2016 IL App (2d) 140454-U
No. 2-14-0454
Order filed March 30, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHNNY SHOTWELL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 11-CF-160 Honorable Rosemary Collins, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Schostok and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant showed no ineffective assistance of counsel (or thus plain error) in counsel's failure to expressly ask the jury to find defendant guilty of a lesser included offense: the jury was instructed on the lesser offense, and, in convicting defendant of the greater offense, the jury obviously rejected defendant's theory of guilt of the lesser offense; thus, defendant cannot show prejudice pursuant to *Strickland v. Washington.*

¶ 2 Defendant, Johnny Shotwell, appeals his conviction of unlawful possession of a stolen vehicle (625 ILCS 5/4-103(a)(1) (West 2010)). He contends that his counsel's failure to argue to the jury that he should be found guilty of the lesser included offense of criminal trespass to a vehicle (720 ILCS 5/21-2 (West 2010)) was plain error and ineffective assistance of counsel.

The State contends that there was no prejudice shown, as the jury was properly instructed on the lesser included offense. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 28, 2011, defendant was indicted in connection with a November 20, 2010, incident in which he took a car from the parking lot of a restaurant in Rockford. In May 2012, a jury trial was held.

¶ 5 Evidence at trial showed that, on November 20, 2010, defendant was at a restaurant in Rockford at the same time as Kristopher Washburn, who was there with some friends. Washburn was driving a car that belonged to his father. Before Washburn left, he went outside and started the car to warm it up. He then went back inside to use the restroom. Shortly after, his friend ran in and told him that somebody had stolen the car.

¶ 6 Washburn called the police and then went out looking for the car with his father, a retired deputy sheriff. They found it parked against a guard rail in a vacant lot near a bar. The keys were gone, one of the headlights was smashed, the radio faceplate and an iPod were missing, and the glove box had been ripped open. Washburn identified defendant from a photo lineup as a person he had seen at the restaurant that night, and one of Washburn's friends identified defendant as the person who took the car.

¶ 7 Defendant admitted to being at the restaurant and testified that he took the car as a prank after someone in the parking lot suggested it to him. He said that he intended to move it to the other side of the parking lot, but some people started chasing him, so he panicked and drove away. He drove to the bar where the car was later found to meet his brother and then left quickly. He did not call the police. He testified that he was not thinking straight and realized that what he had done was not a smart decision. He said that the headlight was already smashed

when he took the car and that he left it at the bar with the keys in it and in the same condition it was in when he took it.

¶ 8 At defense counsel's request, the court agreed to instruct the jury on the lesser included offense of criminal trespass to a vehicle. During closing, counsel focused on the State's lack of proof that defendant intended to steal the car or intended to permanently deprive the owner of its use. Counsel asked the jury to find defendant not guilty. The jury was instructed on the elements of unlawful possession of a stolen motor vehicle, including the requirements that the defendant knew that it had been stolen and intended to permanently deprive the owner of its use. The jury was also instructed on the lesser included offense of criminal trespass to a vehicle. The jury found defendant guilty of unlawful possession of a stolen motor vehicle.

¶ 9 Defendant filed a *pro se* motion for a new trial, alleging ineffective assistance of counsel, but did not raise an issue concerning his counsel's failure to specifically ask the jury to find him guilty of criminal trespass to a vehicle. New counsel was appointed, who adopted defendant's *pro se* motion. After a hearing, the motion was denied. Defendant was sentenced to eight years' incarceration. He appeals.

¶ 10 II. ANALYSIS

¶ 11 Defendant contends that his counsel was ineffective for failing to specifically argue to the jury that it should find him guilty of the lesser included offense of criminal trespass to a vehicle. Defendant concedes that he forfeited this issue by failing to raise it in his posttrial motion (see Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013)), but he asks that we address it as plain error.

¶ 12 Under the plain-error rule, an appellate court may consider unpreserved error when either (1) the evidence is so closely balanced that the error alone might have been the decisive factor against the defendant, or (2) the error was so substantial that the defendant was deprived of a fair

trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). If a defendant can prove ineffective assistance of counsel, it is considered a substantial impairment of fundamental rights, thus satisfying the second prong of the plain-error test and triggering the plain-error rule. *People v. McCarter*, 385 Ill. App. 3d 919, 928 (2008). Accordingly, we address defendant's ineffective-assistance claim. See *id*.

¶ 13 To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984). To satisfy the first prong, the defendant must show that his counsel's performance was deficient because it fell below an objective standard of reasonableness. *People v. Harris*, 206 Ill. 2d 1, 16 (2002). To meet the second prong, the defendant must demonstrate prejudice by showing a reasonable probability that, but for counsel's deficiencies, the result of the proceeding would have been different. *Id*. If such a claim can be disposed of because the defendant suffered no prejudice, then we need not decide whether counsel's performance was deficient. *People v. Villanueva*, 382 Ill. App. 3d 301, 308 (2008).

¶ 14 Here, defendant cannot show prejudice. The jurors were instructed on the elements of unlawful possession of a stolen vehicle and the lesser included offense of criminal trespass to a vehicle. We presume that the jury followed the court's instructions. *People v. Taylor*, 166 Ill. 2d 414, 438 (1995). Although counsel did not specifically ask the jury to find defendant guilty of criminal trespass to a vehicle, counsel's argument focused on defendant's lack of intent to permanently deprive the owner of the vehicle. If the jury had accepted that argument, it would have found defendant not guilty or guilty of criminal trespass to a vehicle. Because the jury found defendant guilty of unlawful possession of a stolen vehicle, it clearly did not believe the defense theory that defendant took the vehicle as a prank. It thus would not have convicted

defendant of the lesser included offense in any event. Accordingly, even if a deficiency were found, prejudice could not be shown. As a result, defendant has not shown that he was deprived of effective assistance of counsel or that there was plain error.

¶ 15 III. CONCLUSION

¶ 16 Defendant has failed to show ineffective assistance of counsel or plain error. Accordingly, the judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 17 Affirmed.