

No. 1-13-0492

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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. 11 C3 30636
)	
FRANCISCO MENDOZA,)	Honorable
)	Kay M. Hanlon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Pucinski and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held:* Where the evidence of defendant's guilt was overwhelming and where he testified that after the car he was seen driving crashed, he ran from the police because he was scared, the trial court's error in excluding evidence that the car's other occupant told defendant the car was stolen was harmless because the improperly excluded evidence would not have changed the jury's determination that defendant was the driver.

¶ 2 Following a jury trial, defendant Francisco Mendoza was convicted of aggravated fleeing or attempt to elude a peace officer and was sentenced to 30 months of probation plus 120 days in Cook County jail. On appeal, Mendoza contends that the trial court erred in barring his testimony

that the driver of the car he was in told him the car was stolen, and that this error improperly allowed the State to portray his flight from the car as consciousness of guilt. Finding that the error was harmless, we affirm.

¶ 3 On August 20, 2011, Mendoza and Gustavo Melecio led police officers on a car chase through a mall parking garage and the surrounding neighborhood before their car crashed and they were both apprehended. Mendoza was charged with, among other offenses, three counts of aggravated fleeing or attempt to elude a peace officer.

¶ 4 Prior to trial, the State filed a motion to admit evidence of other crimes. Specifically, the State sought to introduce evidence of items recovered from the vehicle, including two car stereos and a handbag containing cash and a prescription bottle, all of which were identified as property stolen from other vehicles on the same day and in close proximity to where police apprehended Mendoza and Melecio. The State argued that the evidence was relevant to show Mendoza's intent and motive to flee from the police. The trial court denied the motion.

¶ 5 At trial, Norridge police officer Vincenzo Rubino testified that about 12:40 p.m. on August 20, he was patrolling the parking garage of the Harlem Irving Plaza shopping mall in a squad car when he saw a red sport utility vehicle strike a parked car and keep going. Officer Rubino, who was in radio contact with his supervisor, Corporal Wayne Schober, followed the SUV, and when it turned a corner, he could see the driver. He described the driver as a man with "big poofy frizzy hair" and a little goatee, wearing a black shirt. After following the SUV around the first corner, Officer Rubino activated his flashing lights, siren, and horn, but the SUV accelerated and turned another corner. At that point, Officer Rubino could see that someone was sitting in the front passenger seat of the SUV. He described the passenger as a man with a "really

tight haircut." Officer Rubino continued to follow the SUV onto the ramp leading to Harlem Avenue, where a row of four or five cars were lined up at a stop sign. The SUV drove up over the curb on the passenger side of the row of cars, taking off their side mirrors as it passed them, and then turned onto the street. Officer Rubino took the oncoming lane of the ramp and followed the SUV onto Harlem Avenue.

¶ 6 Just before he turned onto Harlem Avenue, Officer Rubino could see Corporal Schober on the street with his lights and siren on. He gave the corporal a description of the SUV and watched as Corporal Schober entered traffic right behind it. As Officer Rubino followed both vehicles, he saw the SUV drive up onto the sidewalk to pass cars stopped for a light and turn right onto Forest Preserve Drive.

¶ 7 Once the intersection cleared, the officers followed the SUV onto Forest Preserve Drive. After it turned onto Forest Preserve Drive, the SUV crossed into oncoming traffic, hit another car, and came to a stop. Corporal Schober, who had gotten out of his car, told Officer Rubino that the SUV's occupants fled on foot. While Corporal Schober pursued the suspects on foot, Officer Rubino followed in his vehicle.

¶ 8 In a nearby strip mall, Corporal Schober went up a set of stairs and Officer Rubino drove into the alley. Officer Rubino looked up and saw the passenger of the SUV on the rooftop. Some bystanders in the alley yelled, "They jumped," so Officer Rubino drove back to the front of the strip mall and saw Corporal Schober and another officer running across Irving Park Road. The next time Officer Rubino saw Corporal Schober, he and the other officer had detained the driver and passenger of the SUV. The offenders were taken to the police station, where Officer Rubino identified the driver and the passenger. He described the driver as "a white male, skinny with big

bushy frizzy hair, black shirt, black pants," with a cast on his arm. The passenger was a "huskier Hispanic male" with a "very short haircut," who was wearing a white shirt and dark colored pants. In court, Officer Rubino identified Mendoza as the driver of the SUV.

¶ 9 On cross-examination, Officer Rubino stated that although the back windows of the SUV were tinted, the front windows were not and he could see the driver's profile, including his nose, chin, forehead, and facial hair, as well as his left hand on the steering wheel. Officer Rubino acknowledged that he never saw the driver's face and did not view a photo array or a lineup.

¶ 10 Corporal Schober gave a similar description of the events of August 20. After he received a description of the red SUV from Officer Rubino, he stationed his vehicle at the entry/exit ramp of the Harlem Irving Plaza parking garage, with lights, siren, and dashboard video activated. He witnessed the SUV go around cars parked on the exit ramp and eventually drive up onto the sidewalk on Harlem in order to pass cars stopped for a red light. After he turned onto Forest Preserve Drive, Corporal Schober observed the SUV and three damaged cars. A bystander pointed Corporal Schober in the direction of the fleeing occupants of the SUV and Schober saw two men, one Hispanic man with short hair wearing a white shirt, and another man with black "frizzy" hair wearing a black shirt and a cast on his arm, running away from the scene.

¶ 11 Corporal Schober and another officer pursued the men on foot. The man in the white shirt was apprehended by the second officer, and eventually, Corporal Schober found the man in the black shirt in the washroom of a store and arrested him. In court, Corporal Schober identified Mendoza as the man in the black shirt. He later learned that the other man was Melecio. Corporal Schober identified photographs of Mendoza and Melecio that were taken at the police station

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shortly after their arrests. In the photographs, Mendoza had "bushy and frizzy" hair, was wearing a black shirt, and had a cast on his right arm, and Melecio had very short hair and was wearing a white shirt.

¶ 12 Two eyewitnesses also identified Mendoza as the driver of the SUV. Both saw him exit the vehicle after it crashed on Forest Preserve Drive and described him as having "frizzy" hair" and a "cast" or "something white" on his arm and wearing dark clothing.

¶ 13 Mendoza called his friend, Francisco Arellano, as a witness. Arellano testified that around 11 a.m. on August 20, he and Mendoza went to the Harlem Irving Plaza and shopped for about an hour and a half. Mendoza received a phone call and then told Arellano that Melecio was going to pick him up. Arellano and Mendoza walked to the mall entrance. A red SUV pulled up and Mendoza got in the front passenger seat. The SUV's windows were tinted, so Arellano could not see who else was inside the vehicle. He did not see Mendoza again that day.

¶ 14 Mendoza testified on his own behalf. In July 2011, he broke his right wrist and his hand was in a cast. His doctor advised him not to drive a car. On his way to the mall with Arellano, Mendoza text messaged with Melecio and arranged for Melecio to pick him up and take him to a gym. About 12:30 p.m., Mendoza went to the mall entrance and Melecio pulled up in a red SUV. Mendoza testified that he had seen Melecio with the SUV the day before and he believed that it was Melecio's vehicle. Mendoza got into the front passenger seat of the SUV.

¶ 15 Mendoza testified that a police officer "got behind" the SUV and Melecio looked scared. The following exchange ensued:

"Q. Without saying what he said, after [Melecio] looked scared for seeing the policeman, what did [Melecio] do, if anything?"

A. He took off. He started saying got a stolen car.

[THE STATE]: Objection.

THE COURT: All right. Sustained as to anything [Melecio] said. It's hearsay."

Mendoza testified that as Melecio drove through the parking lot, he hit two or three cars. After a few minutes of being pursued by the police, Melecio got into an accident and stopped driving.

¶ 16 After they were in the accident, Melecio tried to open the driver's door, but when he could not get the door open, he jumped into the back seat. While Melecio unsuccessfully attempted to open the back door of the SUV, Mendoza moved to the driver's seat, pushed the door open, and got out of the SUV. Melecio returned to the front seat and got out of the passenger side. Mendoza testified that once he got out of the SUV, he ran because he was scared of the police. He denied having been the driver of the SUV.

¶ 17 On cross-examination, the prosecutor questioned Mendoza at length as to why he had run from the police if he had not been the driver of the SUV and had not done anything wrong. Mendoza responded consistently that he ran because he was scared. Mendoza further testified that Melecio was wearing a black shirt while he was driving, but grabbed a white shirt and put it on over his black shirt when he jumped out of the SUV.

¶ 18 After Mendoza rested, defense counsel informed the trial court that the State was planning to call Corporal Schober as a rebuttal witness to testify that cannabis was found on Melecio, thus giving him a reason to run from the police and implying that Mendoza had no reason to run. Defense counsel reminded the court that he had tried to elicit testimony from Mendoza that Melecio told him the SUV was stolen, and argued that such testimony would have

offered an explanation as to why Mendoza ran, as he could have been guilty of a crime such as criminal trespass to vehicle. Defense counsel asked the trial court to reconsider its ruling that Melecio's statement about the SUV being stolen was inadmissible hearsay and stated that he would call Mendoza in surrebuttal. The prosecutor confirmed that the State was planning to call Corporal Schober to testify that cannabis was found in Melecio's waistband, and that he intended to argue to the jury that this was the reason Melecio ran from the scene. The prosecutor also argued that if Mendoza was allowed to testify to Melecio's statement that the SUV was stolen to explain why he ran from the police, then the State should be allowed to introduce evidence of other crimes, *i.e.*, the fact that burglary proceeds were recovered from the SUV as bearing on Mendoza's motivation.

¶ 19 The trial court ruled that if Mendoza testified in surrebuttal that his motive for running from the police was that he thought the SUV was stolen, he would open the door to other crimes evidence. The trial court declined to reconsider its prior ruling that Melecio's statement was inadmissible.

¶ 20 Corporal Schober testified in rebuttal that when he searched Melecio at the police station, he found a baggie of suspect cannabis in Melecio's waistband.

¶ 21 During closing argument, defense counsel argued that flight could not serve as evidence that Mendoza was the driver of the SUV, since both Mendoza and Melecio ran from the police. In rebuttal, the State argued that Melecio ran from the police because he did not want to be caught with cannabis, but Mendoza ran because he did not want "to get caught and be held responsible for all the accidents and the aggravated fleeing and eluding of a police officer that he just committed."

¶ 22 The jury found Mendoza guilty of aggravated fleeing or attempt to elude a police officer. The trial court entered judgment on the verdict and later sentenced Mendoza to 30 months of probation plus 120 days in Cook County jail.

¶ 23 On appeal, Mendoza contends that where the only disputed issue at trial was whether Mendoza or Melecio was the SUV's driver, the trial court's error in barring Mendoza's testimony that Melecio told him the SUV was stolen improperly allowed the State to portray his flight from the SUV as consciousness of guilt. Mendoza asserts that because the State used evidence of flight as consciousness of guilt, a complete defense should have included his ability to explain why he ran and evidence of his mental state at the time he fled from the scene. Mendoza argues that he was prevented from presenting his version of the facts to the jury or responding to the State's rebuttal because the court improperly sustained hearsay objections to his testimony that Melecio told him the SUV was stolen. According to Mendoza, when the court allowed the State to present rebuttal testimony regarding Melecio's motive to run, while precluding his proffered surrebuttal testimony, it denied him the ability to support a crucial aspect of his defense. We agree with Mendoza that the trial court erred in excluding the evidence, but disagree that the error affected the outcome of the trial.

¶ 24 As an initial matter, we note that the parties disagree as to the appropriate standard of review. Mendoza argues that the erroneous evidentiary ruling resulted in the denial of his constitutional right to present a complete defense, and therefore, should be reviewed *de novo*. See *U.S. v. Serrano*, 406 F.3d 1208, 1214 (10th Cir. 2005). The State characterizes the issue as strictly an evidentiary ruling, which is properly reviewed for an abuse of discretion. See *People v. Patrick*, 233 Ill. 2d 62, 68 (2009). Ultimately, it is unnecessary for us to decide which

interpretation of the issue on appeal is correct, as the trial court's error was harmless and the outcome of the appeal would be the same under either standard of review. See *Chapman v. California*, 386 U.S. 18, 22-23 (1967) (constitutional errors may be deemed harmless); *People v. Patterson*, 217 Ill. 2d 407, 428 (2005) (constitutional error is harmless when it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict).

¶ 25 Turning to the issue presented, under well-settled formulations, hearsay is a statement made by a declarant at a time when he is not testifying at trial, offered to prove the truth of the matter asserted. See *People v. Dunmore*, 389 Ill. App. 3d 1095, 1106 (2009). A statement that is offered for a reason other than for the truth of the matter asserted is not hearsay and, therefore, is generally admissible. *Id.* As relevant to this case, if a statement is offered to prove its effect on the listener's mind or to show why the listener later acted as he did, it is not hearsay and is, therefore, admissible. *People v. Gonzalez*, 379 Ill. App. 3d 941, 954 (2008).

¶ 26 Here, Mendoza proposed to testify that Melecio told him the SUV was stolen. This testimony was not offered to prove that the SUV was actually stolen. Rather, the purpose of the testimony was to explain why Mendoza fled from the police after the SUV crashed. Because the purpose of the testimony was to explain Mendoza's ensuing actions, it did not constitute hearsay and should have been admitted.

¶ 27 Nevertheless, where evidence is erroneously excluded, reversal is warranted only where the defendant was prejudiced and the error affected the verdict. *People v. Anderson*, 407 Ill. App. 3d 662, 674 (2011). Here, Mendoza contends that the exclusion of Melecio's statement prevented him from explaining why he fled from the police. And that contention is correct—as far as it goes. Although Mendoza testified that he ran from the police because he was "scared," that

explanation is clearly not the same as informing the jury that he had just learned that the vehicle in which he was riding was stolen and he was afraid he could be charged with an offense as a result.

¶ 28 But evidence of Mendoza's flight after the SUV crashed was only circumstantial evidence of his guilt; the direct evidence that he was the driver of the vehicle that fled from police and sideswiped at least half a dozen cars before crashing into three others was overwhelming. Numerous witnesses at trial identified Mendoza as the driver of the red SUV. And given the obvious disparity in the hairstyles of Mendoza and Melecio, the chance that all of those witnesses were mistaken is nonexistent. Further, apart from the testimony of Mendoza's friend, the only countervailing evidence was Mendoza's incredible story that after the SUV crashed, Melecio, who had been driving, crawled into the back seat to try to get out and Mendoza, instead of opening the passenger door next to him, moved over to the driver's side to get out. Further, the jury would have had to accept that Melecio, attired in black while he was driving, changed clothes before exiting the SUV. Thus, we are confident that even if Mendoza had been permitted to testify that Melecio told him the SUV was stolen, the jury would not have accepted his preposterous story.

¶ 29 Given the substantial direct evidence of Mendoza's guilt, the exclusion of Melecio's statement that the SUV was stolen did not prejudice Mendoza and the outcome of the trial would not have been different had the omitted testimony been allowed. Because the erroneous evidentiary ruling was harmless, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.