2012 IL App (1st) 111737-U

FOURTH DIVISION
December 20, 2012

No. 1-11-1737

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. 10 MC1 211753
	)	
PRENTICE FORTNER,	)	Honorable
	)	Clarence L. Burch,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

O R D E R

¶ 1 *Held*: Misdemeanor complaint charging defendant with theft was sufficient despite contention that it failed to allege a mental state as set forth in the various subsections of the relevant statute.

¶ 2 Following a bench trial, defendant Prentice Fortner was found guilty of misdemeanor theft and sentenced to one year of supervision. On appeal, defendant solely contends that his conviction must be reversed because the charging instrument failed to include a mental state as set forth in subsections (A) through (C) of the theft statute (720 ILCS 5/16-1(a)(4)(A)-(C) (West 2010)), *i.e.*, intent to permanently deprive the owner of the use or benefit of the stolen property.

¶ 3 The events giving rise to defendant's prosecution occurred in the early evening of April 2, 2010, when patrol officers detected a Lojack radio frequency signal which led them to a stolen, white motorcycle parked in the fenced backyard of the residence at 7357 South Vernon Avenue in Chicago, Illinois. Parked next to the white motorcycle was a green Honda motorcycle which Arakadiusz Zwierniek, the complainant, had reported stolen less than 24 hours earlier. The officers asked defendant about these motorcycles, and a third one covered by a tarp, after they saw him retrieving a toolbox on the ground beside the white motorcycle and taking out the trash. Defendant claimed that he bought the motorcycles and that they belonged to him, but he was unable to show the officers a bill of sale, a title or registration, or a key to any of the motorcycles.

¶ 4 Initial charges of criminal trespass to a motor vehicle were stricken with leave to reinstate, and a bench trial commenced on a misdemeanor complaint charging defendant with the theft of Zwierniek's Honda motorcycle. The complaint provided in pertinent part:

> "that he knowingly obtained control over complainant's stolen green 2009 Honda motorcycle knowing the motorcycle to have been stolen or under such circumstances as would reasonably induce him to believe that the motorcycle was stolen in violation of 720 Illinois Compiled Statutes 5.0/16-1."

¶ 5 After the State rested its case-in-chief, defendant moved for a directed finding, arguing, *inter alia,* that the complaint failed to state an offense because it did not allege a culpable mental state under the various subsections of the theft statute. The trial court denied the motion and defendant testified in his own defense.

¶ 6 According to defendant, an acquaintance named James offered to sell him the white motorcycle and to teach him how to ride it. Although defendant initially told police that all the motorcycles belonged to him, he corrected himself and said, "the white one is mine. I told [the

officer] the white one. I'm supposed to be buying the white one." Defendant testified that he did not know or suspect that any of the motorcycles were stolen. Defendant further testified that James showed him a key and a title to the white motorcycle, and the other two motorcycles were ridden by James' companions. The trial court found defendant guilty of theft, and this appeal follows.

¶ 7 The sole contention before this court is whether defendant's theft conviction must be reversed because the charging instrument failed to include a mental state as set forth in subsections (A) through (C) of the theft statute (720 ILCS 5/16-1(a)(4)(A)-(C) (West 2010)). Defendant asserts that he was prejudiced by this error because the misdemeanor complaint did not apprise him of the proper elements of the offense with sufficient specificity to adequately prepare his defense. This issue involves a question of law, which we review *de novo*. *People v. Rowell,* 229 Ill. 2d 82, 92 (2008).

¶ 8 It is undisputed that a mental state, as set forth in subsections (A) through (C) of the theft statute, was not included in the misdemeanor complaint filed against defendant. In determining whether a defendant is entitled to reversal of his conviction on that ground, the timing of a challenge to the charging instrument is significant. *People v. Davis,* 217 Ill. 2d 472, 478 (2005) (*citing People v. Cuadrado,* 214 Ill. 2d 79, 86 (2005)). Here, where defendant challenged the charging instrument midtrial, he must show that he was prejudiced by the defect. *Cuadrado,* 214 Ill. 2d at 87. The issue, then, is whether the complaint apprised defendant of the precise offense charged with sufficient specificity to allow him to prepare his defense and to plead a resulting conviction as a bar to future prosecutions arising from the same conduct. *Cuadrado,* 214 Ill. 2d at 86-87.

¶ 9 The purpose of a misdemeanor complaint is to apprise the accused of the nature of the accusation so as to enable him to fully prepare his defense, and it must be sufficiently specific to

bar further prosecution arising out of the same conduct. *People v. Tuczynski,* 62 Ill. App. 3d 644, 648 (1978). Here, defendant was charged with violating section 16-1 of the Criminal Code which states in relevant part:

> "(a) A person commits theft when he knowingly:
>
> ***
>
> (4) Obtains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen ***
>
> *** *and*
>
> (A) Intends to deprive the owner permanently of the use or benefit of the property; *or*
>
> (B) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; *or*
>
> (C) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit." (Emphasis added.) 720 ILCS 5/16-1(a)(4)(A)-(C) (West 2010).

¶ 10 In the misdemeanor complaint, the charged offense was properly cited, but omitted any reference to the mental states or actions indicating a mental state listed in subsections (A) through (C). *People v. Haissig,* 2012 IL App (2d) 110726, ¶ 26. Nonetheless, we find that defendant was not prejudiced thereby. *Cuadrado,* 214 Ill. 2d at 88.

¶ 11 Defendant had ample opportunity to object to the complaint before trial (*Cuadrado,* 214 Ill. 2d at 88) but did not challenge it until the close of the State's case-in-chief. The argument made by defense counsel in moving for a directed finding at that time, shows that defendant was not prejudiced by the omission, and that he understood that the State was required to prove his intent to deprive the complainant permanently of the use or benefit of the green Honda motorcycle. *Cuadrado,* 214 Ill. 2d at 88.

¶ 12 Defense counsel asserted that the complaint failed to state an offense because it did not allege a culpable mental state under any of the various subsections of the theft statute. Defense counsel also noted that, "[t]here's [*sic*] various subsections of 16-1 that one needs to provide–or the State needs to provide, in order for my client to be able to make an appropriate defense." We observe that "the several subsections of section 16-1 do not undertake to create a series of separate offenses, but rather to create a single offense of theft which may be performed in a number of ways." (Internal quotation marks omitted.) *People v. Price,* 221 Ill. 2d 182, 189 (2006). Based on the record before us, we find that no serious argument may be made that defendant was unaware of the State's need to prove his intent to permanently deprive Zwierniek of his motorcycle in order to establish his guilt of the charged offense.

¶ 13 Although defendant alleges that the complaint failed to apprise him of the precise offense charged with sufficient specificity to prepare his defense, he does not articulate how the omission of the various subsections of the theft statute adversely affected his defense by specifying the actions his counsel would have otherwise taken had the complaint included the missing subsection(s). *People v. Childs,* 407 Ill. App. 3d 1123, 1130 (2011). The defense position at trial was that defendant was unaware that any of the motorcycles had been stolen and that he was supposed to purchase the white motorcycle from an acquaintance named James, and, therefore, did not address the intent to permanently deprive element of the offense. See, *e.g., People v.*

Bohm, 95 Ill. 2d 435, 440-41 (1983). It is also clear that the complaint, together with the record, are sufficient to bar a subsequent prosecution of defendant for the theft of Zwierniek's motorcycle in Chicago, Illinois on April 2, 2010. *People v. Alexander,* 93 Ill. 2d 73, 79-80 (1982). In light of the above, we find no prejudice to defendant by the defect in the charging instrument to warrant reversal.

¶ 14 The cases relied upon by defendant do not persuade us otherwise as they involved challenges to a charging instrument made before trial, where strict compliance with the pleading requirements of section 111-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3 (West 2004)) must be observed. Defendant argues that "[a] charging instrument that fails to allege one of the mental states, or one of the acts listed as indicating [a] mental state, listed in the theft statute is fatally defective," citing *People v. Hayn,* 116 Ill. App. 2d 241 (1969), *People v. Haynes,* 132 Ill. App. 2d 1031 (1971), and *People v. Hargrave,* 29 Ill. App. 3d 89 (1975), which the State correctly notes is an abstract opinion that cannot be relied upon as precedent (*Cochran v. Great Atlantic & Pacific Tea Company, Inc.,* 203 Ill. App. 3d 935, 937 (1990)). As noted above, *Hayn* and *Haynes* involved a different procedural posture and a different, applicable legal standard than in this case. Put another way, because defendant here challenged the complaint midtrial, the State's failure to strictly comply with the pleading requirements of section 111-3 is not dispositive. *People v. Mimes,* 2011 IL App (1st) 082747, ¶ 33.

¶ 15 We are similarly unpersuaded by defendant's reliance on *People v. Rowell,* 229 Ill. 2d 82 (2008), where the State aggregated several individual thefts into a single felony theft, but failed to allege the necessary element of a single intent or design, and the charging instrument only cited the retail theft statute with no reference to the relevant joinder statute. The supreme court observed that, in contrast to *Cuadrado*, defendant could not look to the cited retail theft statute to find the missing element with regard to joinder. *Rowell,* 229 Ill. 2d at 95-96. Here, unlike

Rowell, the complaint apprised defendant of the charged offense and cited the only applicable statute, section 16-1. Consequently, defendant in this case was able to look to section 16-1 to find the missing mental states or actions indicating a mental state listed in subsections (A) through (C) (*Mimes,* 2011 IL App (1st) 082747, ¶ 36), and, as determined above, was not prejudiced by the omission.

¶ 16 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 17 Affirmed.