's forfeiture argument. Defense counsel agreed to the issuance of IPI 3.14 and did not raise the issue in a posttrial motion. To allow defendant to benefit from such acquiescence deprives the State of an opportunity to cure the alleged defect. *People v. Bush*, 214 Ill. 2d 318 (2005). As a result of defendant's participation in the admission of the disputed evidence and agreement to issue IPI 3.14, defendant has forfeited review. Nevertheless, we will conduct plain error review to determine if the trial court erred in issuing IPI 3.14 and the error affected defendant's fundamental and substantive rights.

¶ 24 The plain error rule permits a reviewing court to bypass a defendant's forfeiture and consider "[p]lain errors or defects affecting substantial rights \*\*\* although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a); *People v. Eppinger*, 2013 IL 114121. Plain error review is appropriate when a clear or obvious error occurred and: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant; or (2) that error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551 (2007). The first step in plain error analysis is to determine whether an error occurred. *Eppinger*, 2013 IL 114121.

¶ 25 Generally, evidence of other misconduct may not be introduced to show a defendant's propensity to commit the charged offense. *People v. Stewart*, 105 Ill. 2d 22 (1984). Evidence of a defendant's uncharged misconduct is admissible if relevant to show a defendant's knowledge. *People v. Lindgren*, 79 Ill. 2d 129 (1980). IPI 3.14 informs the jury of the limited purpose for which it can consider evidence of unrelated misconduct. *People v. Heard*, 187 Ill. 2d 36 (1999). Our supreme court has stated the preferred practice for admitting evidence of unrelated conduct is to instruct the jury, both at the time of admission and before deliberations, of the limited purpose for which it may consider the evidence. *Id.* However, a trial court's failure to follow this procedure does not mandate reversal. *Id.* We review the trial court's decision to issue a jury instruction for an abuse of discretion. *People v. Mohr*, 228 Ill. 2d 53 (2008).

¶ 26 In the instant case, defendant was charged with theft based on a theory that he was in possession of property that he knew was stolen or was obtained under such circumstances as would reasonably induce him to believe the property was stolen. 720 ILCS 5/16-1(a)(4) (West 2010). In support of this theory, Lam testified that he was the victim of a burglary on October 25, 2011. Lam identified a watch that was discovered in defendant's pocket, as well as

various other items discovered in the trunk of the Impala defendant was driving as his property. During closing arguments, the State argued evidence of the October 25 burglary allowed the jury to infer that defendant had knowledge that the items found in his possession were unlawfully obtained.

¶ 27 Defendant was also charged with the October 27 residential burglary based on a theory of accountability. 720 ILCS 5/19-3(a), 5-2 (West 2010). Although no evidence showed defendant participated in the October 25 burglary, its similarity and proximity in time to the charged offenses potentially gave rise to an inference of defendant's participation. As a result, a limiting instruction was necessary to prevent the use of the earlier burglary as propensity evidence. Issuance of IPI 3.14 limited the jury's consideration of the earlier burglary to the issue of defendant's knowledge that the items in his possession were unlawfully obtained. Therefore, the trial court did not abuse its discretion in issuing the instruction.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 30 Affirmed.