2018 IL App (1st) 172121-U

FIRST DIVISION
May 14, 2018

No. 1-17-2121

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re M.S., a Minor,	)	Appeal from the Circuit Court
	)	of Cook County,
(The People of the State of Illinois	)	
	)	
Petitioner-Appellant,	)	
	)	No. 17 JD 382
v.	)	
	)	
M.S.	)	Honorable
	)	Cynthia Ramirez,
Respondent-Appellee).	)	Judge Presiding.
	)	

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in denying defendant's request for an other-crimes jury instruction.

¶ 2 A jury found respondent M.S., a minor, guilty of a vehicular hijacking and robbery that occurred on November 30, 2016. Based on his history of juvenile delinquency, M.S. was sentenced as a habitual juvenile offender to the Department of Juvenile Justice until the age of 21 years. On appeal, M.S. contends that the trial court erred by not giving the jury an other-crimes instruction pursuant to Illinois Pattern Jury Instruction, Criminal, 3.14 (IPI 3.14) (4th ed. 2000).

For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The State filed its petition for adjudication of wardship against M.S. on February 15, 2017, alleging that M.S. was delinquent based on his commission of aggravated vehicular hijacking, armed robbery, vehicular hijacking, aggravated robbery, and robbery, all stemming from a November 30, 2016, incident. The State also sought to prosecute M.S. as a habitual juvenile offender based on his previous adjudications of delinquency.

¶ 5 Prior to trial, M.S., by his attorney, filed a motion *in limine* requesting, in part, that the State be prohibited from eliciting evidence of other bad acts committed by M.S. and, specifically, that it be barred from introducing either testimonial or video evidence regarding transactions made using the victim's credit card on November 30, 2016.

¶ 6 At the hearing on the motions *in limine*, the parties argued about whether surveillance video from a Target store at which the victim's credit card was used could be introduced. Defense counsel opposed the admission, saying "the entirety of the video being shown gets past the point where this is showing circumstantial evidence and goes into an uncharged crime and is highly prejudicial." The State responded that the entire video was highly relevant because the "possession of stolen items give[s] rise to the inference that the person in possession of those items stole those items to begin with," the purchases occurred just 45 minutes to an hour after the items were stolen, and the video also showed M.S. getting into the stolen car. The court admitted the video in its entirety.

¶ 7 The parties also argued about whether the State could introduce into evidence store receipts showing the purchases made with the stolen credit card. Defense counsel argued that the

State did not charge M.S. with possession of a stolen credit card, "and now they want to bring all the evidence of that, which is prejudicial when the only question that the jury will have in front of them is 45 minutes earlier did this minor participate in taking property from the victim." The trial court admitted the receipts, finding that they were circumstantial evidence relevant to the offense M.S. was charged with.

¶ 8 Because M.S. is not challenging the sufficiency of the evidence on appeal, we discuss the testimony and other evidence presented at trial only to the extent necessary for an understanding of the issue he raises on appeal.

¶ 9 The victim, Ramona Tinberg, testified that on November 30, 2016, she drove to 6722 South Dorchester Avenue to meet her coworker and a new client. She arrived at approximately 11 a.m. and parked her car—a gray 2010 Kia Forte with license plate Z 669 903—on the right side of the street. While she waited in her car for her coworker to arrive, a gray, four-door sedan that contained three passengers, none of whom Ms. Tinberg had seen before, pulled up alongside her. The front passenger exited the sedan and "knocked on [her] window with his gun and then [signaled] for [her] to get out." Ms. Tinberg exited her car because she was "terrified."

¶ 10 The man with the gun stood in front of Ms. Tinberg, and the rear passenger of the sedan—who Ms. Tinberg identified at trial as M.S.—then exited the sedan. M.S. was wearing a a puffy, "maroon" coat. The man with the gun got into Ms. Tinberg's car while M.S. came "right up to" her, "grabbed" her cell phone out of her hand, and "demanded [her] pin numbers." Ms. Tinberg testified that M.S. pulled a gun from his pocket and held it at her side. When she did not provide M.S. with her pin numbers, he "aggressively demanded" them again and pushed the gun into her side "more aggressively." After his second demand, a car drove by on 67th Street, and

M.S. got back into the sedan, the driver of the sedan took off, and "then the guy in [Ms. Tinberg's] car took off after them." Ms. Tinberg borrowed a phone from some nearby construction workers to call the police.

¶ 11 On December 1, 2016, Detective Fred Marshall, who was assigned to investigate the case, asked Ms. Tinberg to check her credit card activity. Ms. Tinberg did that and reported to the detective that her MasterCard had been used. She provided him with the times, dates, and locations of those charges.

¶ 12 Detective Marshall testified that he went to the Target store at 86th Street and Cottage Grove Avenue on December 3, 2016, and met with Brandon Cade, a "loss prevention agent[ ]." Mr. Cade showed Detective Marshall surveillance video from November 30, 2016, of specific transactions the detective was interested in, and video of the building's entrance, exit, and parking lot. Detective Marshall testified that he observed Ms. Tinberg's car on the surveillance video. At trial, the State published the video to the jury. Mr. Cade also testified at trial and narrated during the video that the individual standing at the terminal making the specific transactions was wearing a "burgundy jacket," and that the name of the card holder on the receipt for those specific transactions was "Ramona Tinberg."

¶ 13 After leaving Target, Detective Marshall put together a photo array. Another detective, Detective Gerald Cruz, showed the photo array to Ms. Tinberg on December 11, 2016. From the array, Ms. Tinberg identified M.S. as the person she had reported as "wearing the maroon coat with the gun to [her] side." Detective Marshall arrested M.S.

¶ 14 The State rested, and the court denied defense counsel's motion for a directed verdict.

¶ 15 Chicago police officer John Minogue, who testified for the defense, was one of the

officers who initially reported to the scene of the offense on November 30, 2016. He met Ms. Tinberg, who he described as "pretty distraught, she was a little shaking. She was actually shaking, very nervous." Officer Minogue testified that, from what he remembered, Ms. Tinberg told him that the person in a puffy "red" jacket approached her window and had something in his pocket that she assumed was a weapon. Ms. Tinberg also told Officer Minogue that the person in the puffy "red" jacket pushed whatever was in his pocket into her side.

¶ 16 M.S. chose not to testify, and the defense rested.

¶ 17 At the jury instruction conference, defense counsel asked the trial court to instruct the jury pursuant to IPI 3.14, titled "Proof of Other Offenses or Conduct." Defense counsel argued that the instruction was necessary because the evidence showed that M.S. had possessed a stolen credit card and been in a stolen vehicle, both uncharged offenses. The State objected to the instruction "as being confusing to the jury" because the jury would not be aware of "all of those other offenses." The court denied the requested instruction, simply saying "It's going to be out."

¶ 18 In closing, with respect to the evidence of M.S. making transactions using Ms. Tinberg's credit card at Target, the State argued:

> "And here we have circumstantial evidence. Who do we see 45 minutes later walking into a Target? A guy in a burgundy, maroon coat. Where do we see him go? We see him go to the register. And what is he doing? He is making a purchase on [Ms. Tinberg's] card.
>
> *** He's walking out of Target after fourteen transactions with all of his proceeds from that shopping spree. Then again you see him enter a car in the Target parking lot after shopping. What kind of car does he get in? None other

> than a Kia Forte. A gray Kia Forte. Whose Kia Forte? [Ms. Tinberg's]."

¶ 19 Defense counsel's closing argument included the following references to M.S.'s use of the credit card and getting into the stolen car:

> "The first thing is I really need to be clear, you don't have to like that it looks like [M.S.] is using [Ms. Tinberg's] credit card at Target. That is a lousy thing to do with someone else's credit card. That is not what the State is charged [M.S.] with doing. That is not what they're asking you to find him guilty of. In fact, you can think that's him in the Target using her credit card, crappy thing to do. And you can think that's him driving away in her car and he has no business being in that car and you will still not have answered the fundamental question of this case. The question of this case was, was he there 45 minutes before that when [Ms. Tinberg] was robbed and when her car was actually taken."

¶ 20 The jury found M.S. guilty of vehicular hijacking and robbery.

¶ 21 At sentencing, the State presented three previous juvenile adjudications that qualified M.S. as a habitual juvenile offender. After hearing argument from both sides, the trial court sentenced M.S. to the Department of Juvenile Justice until the age of 21 years.

¶ 22 II. JURISDICTION

¶ 23 M.S. was sentenced on August 23, 2017, and filed a timely notice of appeal the following day. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case. (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013)), and Illinois Supreme Court Rule 660 (eff. Oct. 1, 2001), governing appeals

in cases arising under the Juvenile Court Act of 1987 (705 ILCS 405/1-1 *et seq.* (West 2014)).

¶ 24 III. ANALYSIS

¶ 25 The parties disagree on the appropriate standard of review. The State argues that whether an instruction should be given is within a trial court's discretion. M.S. argues that "[a]lthough jury instructions are generally reviewed for an abuse of discretion, the standard of review is *de novo* when the question is whether the applicable law was accurately explained to the jury." *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 34. But here the issue is not whether the court accurately explained the applicable law to the jury, but whether the court erred in not giving the requested jury instruction. We review the trial court's decision on giving a jury instruction for "an abuse of discretion." *People v. James*, 2017 IL App (1st) 143391, ¶ 136 (citing *People v. Lovejoy*, 235 Ill. 2d 97, 150 (2009)). An abuse of discretion occurs where the ruling is "arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Laabs*, 2011 IL App (3d) 090913, ¶ 18.

¶ 26 The trial court did not abuse its discretion in refusing the other-crimes instruction here. It is well-established that evidence of other crimes is not admissible to prove the defendant's propensity to commit crimes, but that such evidence *is* admissible when it is relevant to prove *modus operandi*, intent, identity, motive, or absence of mistake. Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); *People v. Illgen*, 145 Ill. 2d 353, 364-65 (1991).

¶ 27 M.S. is not challenging the admissibility of the other-crimes evidence at his trial. M.S. was charged with vehicular hijacking and robbery, based on his involvement in the taking of Ms. Tinberg's car and belongings, including her credit card. Ms. Tinberg identified him as wearing a maroon, puffy coat at the time. The jury then viewed the Target surveillance video showing what

Mr. Cade described as an individual in a burgundy jacket using Ms. Tinberg's credit card and getting into Ms. Tinberg's car approximately 45 to 60 minutes after the robbery occurred. This evidence is clearly relevant to establishing the identity of M.S. as the perpetrator.

¶ 28 M.S. argues that the trial court erred by admitting this evidence of using the credit card and getting into the car without providing an instruction that it could only be considered for this limited purpose. Specifically, the defense requested IPI 3.14 which provides:

> "[1] Evidence has been received that the defendant[s] *[(has) (have)]* been involved in *[(an offense) (offenses) (conduct)]*other than *[(that) (those)]* charged in the *[(indictment) (information) (complaint)]*.
>
> [2] This evidence has been received on the issue[s] of the *[(defendant's) (defendants')][(identification) (presence) (intent) (motive) (design) (knowledge) (______)]* and may be considered by you only for that limited purpose.
>
> [3] It is for you to determine [whether the defendant[s] *[(was) (were)]* involved in *[(that) (those)][(offense) (offenses) (conduct)]* and, if so,] what weight should be given to this evidence on the issue[s] of ______." IPI 3.14 (4th ed. 2000)

¶ 29 According to M.S., "in the absence of a limiting instruction, the jury was free to consider the other-crimes evidence in any manner they saw fit, including as proof of criminal propensity." The State argued to the trial court that the members of the jury could be confused by the requested instruction because they might not think that using a stolen credit card or riding in a stolen car were separate, uncharged crimes. Apparently agreeing with the State, the court denied the instruction. We do not find this denial to be arbitrary, fanciful, or unreasonable.

¶ 30 We also note that in closing argument, the State exclusively focused on the evidence regarding M.S. using the credit card and getting into the car for the purpose of establishing M.S.'s identity as the perpetrator of the charged crimes, not at all suggesting that M.S. had a propensity to break the law because he committed other uncharged crimes. Only the defense focused on the potential use of that evidence to demonstrate M.S.'s bad character.

¶ 31 M.S. relies on our supreme court's decision in *People v. Heard*, 187 Ill. 2d 36 (1999). In *Heard*, the court held that the trial court's failure to instruct the jury at the time the other-crimes evidence was admitted was not reversible error because the court "properly instructed the jury after closing arguments" pursuant to IPI 3.14. *Id.* at 60-61. The court explained that the "better practice may be for trial court to instruct the jury" both at the time the other-crimes evidence is admitted and at the close of the case, but that the trial court's failure to do so did not "mandate reversal." *Id.* at 61.

¶ 32 Nothing in *Heard* suggests that IPI 3.14 is necessary in every case in which evidence of uncharged criminal activity is introduced. To the contrary, our supreme court has repeatedly stated that the issuance of jury instructions is within the province of the trial court and its decisions to give or withhold instructions will only be reversed for an abuse of discretion. *Heard*, 187 Ill. 2d at 58; *Lovejoy*, 235 Ill. 2d at 150. In this case, we cannot say that the trial court abused its discretion when it refused to give IPI 3.14 to the jury.

¶ 33 IV. CONCLUSION

¶ 34 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 35 Affirmed.