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2015 IL App (3d) 130161-U

Order filed March 16, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

| | | |
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| THE PEOPLE OF THE STATE OF |) | Appeal from the Circuit Court |
| ILLINOIS |) | of the 12th Judicial Circuit, |
| |) | Will County, Illinois. |
| Plaintiff-Appellee, |) | |
| |) | Appeal No. 3-13-0161 |
| v. |) | Circuit No. 11-CF-1569 |
| |) | |
| MICHAEL W. MCGRUFF, |) | Honorable |
| |) | Daniel J. Rozak |
| Defendant-Appellant. |) | Judge, Presiding |

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice McDade and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant received ineffective assistance of counsel when his attorney failed to submit a jury instruction on accomplice-witness testimony.

¶ 2 Defendant Michael McGriff was convicted by a jury of theft and conspiracy to commit theft. He was sentenced to terms of imprisonment of 2, 4, and 6 years, and ordered to pay \$195,000 in restitution. He appealed his conviction and his sentence. We reverse and remand.

¶ 3 **FACTS**

¶ 4 Defendant Michael McGriff was indicted with one count each of theft exceeding \$100,000 but not exceeding \$500,000 (720 ILCS 5/16-1(a)(1)(A), (b)(6) (West 2010)); theft exceeding \$10,000 but not exceeding \$100,000 (720 ILCS 5/16-1(a)(1)(A), (b)(5) (West 2010)); conspiracy to commit theft (720 ILCS 5/8-2(a) (West 2010)); and burglary (720 ILCS 5/19-1 (West 2010)). The burglary charge was later dismissed. The charges alleged that between June 30 and July 2, 2011, McGriff agreed with Lance Ratcliff to commit theft; that on July 2, 2011, McGriff drove a tractor-truck to a Kraft warehousing site in Joliet and knowingly obtained unauthorized control over a trailer owned by RWI Transportation (RWI) and food products owned by Kraft Foods, intending to permanently deprive RWI and Kraft of their respective property.

¶ 5 A jury trial took place. The evidence presented established that at about 6 p.m. on July 2, 2011, a theft took place at the Kraft warehousing site in Joliet. A RWI trailer valued at \$22,500 and \$192,999 in Kraft food products on the trailer were stolen. The trailer was recovered on July 4, and was empty, aside from two empty pallets and wrapping materials. Chris Linares, an officer with the cargo theft task force of the Illinois State Police (ISP), and Daniel Wooten, a Joliet police officer assigned to the ISP auto theft unit, investigated the theft. Linares testified that he obtained the Kraft logbook maintained by the security guards manning the guard shack. The logbook dates are June 30, 2011, through July 2, 2011. The June 30 entry reflects a Sunco tractor-truck with tractor number 2737, driven by Mike, with a “Time In” of 1725 (5:25 p.m.) and a “Time Out” of 1745 (5:45 p.m.). The entries for July 1 and July 2 do not include Sunco or Mike. The final entry for July 2 is scratched out.

¶ 6 Linares also obtained surveillance videos from the warehousing facility and the videos, which contain views from different locations, were shown for the jury. They depict a tractor-

truck entering the facility and passing the guard shack without stopping; the tractor parking near a loading dock; two men exiting the tractor and one of them entering the guard shack and then exiting; a security guard exiting the shack, walking out of the cameras' view, and reappearing and returning to the guard shack; the two men from the tractor-truck inspecting a trailer and driving within the facility with the trailer attached to the tractor; and the tractor-truck with the trailer attached exiting the facility without stopping at the guard shack. According to Linares, paper was used to cover the identifying information on the tractor-truck. The driver of the tractor and any numbering or logos on the tractor cannot be identified from the videos.

¶ 7 Linares and Wooten interviewed Lance Ratcliff on several occasions. The first time officers sought to talk to him at his home, Ratcliff hid under a pile of dirty laundry. His versions of events differed at the various interviews. Ratcliff eventually worked with law enforcement after the state's attorney's office agreed not to prosecute him in exchange for his cooperation. Ratcliff implicated McGriff in the theft and picked McGriff out of a photographic array. He told the officers that McGriff approached him on June 30 and explained that he was going to commit and cover up the theft, and then paint his tractor-truck.

¶ 8 Linares contacted Sunco, McGriff's employer, which provided photographs taken in 2008 depicting the tractor-truck assigned to McGriff on the date when the theft occurred. The photographs show an International tractor-truck, with a white base with the number 2737 on the front of the wheel on the driver's side, and "USDOT 192955" and "ProSLEEPER" on the right of the driver's door. The driver and passenger doors were marked with a Sunco logo with black, blue, and white stripes that extended horizontally to the rear of the tractor. Linares testified that McGriff's Sunco tractor-truck and the tractor shown in the video shared physical characteristics, including side mirrors, a sun screen above the windshield, the license plate bracket, fender

configurations, grills and bumpers, the saddle tank and engine compartment. It was a common International design and the features were common to other tractor-trucks. According to Linares, paper was placed on the tractor to cover the area where the Sunco logo and stripes were located. He admitted the area on tractor was a common area for logos for other companies.

¶ 9 The tractor-truck, which was not reported stolen, was located in August 2011. The Sunco logos had been removed and the tractor had been painted blue in one area. There was painter's tape attached to parts of the blue color, which indicated to Linares that the tractor had been repainted. Linares admitted that no Kraft products were found in McGriff's tractor or in his possession, and the investigation did not reveal McGriff received any proceeds from the theft. Linares also admitted it would have been difficult to identify the thieves without Ratcliff's cooperation.

¶ 10 Ratcliff testified for the State. In exchange for his cooperation, the State agreed not to prosecute him for his role in the theft. Ratcliff worked at the guard shack and was on duty there on July 2. Part of his guard duties included maintaining the logbook to document trucks entering and exiting the facility. He met various drivers and became acquainted with McGriff and the Sunco tractor-truck McGriff drove. Other Sunco tractors also used the facility. He did not have any relationship with McGriff outside of the Kraft facility and he harbored no animosity toward McGriff. He was approached by McGriff on June 30 and asked about getting an empty trailer to scrap. McGriff promised Ratcliff payment for his assistance and informed Ratcliff he would paint his Sunco tractor after the theft. McGriff said he would return on July 2. According to Ratcliff, his shift ended at 4 p.m. on June 30, but he stayed in the guard shack for an additional hour to help the next guard on shift, who was new to the position. He acknowledged that the logbook indicated that McGriff arrived at the facility at 5:25 p.m. on June 30.

¶ 11 Ratcliff said he was working alone on July 2 at 6 p.m. A tractor-truck drove by the guard shack in a blur and he then noticed someone standing by the guard shack. Ratcliff did not know the person, who said he was there to get an empty and told Ratcliff to go to the bathroom. Ratcliff was scared, did not question the man, and after the man left the guard shack, he went to the port-a-potty as directed. After he left the port-a-potty, he saw McGriff with the other man closing the back of a trailer and realized the events were connected to McGriff's plan. The men drove past the guard shack and honked the horn but did not stop for the normal security procedures. Ratcliff told Linares he was aware a theft had occurred and that he might be in trouble. Ratcliff admitted that he made and scratched out the last entry in the logbook on July 2. He claimed to have done so in order to assist the next guard on shift.

¶ 12 Ratcliff did not call the police, surmising that they would not come. He did not have a phone and the phone in the guard shack did not work. After July 2, Ratcliff was relieved of his guard duties and did not return to the facility. He had no further contact with McGriff and never received any proceeds or cash for his role in the theft. Ratcliff subsequently talked to the police several times about the theft. When the police first questioned him at his house, he gave what he described as a "partial statement." A written statement he provided the police that indicated a mystery tractor-truck rushed in, grabbed a trailer, and rushed back out without leaving any information. He explained he was not initially forthcoming to the police because he was worried about getting in trouble. Ratcliff ultimately gave a statement implicating McGriff.

¶ 13 The defense rested without presenting a case. Closing arguments took place. During rebuttal, the State informed the jury that Linares was telling the truth about finding painter's tape on McGriff's truck and that it was "preposterous" that he would lie about the case. The State also argued that it would be "[w]ay, way, way impossible" for Ratcliff to have made up

information about a tractor-truck that matched the one assigned to McGriff. The State asked the jury to consider their common sense experience as driver and familiarity with other company logos. The prosecutor stated that if the truck in the video was not McGriff's truck, then McGriff "would have had to find another company's truck that had the exact same logo so he can cover it up in exactly the same way to make the truck look totally clean."

¶ 14 The trial court instructed the jury, including several instructions regarding witness credibility. The jury was not provided an accomplice-witness instruction. After deliberations, the jury found McGriff guilty on all counts. A sentencing hearing took place and the trial court sentenced McGriff to concurrent sentences of 4 years for theft exceeding \$100,000 but not \$500,000; 3 years for theft exceeding \$10,000 but not \$100,000, and 2 years for conspiracy to commit theft. The trial court ordered nearly \$195,000 in restitution to Kraft but did not specify a method or time for payment. McGriff appealed.

¶ 15 ANALYSIS

¶ 16 McGriff raises four issues on appeal. We first consider his claim that he received ineffective assistance of counsel. McGriff argues that his trial counsel was ineffective for failing to tender an accomplice-witness instruction as to Ratcliff's testimony. He maintains he was entitled to the accomplice-witness instruction because the evidence established probable cause to believe that Ratcliff was guilty of theft as a principal or an accessory. McGriff asserts that trial counsel's performance was deficient and the deficiency prejudiced him.

¶ 17 All defendants have a constitutional right to the effective assistance of counsel. Ill. Const. 1970, art. I, § 8; *People v. Domagala*, 2013 IL 113688, ¶ 36. To prevail on a claim of ineffective assistance, a defendant must meet the two-prong *Strickland* standard. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the first prong, the defendant must demonstrate

the counsel's performance was deficient. *Strickland*, 466 U.S. at 687. Under the second prong, the defendant must show counsel's deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687. On appeal, we consider whether counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1994).

¶ 18 “ ‘Fundamental fairness includes, among other things, seeing to it that certain basic instructions, essential to a fair determination of the case by the jury, are given.’ ” *People v. Gonzalez*, 385 Ill. App. 3d 15, 21 (2008) (quoting *People v. Pegram*, 124 Ill. 2d 166, 173 (1988)). It cannot be considered trial strategy where defense counsel argues a defense theory but does not ensure the jury is instructed on the theory. *Gonzalez*, 385 Ill. App. 3d at 21. There must be some evidence in the record to justify an instruction. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008).

¶ 19 An accomplice's testimony is notoriously unreliable. *People v. Wilson*, 66 Ill. 2d 346, 349 (1977). The hope of leniency is a strong motivation for an accomplice to testify falsely. *People v. Jordan*, 247 Ill. App. 3d 75, 84 (1993) (citing *People v. Riggs*, 48 Ill. App. 3d 702, 705 (1977)). The test to determine whether a witness should be considered an accomplice is whether the witness could have been indicted for the offense as a principal or an accessory. *People v. Travis*, 94 Ill. App. 3d 983, 992 (1981). An accomplice must “ ‘knowingly, voluntarily, and with common interest unite with the principal offender in the commission’ ” of the offense. *People v. Wheeler*, 401 Ill. App. 3d 304, 311-12 (2010) (quoting *Travis*, 94 Ill. App. 3d at 991). The accomplice-witness jury instruction should be given when the totality of the evidence and the reasonable inferences from the evidence establish probable cause to believe that the witness participated in the crime. *Wheeler*, 401 Ill. App. 3d at 313.

¶ 20 The accomplice-witness jury instruction provides:

“When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case.”

Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000).

¶ 21 McGriff’s trial counsel should have tendered the jury instruction on accomplice-witness testimony. The evidence presented at trial established that Ratcliff knowingly, voluntarily and with common interest united with McGriff in order for McGriff to successful accomplish theft of the trailer. Although he offered different versions of the his role in the theft, Ratcliff admitted McGriff approached him about the plan ahead of time and that he figured out McGriff’s plan was in effect when he saw McGriff at the trailer with the unidentified man who approached him at the guard shack. Ratcliff also testified he knew a theft occurred and he could be in trouble for it.

¶ 22 Although the jury was instructed that it was to determine the credibility of the witnesses, the accomplice-witness instruction is a stronger statement that they should consider accomplice witness testimony suspect. Had the instruction been given, there is a reasonable possibility that the jury would not have convicted McGriff. Ratcliff’s testimony was critical to the State’s case. Ratcliff was the only eyewitness to the events and he admitted his participation in the theft. The only other witnesses were the investigating officers, both of whom testified regarding Ratcliff’s role in the crime. The log book entry also supports Ratcliff’s role as an accomplice. The video evidence was insufficient to identify the participants in the theft or the trailer-truck used in its commission. Because the totality of the evidence and the reasonable inferences from the

evidence established probable cause that Ratcliff participated in the crime, we find that McGriff's trial counsel was ineffective for failing to offer the accomplice-witness instruction.

¶ 23 Our finding on McGriff's ineffective assistance of counsel claim is dispositive and we will not address his assertion that he is entitled to a new trial due to the cumulative effect of errors that took place during trial. We will, however, address McGriff's other two claims on appeal: whether the trial court erred when it entered a conviction and sentence for conspiracy, and when it failed to specify the time and manner of restitution payment.

¶ 24 McGriff submits that because he was also convicted of theft, the conspiracy conviction and sentence cannot stand and it and should be vacated. A defendant cannot be convicted of both the inchoate offense and the principal offense. 720 ILCS 5/8-5 (West 2010). Judgment and sentence can be entered on either offense but not on both offenses. *People v. Gomez*, 286 Ill. App. 3d 232, 235 (1997). Where a defendant has been improperly convicted of both the inchoate and principal offenses, the proper remedy is to vacate the conviction and sentence for the inchoate offense. *People v. Johnson*, 250 Ill. App. 3d 887, 905 (1993).

¶ 25 The jury convicted McGriff of both theft and conspiracy to commit theft. The trial court sentenced him on the theft and conspiracy convictions and entered judgment on both. The conviction and sentence on the conspiracy count were improper and cannot stand. Although McGriff did not raise this issue in the trial court, review is appropriate under the plain error doctrine. *People v. Haycraft*, 349 Ill. App. 3d 416, 429-30 (2004). The State concedes the error. We agree and find that the conviction and sentence for conspiracy must be vacated.

¶ 26 McGriff also argues that the trial court erred when it failed to specify the time and manner of payment. McGriff maintains that the case must be remanded for a proper restitution order to be entered because the trial court erred in failing to specify the time and manner of

payment of restitution as statutorily required. McGriff did not challenge the restitution order in his posttrial motion but this court may review the issue as plain error. *People v. Rayburn*, 258 Ill. App. 3d 331, 335 (1994) (reviewing restitution order for plain error); *People v. McCormick*, 332 Ill. App. 3d 491, 500 (2002) (improper restitution order vacated under second prong of plain error doctrine).

¶ 27 A trial court ordering restitution must consider the defendant's financial resources and determine whether restitution should be paid in a single payment or in installments, and shall fix a period of time for repayment not greater than five years. 730 ILCS 5/5-5-6(f) (West 2010). A restitution order where the court failed to specify particulars regarding payment is an insufficient and incomplete order. *In re Estate of Yucis*, 382 Ill. App. 3d 1062, 1067 (2008) (time for payment); *People v. Hayes*, 173 Ill. App. 3d 1043, 1052 (1988) (method of payment). A restitution order that fails to comply with the statute requires remand for the trial court to amend the restitution order to specify time and manner of payment. *People v. Lambert*, 195 Ill. App. 3d 314, 334 (1990).

¶ 28 The State also concedes this issue. The restitution order in the instant case only ordered McGriff to pay restitution of \$195,000. It did not specify time or manner of payment. Accordingly, remand is required and the trial court should enter an order specifying the time and manner McGriff is to pay the restitution amount.

¶ 29 In summary, we conclude that McGriff was denied effective assistance of counsel and a fair trial. The conviction and sentence for conspiracy cannot stand. Because the restitution order did not specify the time and manner of payment, it was insufficient and must be vacated.

¶ 30 The judgment of the circuit court of Will County is reversed and the cause remanded.

¶ 31 Reversed and remanded.