2013 IL App (1st) 112860-U

FOURTH DIVISION
September 19, 2013

No. 1-11-2860

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 CR 7145
	)	
LEONDRE SMITH,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not err in responding to the jury's question seeking definition of the possession of knowingly stolen goods; defendant's conviction was affirmed as modified.

¶ 2 Following a jury trial, defendant Leondre Smith was convicted of theft and was sentenced to an extended term of eight years in prison due to his prior convictions. On appeal, defendant contends his conviction should be reversed and his case remanded for a new trial because in responding to a jury question during deliberations, the court introduced a different theory of culpability as to the offense of theft, *i.e.*, that defendant knowingly possessed stolen property, and

that constituted plain error. In the alternative, defendant argues his counsel was ineffective in failing to defend against that theory, and he also challenges his sentencing credit for time spent in custody, as well as certain fines and fees. We affirm as modified.

¶ 3 The evidence at trial established that at 2:23 a.m. on April 23, 2011, two police officers in an unmarked vehicle observed defendant walking in an alley at 79th and Kingston carrying a bag in each hand. Chicago police officer Alejandro Cabral testified that when he and his partner drove toward defendant, defendant ran away and was apprehended after a foot chase. He testified that defendant stopped and threw both bags to the ground, stating, "I didn't steal them. I bought them for two rocks." Officer Cabral testified "rocks" were crack cocaine and that two rocks were worth about $10.

¶ 4 While handcuffing defendant, the officer noticed glass in the folds of defendant's clothing; however, he acknowledged on cross-examination the glass was not recovered as evidence and there were "less than a dozen" pieces of glass. The bags contained a laptop computer, several textbooks and a scientific calculator, along with papers indicating the items were owned by Lashonda Anderson. Defendant told the officers that he bought the bags from a guy named Mike in a red truck at 83rd and Kingston because he wanted a computer for his daughter.

¶ 5 The police contacted Anderson, who said her car had been broken into that night. Anderson identified her property at the police station. Anderson testified that on the night of the offense, she was a pre-pharmacy student at Chicago State University and parked her car from 8 p.m. to 2:30 a.m. with the items inside. Anderson returned to find one of her car windows shattered and the items removed. Anderson testified "most of the glass was all gone, but the glass was on the ground and in the car."

¶ 6 In the defense case, counsel called Officer Cabral, who testified that Anderson said she did not know defendant. Defense counsel argued the State could not prove defendant took the items from Anderson's car because no physical evidence or eyewitness testimony linked him to the crime.

¶ 7 The jury was instructed, *inter alia*, that defendant was charged with theft pursuant to section 16-1(a)(1) of the Criminal Code of 1961 (the Code), which provides that a person commits theft when he knowingly "[o]btains or exerts unauthorized control over the property of the owner." 720 ILCS 5/16-1(a)(1) (West 2010). The jury was instructed that to find defendant guilty of that charge, the State must establish that: (1) Anderson owned the property in question; (2) defendant knowingly obtained or exerted unauthorized control over the property; (3) defendant intended to deprive the owner permanently of the use and benefit of that property; and (4) the property was valued between $500 and $10,000.

¶ 8 After receiving instructions, the jury left the courtroom at 2:40 p.m. to begin deliberating. At 3:10 p.m., the jury submitted the following question: "In terms of the second portion of the guidelines of being guilty, is having possession of knowingly stolen goods the same as knowingly obtaining or exerting unauthorized control over the property in question?"

¶ 9 Defense counsel argued that defendant had not been charged with theft under the theory of possession of stolen property and asserted the court should instruct the jury to continue deliberations. The State argued that "obviously the defendant knowingly had to have possession of stolen goods," and asserted the court should advise the jury that exerting unauthorized control was "the same thing" as possession of stolen goods. The court then stated as follows:

> "Okay. Well, certainly, there was evidence in the case from the testimony of the two officers and the testimony of the victim that that was her property, that Mr. Smith did possess her property

> and the property was stolen from her car. And there was evidence that her car, the glass in her car was broken out and her items were missing. They were there at 10 or 10:30 in the evening and not there at 2:30 in the morning.
>
> So the property from the evidence that the jury has was stolen and sometime later [] according to the evidence Mr. Smith was found in possession of that property.
>
> Over the [d]efense's objection, because the Appellate Court cases that I've read state that if you can answer a question, you should given an answer to that question. It's clear to me that the jury is looking for some guidance and I do believe it relates to the charge for reasons I just stated.
>
> My response is going to be as follows: If a person knowingly possesses stolen property, that person is exerting unauthorized control over the stolen property. It has the same elements as the instruction in that it must be knowingly possessed, knowingly possessing stolen property."

¶ 10 The court responded to the note at 3:26 p.m. by writing the following underneath the jury's written question: "If a person knowingly possesses stolen property, that person is exerting unauthorized control over the stolen property." At 3:38 p.m., the jury returned a guilty verdict.

¶ 11 On appeal, defendant first contends the court's response to the jury's question impermissibly extended the scope of the theft charge to include a new theory of guilt. He argues the response expanded the possible theory of culpability from the commission of a theft to the mere possession of stolen property.

¶ 12 Defendant acknowledges he failed to preserve this issue by including it in his motion for a new trial. Still, defendant argues it may be addressed under the doctrine of plain error, which allows a reviewing court to consider an unpreserved error if either "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). We begin our plain error analysis by first determining whether any error occurred. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). If so, this court then considers whether either of the two prongs of the plain error doctrine has been satisfied. *Id*. at 189-90.

¶ 13 Determining the propriety of a response to a jury question involves a two-part analysis. The first inquiry is whether the trial court should have answered the jury's question. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 16. Defendant does not assert the court should not have answered the question; rather, he challenges the response that was given.

¶ 14 The second inquiry is whether the trial court's response to the question was correct. *Id.* The trial court must provide instruction when the jury has posed an explicit question or asked for clarification on a point of law arising from facts showing doubt or confusion. *People v. Averett*, 237 Ill. 2d 1, 24 (2010). However, the court should not submit new charges or new theories to the jury after it commences its deliberations. *Id.* Moreover, when a trial court decides to answer a jury's question, it must do so correctly and "must not misstate the law." *Leach*, 2011 IL App (1st) 090339, ¶ 15.

¶ 15 Here, defendant contends the court committed prejudicial error by telling the jury during its deliberations that it could find him guilty merely for possessing the bags of Anderson's

property, *i.e.*, without finding that he broke into the vehicle himself and took the items. Defendant asserts the court effectively advised the jury that it could convict him based only on the knowing possession of stolen property in violation of section 16-1(a)(4) of the theft statute (720 ILCS 5/16-1(a)(4) (West 2010)), as opposed to the charged offense of theft pursuant to section 16-1(a)(1) of the statute (720 ILCS 5/16-1(a)(1) (West 2010)).

¶ 16 Before considering defendant's assertions, it is necessary to describe the criminal acts contained in those two statutory sections. A person commits theft when he knowingly obtains or exerts unauthorized control over property of the owner and intends to deprive the owner permanently of the use of benefit of that property. 720 ILCS 5/16-1(a) (West 2010). Interpreting the Illinois theft statute, our supreme court has observed that the different 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); see also *People v. Graves*, 207 Ill. 2d 478, 484 (2003). Section (a)(1) proscribes the possession of stolen property, *i.e.*, maintaining unauthorized possession over property that one does not own. *People v. Walton*, 2013 IL App (3d) 110630, ¶ 26 (the possession of stolen property under section (a)(1) represents an ongoing act).

¶ 17 By comparison, section (a)(4) involves the act of obtaining control over stolen property or "bring[ing] about a transfer of interest or possession," which occurs at a particular moment in time. *Id*. at ¶ 28, citing 720 ILCS 5/15-7 (West 2010). Under section (a)(4), theft can be established by proving the defendant knowingly obtained control over stolen property either (1) knowing the property to have been stolen; or (2) "under such circumstances as would reasonably induce" a belief that the property was stolen. 720 ILCS 5/16-1(a)(4) (West 2010). This form of theft has been described as "receiving stolen property." See *People v. Marino*, 44 Ill. 2d 562,

575-76 (1970). The *Marino* court noted the receipt of stolen property "is not a separate offense in Illinois" but rather is an element of the crime of theft set out in what is now section (a)(1). *Id.* at 576. To illustrate, a jury can find a defendant guilty under section (a)(4) by concluding that the defendant stole property. The jury also could find the defendant guilty of theft under section (a)(1) for exerting control over that property, *e.g.*, carrying the property away, provided those are based on two separate acts. See *Price*, 221 Ill. 2d at 193.

¶ 18 Since *Marino*, our supreme court has continued to conclude the conduct prohibited by section 16-1(a)(4) is "not separate from, but rather is included within, the conduct proscribed in section 16-1(a)(1)." *Graves*, 207 Ill. 2d at 484, citing *Marino*, 44 Ill. 2d at 576. See also *Price*, 221 Ill. 2d at 189 (noting the elements of those two crimes overlap and are two different ways to commit the offense of theft). We therefore reject defendant's contention that sections (a)(1) and (a)(4) are "two separate offenses."

¶ 19 Defendant further argues the court's response was not an accurate statement of the law. The jury asked, "In terms of the second portion of the guidelines of being guilty, is having possession of knowingly stolen goods the same as knowingly obtaining or exerting unauthorized control over the property in question?" The court responded: "If a person knowingly possesses stolen property, that person is exerting unauthorized control over the stolen property." The term "obtains or exerts unauthorized control" in section (a)(1) is defined elsewhere in the Code as including, but not limited to "the taking, carrying away, or the sale, conveyance or transfer of title to, or interest in, or possession of property." 720 ILCS 5/15-8 (West 2010). Under that definition, if a person possesses stolen property, he is exerting unauthorized control over the property. Therefore, the court's response to the jury's inquiry correctly stated the law.

¶ 20 Defendant likens this case to the facts of *People v. Millsap*, 189 Ill. 2d 155 (2000), in which the defendant was charged with home invasion and robbery. The testimony showed the

defendant was seen in an alley near the crime scene carrying the victim's wallet and also that the person who entered the victim's home held a gloved hand over her face. *Id.* at 156-57. The State did not argue the defendant could be convicted on an accountability theory, and neither side argued to the jury regarding accountability. *Id.* at 159.

¶ 21 During deliberations, the jury asked: "Is the accomplice just as guilty [as] the offender who causes an injury in a home invasion?" *Id.* The court responded, over defense counsel's objection, with a jury instruction on accountability, *i.e.*, that a person was legally responsible if he knowingly solicited, aided, abetted, agreed to aid or attempted to aid the other person in the offense's commission or planning. *Id.* at 160. The Illinois Supreme Court agreed the trial court violated the defendant's due process rights by submitting to the jury an instruction on a new legal theory after it had begun deliberating, and the court reversed the defendant's convictions and remanded for a new trial. *Id.* at 163-64. We do not find *Millsap* analogous because here, the jury was not advised as to a new theory of liability. Instead, the court's response to the jury's question defined an element of the charged offense of theft pursuant to section (a)(1).

¶ 22 We find *People v. Siverson*, 333 Ill. App. 884 (2002), to be illustrative. In *Siverson*, the defendant was charged with theft by obtaining unauthorized control over property pursuant to section (a)(1). *Id.* at 885. The defendant testified he had purchased the items from someone knowing they had been stolen from a store. *Id.* at 886.

¶ 23 On appeal, the defendant asserted his due process rights were violated when the judge instructed the jury on theft under section (a)(1) and section (a)(4) of the statute, and the verdict form did not specify the section under which the jury found the defendant guilty. *Id.* at 886. He argued the court erred by instructing the jury on the offense of theft by receiving stolen property when the defendant was charged with theft by obtaining unauthorized control over property (which is, in effect, what defendant in this case contends the trial court did by answering the

jury's question). *Id.* Rejecting the defendant's argument, the appellate court in *Siverson* held that the defendant had been charged with theft and had confessed to theft and noted that pursuant to *Marino*, sections (a)(1) and (a)(4) did not set out separate offenses. *Id.* at 887.

¶ 24 In the case at bar, the wording of the jury's question reveals that it sought clarification as it attempted to apply the facts presented to the elements instruction for section (a)(1), which was the charged offense. The record thus establishes the jury was contemplating defendant's guilt of that charge. Defendant claims he could not have been found guilty of theft "if the jury believed that he merely possessed property that he knew to be stolen." That assertion is mistaken, as defendant could be, and in fact was, convicted on the basis that he exerted control over stolen property at the time he was arrested. See *Price*, 221 Ill. 2d at 192-93. Defendant has not established that the court improperly introduced a new theory of his guilt. Accordingly, because no error occurred in the court's response to the jury's question, there can be no plain error to excuse defendant's forfeiture of that argument.

¶ 25 As an alternative to his contention that the court erroneously responded to the jury's inquiry, defendant contends his attorney was ineffective in failing to challenge his knowing possession of stolen property. He argues his attorney's overall strategy was to argue that defendant did not personally take the items from Anderson's car but that counsel did not challenge the fact that he knowingly possessed stolen property. He asserts his counsel effectively conceded that defendant knew the items in his possession were stolen.

¶ 26 To establish ineffective assistance of counsel, a defendant must show that his attorney's performance fell below an objective standard of reasonableness and that the result of the proceeding would have been different but for counsel's inadequate representation. *Strickland v. Washington*, 466 U.S. 668 (1984). As to the first prong, a strong presumption exists that counsel's conduct fell within the range of reasonable professional assistance. *Id.* at 689. It is

well-settled that what evidence to present and what theory of defense to pursue are matters of trial strategy that rest solely in the purview of defense counsel, and neither a mistake in strategy nor the fact that another attorney would have handled a case differently are sufficient to establish the incompetence of defense counsel. *People v. Enis*, 194 Ill. 2d 361, 376 (2000); *People v. Smith*, 2012 IL App (1st) 102354, ¶ 86.

¶ 27 As explained above, sections (a)(1) and (a)(4) of the theft statute do not represent discrete offenses but are instead different ways to perform the offense of theft, *i.e.*, through the possession of stolen property or the receipt of stolen property. See *Graves*, 207 Ill. 2d at 484. Under section (a)(4), theft can be established by proving the defendant obtained control over property knowing it to be stolen or "under such circumstances as would reasonably induce" a belief that the property was stolen. 720 ILCS 5/16-1(a)(4) (West 2010). An inference of guilt arising from the possession of stolen property can be rebutted by a defendant's reasonable explanation. *People v. Miller*, 2013 IL App (1st) 110879, ¶ 55. The jury heard testimony that defendant told a police officer he had bought the bags from another person, though that evidence was presented as part of the State's case. The jury did not find that explanation to be reasonable. Because we cannot conclude that defense counsel prejudiced defendant's case by failing to challenge defendant's knowing possession of stolen property, defendant's ineffective assistance claim must fail.

¶ 28 Defendant's remaining two contentions on appeal involve corrections to the mittimus. Defendant first asserts he is entitled to eight additional days of credit for time spent in custody prior to his sentencing hearing. The State concedes that defendant was in pretrial custody for 138 days, as opposed to the 130 days for which he was given credit. Accordingly, pursuant to Supreme Court Rule 615 (Ill. S. Ct. R. 615 (b)(1) (eff. Aug. 27, 1999)), we correct the mittimus to reflect 138 days of presentencing custody credit.

¶ 29 Lastly, defendant asserts, and the State correctly agrees, that this court should vacate the $200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2011)) and the $30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2011)). As to the DNA charge, defendant points out he has previous felony convictions since 1998, which is when the DNA analysis and fee requirement went into effect. Therefore, defendant already submitted a sample to the Illinois State DNA database. Accordingly, the DNA analysis fee should be vacated. See *People v. Marshall*, 242 Ill. 2d 285, 296-97 (2011). Additionally, defendant should receive $30 in credit for his time spent in presentence custody, as applied toward the Children's Advocacy Center fine. See, *e.g.*, *People v. Butler*, 2013 IL App (5th) 110282, ¶ 4 (that charge is a fine, not a fee, and thus can be fulfilled by the $5-per-day credit defendant has earned for time spent in presentence custody). Per those determinations, the fines and fees order should reflect an assessment of $495 in fines, fees and costs.

¶ 30 Affirmed as modified.