2011 IL App (1st) 093421-U

SECOND DIVISION
September 30, 2011

No. 1-09-3421

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. 08 CR 21058
	)	
JAMES GORDON,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE Connors delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: The evidence was sufficient to convict defendant of possession of a stolen motor vehicle where both the description and license plate number of the vehicle taken from the owner matched the description and plate number of the vehicle recovered by police. The State did not make an improper closing argument where the comment in question was generally a reasonable inference from the evidence and did not constitute reversible error to the minor extent that it was not. Defendant's fees were properly assessed. Defendant is entitled to credit against his fines for his pre-sentencing detention, but the $200 DNA analysis fee is not a fine subject to credit. Defendant's prison sentence was properly credited for his pre-sentence detention.

¶ 2 Following a jury trial, defendant James Gordon was convicted of possession of a stolen motor vehicle (PSMV) and sentenced to nine years' imprisonment with fines and fees. On appeal, defendant contends that there was insufficient evidence for his conviction in that the State failed to prove that the vehicle alleged to have been in defendant's possession was owned by the person alleged in the charging instrument to be the owner. Defendant also contends that the State engaged in improper closing arguments. Defendant challenges two of his fees and seeks credit against his fines for his pre-sentencing detention. The State contends that defendant's pre-sentencing credit against his prison term is incorrect and seeks to correct the mittimus accordingly.

¶ 3 Defendant was arrested on October 16, 2008, and a complaint was issued alleging that defendant committed PSMV by possessing on that date "a blue 1994 Oldsmobile Cutlus [*sic*] *** with an IL registration plate of 7371171." The grand jury later issued an indictment against defendant for PSMV alleging that defendant had possessed on that date "a 1994 Oldsmobile, property of Juan Carillo [*sic*]."

¶ 4 At trial, Juan Carrillo testified that, as of September 2008, he owned a blue 1994 Oldsmobile Cutlass Sierra sedan with plate number 7371171. Carrillo parked this car on the street outside his home on the evening of September 28, 2008, but it was not there the next morning and Carrillo reported its absence to the police. Carrillo had not given anyone else permission to drive this car, and it was undamaged the last time he saw it. Carrillo had never seen defendant before trial and had not given him permission to drive the Oldsmobile.

¶ 5 Police officer Benjamin Huh testified that he was on patrol on October 16, 2008, with Officer Elizabeth Hill when he saw a blue 1994 Oldsmobile Cutlass sedan. Officer Huh checked that car's license plate against police records and found that it had been reported stolen. The license plate number of the Oldsmobile was 7371171, and Officer Huh later learned that it was

registered to Carrillo. The officers followed the blue Oldsmobile and Officer Huh saw that defendant was driving it. The Oldsmobile fled at high speed with the officers in pursuit, informing other officers by radio that they were pursuing that car. When Officers Huh and Hill caught up, the Oldsmobile was stopped near the intersection of Keeler and North Avenues. While other officers including Officer Linda Romano were at the scene, defendant was not there. The engine of the Oldsmobile was still running but there was no key in the ignition as the steering column had been peeled, and the driver's side window was broken with broken glass on the driver's floorboard. Jacqueline Williams was still in the Oldsmobile in the passenger seat, and Officer Huh arrested her. Other officers then found defendant nearby and brought him to Officer Huh. While Officer Huh testified that defendant "appeared to be" the driver of the Oldsmobile, he clarified on cross-examination that he did not identify defendant as the driver but that both defendant and the driver were black men with braided hair.

¶ 6 Officer Linda Romano testified that she heard Officer Huh's radio report and then saw a blue Oldsmobile Cutlass sedan. The Oldsmobile stopped abruptly at Keeler and North, and defendant exited from the driver's side and fled. Officer Romano pursued defendant, describing him on police radio as having braided hair and wearing a brown leather jacket and dark blue jeans. However, other officers were faster than Officer Romano and pursued defendant into an alley out of her sight. A short time later, Officer Salvatore Samartino brought defendant to Officer Romano, who identified him as the man she saw flee the Oldsmobile. Upon his arrest by Officer Samartino, defendant had braided hair and was wearing a brown leather jacket and dark blue jeans. Officer Romano testified on cross-examination that defendant's jacket and jeans were not inventoried after his arrest, explaining on redirect examination that "that's not evidence; those were his clothes."

¶ 7 Officer Salvatore Samartino testified that he responded to the radio reports, searching the area near the Keeler-North intersection for a man matching Officer Romano's description of a black man with braided hair wearing a brown jacket and dark jeans. He found and arrested defendant, who matched the description and was hiding under a parked car on Keeler Avenue within a block of North Avenue. Defendant told Officer Samartino that he had been sleeping but he noticed that defendant was sweating and had a fast heartbeat; Officer Samartino did not mention this in his police report. When he brought defendant to Officer Romano, she identified defendant as the man who fled the Oldsmobile.

¶ 8 Defendant made a motion for a directed verdict, noting that the State had not introduced into evidence any vehicle identification numbers (VINs) or evidence connecting by VIN Carrillo's car to the car found by police. When the State argued that the descriptions and license plate numbers matched, defendant argued that because plates may be moved from one vehicle to another "the rule is you have to prove up the VIN number." The court denied the motion.

¶ 9 Jacqueline Williams testified for the defense that she was picked up on the early morning of October 16, 2008, by a man called Dee driving a sedan so that they could go together to a hotel. Dee had braided hair, but defendant was not Dee and Williams did not see defendant before trial. Because it was dark, she could not tell what color the sedan was. She did not notice a broken window or that the steering column was stripped. Several minutes later, with Dee still driving, Williams noticed that a police car was following them. When Dee noticed the police, he said that "I got to go" and fled at high speed with the police in pursuit. Dee struck a van and stopped the sedan near the intersection of Keeler and North Avenues before fleeing on foot. Williams was still in the front passenger seat of the sedan about a minute later when police arrived and arrested her. However, on cross-examination, she admitted that other officers arrived

across the street before the arresting officers. She told the police that Dee was the driver and denied telling police that the driver said "I'm going back" after seeing the police.

¶ 10 In rebuttal, Officer Huh testified that Officer Hill questioned Williams in his presence after her arrest. Williams said that defendant picked her up and made no reference to Dee. When defendant realized that the police were pursuing him, he exclaimed that "I'm going back." On cross-examination, Officer Huh clarified that Williams did not refer to defendant by name.

¶ 11 During closing arguments, defense counsel argued in part that Officer Samartino arrested defendant because he was under a parked car wearing a brown jacket and blue pants.

> "That brown jacket and those pants. Now, interestingly, the State asked *** Officer Romano 'Well, why weren't those inventoried?' 'Well, those aren't evidence.' Well, ladies and gentlemen, that's exactly what evidence is. Because if [defendant] was wearing a brown jacket and pants, you would have seen that brown jacket and those dark blue jeans. If his clothes matched the description that was radioed, that would be proof. His clothes didn't match. You know how you know they didn't match? These professionals would have made sure that you saw it if they matched."

¶ 12 In rebuttal, the State argued in relevant part:

> "[D]on't be fooled about the clothes. The clothes isn't evidence. It is the clothes. What would they have the defendant do? Go naked into custody? No. This is just a description. It is not evidence. It was used to communicate with the other police officers the description of the defendant and what he was wearing."

Defense counsel did not object to this argument.

¶ 13 Following instruction and deliberations, the jury found defendant guilty of PSMV.

¶ 14 In his post-trial motion, defendant argued that the State failed to prove that the recovered car was the vehicle referred to in the indictment or that it had been stolen. He acknowledged that (1) Carrillo testified that he owned a blue 1994 Oldsmobile sedan with plate number 7371171 that went missing in late September 2008, and (2) Officer Huh testified that he saw a 1994 Oldsmobile sedan with plate number 7371171 on October 16 while Officer Romano testified that she saw defendant flee that car. However, because the State did not introduce title or registration documents or records, and because Carrillo did not identify the car found by Officers Huh and Romano as his car, the evidence was insufficient. Defendant raised no claims regarding closing arguments. Following arguments on the motion, the court denied the motion, expressly finding that "the direct and circumstantial evidence more than established that this was the vehicle."

¶ 15 Defendant was sentenced on November 23, 2009, to nine years' imprisonment with fines and fees. The mittimus was stayed until December 1, 2009, and reflected 404 days of credit for pre-sentencing detention, while the order assessing fines and fees did not reflect any credit. Defendant's post-sentencing motion was denied, and this appeal timely followed.

¶ 16 On appeal, defendant first contends that there was insufficient evidence for his conviction in that the State failed to prove that the car alleged to have been in his possession was the car owned by Carrillo as alleged in the indictment.

¶ 17 When presented with a challenge to the sufficiency of the evidence, this court must determine whether, after taking 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. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). On review, we do not retry the defendant and we accept all reasonable inferences from the record in favor of the State. *Beauchamp*, 241 Ill. 2d at 8. The trier of fact is not required to disregard inferences that flow normally from the

evidence nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 281 (2009). A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of defendant's guilt remains. *Beauchamp*, 241 Ill. 2d at 8.

¶ 18 It is an offense, referred to as PSMV, for a "person not entitled to the possession of a vehicle *** to receive, possess, conceal, sell, dispose, or transfer it, knowing it to have been stolen or converted." 625 ILCS 5/4-103(a)(1) (West 2008). For a defendant to be convicted of PSMV, the State must prove beyond a reasonable doubt that he (1) possessed the vehicle, (2) was not entitled to possession of the vehicle, and (3) knew that the vehicle was stolen. *People v. Cox*, 195 Ill. 2d 378, 391 (2001). While it is not necessary to prove ownership of a stolen vehicle, where evidence of ownership is used to show that the car was stolen, there must be evidence that the defendant possessed the same vehicle that was owned by complainant. *People v. Smith*, 226 Ill. App. 3d 433, 438 (1992).

¶ 19 Here, as noted above, Carrillo testified clearly that he owned a blue 1994 Oldsmobile Cutlass sedan with license plate number 7371171 but that car went missing in late September 2008. The evidence from Officers Huh, Romano, and Samartino places defendant as the driver of a blue 1994 Oldsmobile Cutlass sedan with plate number 7371171 on October 16, 2008. Reviewing this evidence in the light most favorable to the State, we find it sufficient to show that the vehicle taken from Carrillo was the same one that police found in defendant's possession on October 16. While defendant is correct that license plates can be removed and placed upon another vehicle, the finder of fact was not required to elevate to reasonable doubt the possibility that the license plate had been moved from one blue 1994 Oldsmobile Cutlass sedan to another blue 1994 Oldsmobile Cutlass sedan.

¶ 20 The cases cited to the contrary by defendant will not bear the weight he places upon them. In *People v. Hope*, 69 Ill. App. 3d 375, 380 (1979), the "evidence established that a 1976 white Oldsmobile 98 was reported stolen *** sometime between May 20, 1976 and July 8, 1976 and that defendant was arrested on July 8, 1976 while driving a 1976 white Oldsmobile 98 which had apparently been reported stolen by an unidentified owner." Notably, "the license plates on the vehicle [the *Hope* defendant was driving] did not register to a 1976 Oldsmobile." *Hope*, 69 Ill. App. 3d at 377. In *People v. Stone*, 75 Ill. App. 3d 571 (1979), car owner Keith Sasek testified that "his green, 1967 Ford Fairlane four-door automobile, license number HR3784 [was] stolen from in front of his home" while the police officer's testimony placed the defendant in a green car and that a license plate check showed that car registered to "a Sasek." Because "Sasek[] testified as to the year, make, model, color and license number of the vehicle," while the officer "testified only as to the color of the car, and not as to any of the other information above to corroborate that the car he found *** was the one which Keith Sasek reported stolen the following day," this court found that there was insufficient evidence they were the same car. In *People v. Fernandez*, 204 Ill. App. 3d 105 (1990), where the "defendant was charged with possession of a 1984 Mazda belonging to Susan Haerr," the parties stipulated at trial that Haerr would testify that she owned a 1984 Mazda with the particular VIN, which she had not given anyone else permission to drive, while the key witness "testified that she observed a red Mazda RX7 in her garage which was being stripped of its parts" by the defendant and others. Thus, in none of these cases did the owner describe the stolen vehicle by color, year, and model and give its license plate number *and* the trial evidence include a matching color, year, and model description and plate number for the car possessed by the defendant.

¶ 21 Defendant also contends that the State engaged in improper closing arguments by exhorting the jury to not be fooled by a defense argument and by falsely claiming that defendant's

clothing was not evidence and that inventorying his clothing would have required leaving him naked.

¶ 22 A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair and reasonable inferences it yields. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). However, a prosecutor may not argue assumptions or facts not contained in the record. *Glasper*, 234 Ill. 2d at 204. A closing argument must be viewed in its entirety and the challenged remarks viewed in context. *Glasper*, 234 Ill. 2d at 204. A statement will not be held improper if it was provoked or invited by defense counsel's argument. *Glasper*, 234 Ill. 2d at 204. While it is improper for the State to suggest that defense counsel fabricated a defense theory, used trickery or deception, or suborned perjury, it is not erroneous for the State to challenge a defendant's credibility or the credibility of his defense theory when evidence exists to support the challenge. *Glasper*, 234 Ill. 2d at 207.

¶ 23 Here, first and foremost, defendant did not preserve this claim of error either by timely objection or in his post-trial motion, so that his claim must rise to the level of plain error to survive forfeiture. *People v. Kitch*, 239 Ill. 2d 452, 460-61 (2011). For the reasons stated below, we conclude that there was no error, much less plain error, in the State's argument at issue. See *Kitch*, 239 Ill. 2d at 462 (first step in plain error analysis is whether there was an error).

¶ 24 Defense counsel argued in closing arguments that the police would have inventoried, and the State would have introduced into evidence at trial, defendant's jacket and jeans had they favored the State's case so that the jury could infer from their absence that they did not support the State's case. This court is unaware from reviewing an untold number of criminal cases that the police routinely preserve, or the State routinely offers into trial evidence, an arrestee's clothing merely because he or she was identified at least partially by clothing. While this defense argument was not thereby improper, the State was permitted to make a reasonable rebuttal

argument. We consider it key that Officer Romano testified that defendant's clothing was not taken by the police because she did not consider it evidence. It is reasonable to infer that Officer Romano was expressing her honest belief formed in her experience as a police officer. Similarly, the testimony of Officers Romano and Samartino was indeed to the effect that the clothing description "was used to communicate with the other police officers the description of the defendant and what he was wearing," as the State argued. Thus, the State's rebuttal argument that defendant's clothing "isn't evidence" was not false in some objective or platonic sense as defendant contends, but instead was a reasonable inference from trial evidence. In sum, defendant offered the jury his favored inference from, or explanation of, the fact that the police did not inventory his clothing, and the State then merely offered a competing inference and explanation. In that light, the State's comment that the jury should not "be fooled about the clothes" was a proper comment on the credibility of the defense theory in question.

¶ 25 The remark that inventorying defendant's clothing would leave him naked was not a reasonable inference from any particular trial evidence. However, the cases cited by defendant regarding the inventorying or confiscation of arrestee clothing do not uniformly support his contention of error. In *People v. Mackey*, 207 Ill. App. 3d 839, 850 (1990), officers had a defendant accused of murder and armed robbery in a bloody knife attack "remove all of his clothing until he put on a paper suit *a short time later*." (Emphasis added.) In *People v. Gholston*, 124 Ill. App. 3d 873, 890 (1984), a sexual assault suspect's clothing including undershorts was taken, inventoried, and sent for testing with no discussion in the court's opinion of what (if any) covering the defendant was provided in its absence. Neither *People v. Bean*, 107 Ill. App. 3d 662 (1982), nor *People v. Collins*, 53 Ill. App. 3d 114 (1977), address whether the arrestee was provided covering when his clothing was taken and inventoried. Moreover, assuming that this particular comment by the State was factually incorrect, the "jury was

admonished to consider the evidence and the reasonable inferences that could be drawn therefrom. We do not believe that one incorrect comment made by the State during argument would be sufficient to confuse the jury and cause it to ignore the clear instructions given to it by the court as to the proper course of its deliberations." *Glasper*, 234 Ill. 2d at 214. As stated above, we find no plain error in the State's closing argument at issue.

¶ 26 Defendant contends that two of his fees were erroneously assessed. He contends that the $10 fee for the county jail medical cost fund (730 ILCS 125/17 (West 2008)) was improper because there were no medical costs arising from his arrest. However, the supreme court recently addressed this exact issue and held that this statute, both before and after its August 2008 amendment, applies to all arrestees regardless of whether they incurred medical costs while in custody. *People v. Jackson*, 2011 IL 110615. He also challenges his $25 court services fee because he did not commit one of the offenses enumerated in the enabling statute. 55 ILCS 5/5-1103 (West 2008). We have previously rejected this contention, holding that the list of statutes in section 5-1103 is not intended to be an enumeration of eligible offenses. *People v. Anthony*, 408 Ill. App. 3d 799, 810-11 (2011); *People v. Adair*, 406 Ill. App. 3d 133, 144-45 (2010); *People v. Williams*, 405 Ill. App. 3d 958, 965 (2010).

¶ 27 Defendant's final contention is that his fines were not credited for his pre-sentencing detention under section 110-14 of the Code of Criminal Procedure. 725 ILCS 5/110-14(a) (West 2008). The parties correctly agree that the court credited defendant's prison sentence for pre-sentencing detention, that the order assessing fines and fees does not reflect a credit, and that defendant has $50 in fines entitled to credit. *Anthony*, 408 Ill. App. 3d at 813-14; *Williams*, 405 Ill. App. 3d at 965-66. However, the parties dispute whether the credit also applies to his $200 DNA analysis fee; that is, whether it is a fine that is subject to credit or a fee that is not.

¶ 28 In support of his contention that it is a fine, defendant cites to *People v. Long*, 398 Ill. App. 3d 1028, 1033-35 (4th Dist. 2010). See also *People v. Childs*, 407 Ill. App. 3d 1123, 1134 (4th Dist. 2011); *People v. Folks*, 406 Ill. App. 3d 300, 308 (4th Dist. 2010); *People v. Grubbs*, 405 Ill. App. 3d 187, 188-89 (3d Dist. 2010)(all following *Long*). However, the supreme court's recent decision in *People v. Marshall*, 242 Ill. 2d 285 (2011), decided that the charge may be assessed only when a defendant is not currently registered in the DNA database. See *id.* at 303. This indicates that the charge is a compensatory fee, not a punitive fine. See *People v. Stuckey*, 2011 IL App. (1st) 092535, ¶ 36; *cf. Anthony*, 408 Ill. App. 3d at 808-09 (pre-*Marshall* case reaching the same conclusion). Similarly, in *People v. Guadarrama*, Nos. 2-10-0072, -0255 (cons.)(August 12, 2011), the second district of this court recently rejected *Long* and its own cases following *Long* in concluding that the DNA analysis fee is a fee not subject to credit. The DNA analysis fee is not subject to credit.

¶ 29 The State contends that defendant is not entitled to 404 days' credit against his prison sentence, as the mittimus now reflects, but only 403 days. Defendant was arrested on October 16, 2008, and sentenced on November 23, 2009, with the mittimus stayed until December 1, 2009. The State cites *People v. Williams*, 239 Ill.2d 503, 504 (2011), for its holding that "the date of the mittimus is the first day of sentence and a defendant should therefore not be credited with that day as presentencing credit." However, as defendant's mittimus was stayed, the day he was sentenced was not the first day of his sentence but part of his pre-sentencing detention. See *Williams*, 239 Ill.2d at 508-09 (applicable statute "requires the court to commit the defendant to the custody of the Department [of Corrections] at the time that the court issues the mittimus, which is the document by which the judgments of conviction and sentence are entered").

¶ 30 Accordingly, pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), the clerk of the circuit court is directed to correct the order assessing fines and fees to reflect $50 credit for pre-sentencing detention. The judgment of the circuit court is affirmed in all other respects.

¶ 31 Affirmed; order corrected.