THIRD DIVISION
June 15, 2011

No. 1-09-0927

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KHALEEL ZARIF, Defendant-Appellant.	)))))))))	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY No. 08 CR 8104 HONORABLE THOMAS JOSEPH HENNELLY, JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Murphy concurred in the judgment of the court.

O R D E R

HELD: Where defendant was convicted of possession of a stolen motor vehicle, defense counsel was not ineffective in: failing to seek jury instructions defining stolen property and theft; objecting to giving the pattern jury instruction on identification in whole or in part; and failing to provide the trial judge with case law ruling that criminal trespass to a vehicle is a lesser-included offense of possession of a stolen motor vehicle. The trial court did not commit plain error by failing to instruct the jury on: stolen property and theft; all five standard factors for judging witness identifications; and criminal trespass to a vehicle. Thus, the judgment of the circuit court of Cook County is affirmed.

Following a jury trial in the circuit court of Cook County, defendant Khaleel Zarif was found guilty of possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2008)) and sentenced to 19 years in prison as a Class X offender. Zarif now appeals his conviction, arguing: (1) his trial counsel was ineffective in failing to seek additional jury instructions defining stolen property and theft; (2) the trial court committed plain error in failing to give the jury instructions defining stolen property and theft *sua sponte*; (3) trial counsel was ineffective for objecting to the pattern jury instruction on identification; (4) the trial court committed plain error by failing to instruct the jury on all five standard factors for judging witness identifications; (5) the trial court committed plain error by refusing to give jury instructions on criminal trespass to a vehicle as a lesser-included offense; and (6) trial counsel was ineffective in failing to provide the trial judge with case law supporting the alleged lesser-included offense. For the following reasons, we reject Zarif's claims and affirm the judgment of the circuit court.

BACKGROUND

The record on appeal discloses the following facts. Michael King testified that on April 9, 2008, he parked and locked his blue 1989 Buick Park Avenue near his home at 4970 North Marine Drive in Chicago, Illinois. At approximately 7:30 a.m. the following morning, King returned to the parking spot and discovered his car missing. King reported the car as stolen to the Chicago police department.

Chicago police officer Veronica Novalez testified that on April 11, 2008, at approximately 4:40 a.m., she was stopped at a red light on Bryn Mawr Avenue when she observed an older Buick driving south on Broadway Street without headlights. Officer Novalez

followed the Buick and ran a computer check on its license plates, which indicated the car was reported stolen. Officer Novalez radioed the police dispatcher that she was following a stolen car and requested assistance. Chicago police officers Lisa Becker and Beth Olsen responded to the call and followed Officer Novalez in their car.

After the Buick turned onto Berwyn Avenue, Officer Novalez activated the lights on her patrol car. The Buick slowed and pulled to the curb. However, as Officer Novalez slowed to pull up behind the car, the Buick sped up, drove around a median, and headed southbound on Wayne Avenue. Both police cars gave pursuit as Officer Novalez requested another vehicle to assist.

At the intersection of Wayne and Foster Avenue, the Buick came to a stop, the doors opened, and the driver and passenger ran from the car. According to Officer Novalez, both persons were Black men wearing black coats and black pants. Officer Novalez testified the passenger wore a knit cap, while the driver had braids. She later acknowledged those details were not in her radio dispatches or police reports.

Officer Novalez pursued the two men east on Foster, while Officers Decker and Olsen investigated the Buick. The two men split up; Officer Novalez pursued the driver down an alley. The driver jumped a fence into a backyard behind a house. Officer Novalez could not get over the fence and waited until she was joined by Chicago police sergeant Patrick Barker. Officer Novalez testified that Sergeant Barker ran to enter the yard at 5128 North Lakewood from the front of the house while she waited in the alley near the fence.

Officer Novalez further testified that she could not see the driver, but heard Sergeant Barker issue an order to someone to come out from under the porch of the house. She then saw the driver, identified in court as Zarif, moving behind the lattice covering the area under the porch. Officer Novalez saw Zarif come out from under the porch and run toward her.

According to Officer Novalez, she came face-to-face with Zarif, from less than a foot away. Officer Novalez again noticed his braids and jacket. She further noted Zarif had "slanted eyes." Zarif then ran back under the porch and again crawled behind the lattice. Officer Novalez heard Sergeant Barker order Zarif to come out again, but she did not see Zarif again until he was in police custody.

Sergeant Barker testified that he responded to Officer Novalez's radio call regarding the reportedly stolen Buick. Sergeant Barker learned that Officer Novalez was in pursuit of the two men. Sergeant Barker also testified he turned north into the alley east of Wayne and north of Foster and saw Officer Novalez in a backyard.

Sergeant Barker went into the neighboring yard and saw a man meeting the police radio description hiding under the porch at 5128 North Lakewood Avenue. Sergeant Barker illuminated the man, identified in court as Zarif, with a flashlight and ordered him to come out from under the porch. Zarif ran from Sergeant Barker to the south side of the porch, exited from under the porch, and ran toward Officer Novalez. Zarif then ran back under the porch.

According to Sergeant Barker, Zarif then broke the lattice and threw it in Sergeant Barker's direction. Sergeant Barker testified that he was about four or five feet away from Zarif and clearly saw his face, although it was foggy that morning. Sergeant Barker also testified Zarif

was roughly 5'10", wearing braids and a black parka. Sergeant Barker added he pursued Zarif as he ran eastbound through a gangway, crossed Lakewood Avenue, entered yards across the street, and continued eastbound.

Moreover, Sergeant Barker testified he lost sight of Zarif after Zarif jumped a fence into a backyard on the east side of Lakewood Avenue. Sergeant Barker jumped the fence, but lost his police radio in the process. Sergeant Barker went back for his radio, then continued his pursuit through an alley and onto Magnolia Avenue. Sergeant Barker met Chicago police officer Stephen McNichols and conducted a yard-by-yard search.

Officer McNichols testified that he and his partner responded to Officer Novalez's radio call for assistance and monitored the pursuit of the foot chase over the police radio. Officer McNichols and his partner went ahead of the chase, hoping to contain it. Officer McNichols discovered a black jacket on the back porch at 5239 Magnolia Avenue. According to Officer McNichols, the jacket was warm and dry, although the morning was cold and foggy. Officer McNichols then walked through a gangway to the front of the property, where he discovered Zarif hiding in the bushes. Officer McNichols took Zarif into custody.

Officer Decker testified about her inspection of the Buick. She and Officer Olsen found the passenger side door lock had been punched out and the steering column was peeled. The police also found screwdrivers on the floor on both the driver and passenger side. The ignition was on the floor on the driver's side, along with a piece of the steering column. Keys to a Dodge and apparent house keys were also found in the Buick. Officer Decker stated the Buick could not be driven because it was out of gasoline. The police inventoried the items and submitted them to

the evidence department. On cross-examination, Officer Decker admitted that she and Officer Olsen "contaminated" the evidence by handling it without gloves.

King testified that on April 1, 2008, at approximately 5 a.m., Chicago police officers brought him to the area of Foster and Wayne Avenues. King observed the passenger side door lock had been punched out, the ignition was "busted," and the cover of the steering column was removed. King also testified the screwdrivers and the keys did not belong to him. King added that he did not know Zarif and had not given Zarif permission to drive the Buick.

The State also submitted the certified business record of the Illinois Secretary of State identifying King as the Buick's owner.

The defense presented a stipulation that Zarif was wearing a checkered shirt and blue jeans at the time of his arrest. Zarif did not testify on his behalf.

During the jury instruction conference, defense counsel stated he would not request Illinois Pattern Instruction (IPI) No. 3.15, Circumstances of Identification (Illinois Pattern Instructions, Criminal, No. 3.15 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.15)), as he previously had. That instruction provides as follows:

"3.15 Circumstances of Identification

When you weigh the identification testimony of a witness, you consider all the facts and circumstances in evidence, including, but not limited to, the following:

[1] The opportunity the witness had to view the offender at the time of the offense;

[2] The witness's degree of attention at the time of the offense;

[3] The witness's earlier description of the offender;

[4] The level of certainty shown by the witness when confronting the defendant; and

[5] The length of the time between the offense and the identification confrontation."

Defense counsel argued the references to "confrontation" in factors four and five of the instruction would confuse the jury because there was no identification confrontation by Officer Novalez. The State noted Officer Novalez identified Zarif in court and there was no need for a police lineup or one-on-one showup in this case. The trial judge noted that the committee notes state that instruction 3.15 should be given when identification is an issue. However, the trial judge ruled that the instruction would be given with only the first three factors, as those were the factors that would be supported by the evidence in the case.

Defense counsel also sought use of Illinois Pattern Instructions Nos. 16.09 and 16.10, which define and state the issues for Criminal Trespass to Vehicle (Illinois Pattern Instructions, Criminal, Nos. 16.09 and 16.10 (4th ed. 2000) (hereinafter, IPI Criminal 4th Nos. 16.09, 16.10), respectively. The State objected on the ground that there was no evidence Zarif was the passenger in the Buick. Defense counsel argued the jury should decide whether the evidence allowed for an identification of the driver versus the passenger. The trial judge stated:

"Unless you can show me some law that criminal trespass to vehicle is a lesser-included [offense of possession of a stolen motor vehicle], and I agree with the State, I don't think it is, I am not going to give that instruction."

Following closing arguments, the trial court instructed the jury, including the modified version of instruction 3.15. The jury was also given Illinois Pattern Instructions Nos. 23.35 and 23.26, which define and state the issues for Possession of Stolen or Converted Vehicle (Illinois

Pattern Instructions, Criminal, Nos. 23.25 and 23.36 (4th ed. 2000) (hereinafter, IPI Criminal 4th Nos. 23.35, 23.36), respectively. The jury was instructed:

> "A person commits the offense of possession of a stolen or converted vehicle when that person possesses a vehicle when not entitled to possession of the vehicle and when knowing it to have been stolen or converted."

The jury was further instructed:

> "To sustain the charge of possession of a stolen or converted vehicle, the State must prove the following propositions:
>
> First: That the Defendant possessed a vehicle; and
>
> Second: That the Defendant was not entitled to possession of the vehicle; and
>
> Third: That the Defendant knew that the vehicle was stolen or converted.
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty.
>
> If you find from your consideration of all of the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the Defendant not guilty."

After the trial court gave the jury instructions, the jury deliberated and found Zarif guilty of possession of a stolen motor vehicle. Zarif filed a posttrial motion for a new trial, arguing: (1) the State failed to prove his guilt beyond a reasonable doubt; (2) the trial judge erred in giving IPI Criminal 4th No. 3.15; (3) the State made erroneous comments during closing argument; (4) he

did not receive a fair trial; and (5) the trial judge erred in denying his motion for a directed finding. Following a hearing, the trial court denied Zarif's posttrial motion and proceeded to a sentencing hearing. After hearing arguments in aggravation and mitigation, the trial court sentenced Zarif to 19 years in prison as a Class X offender. Zarif filed a motion to reconsider his sentence, which the trial court denied on April 2, 2009. Zarif filed a timely notice of appeal to this court that same day.

DISCUSSION

On appeal, Zarif raises a number of issues regarding the jury instructions, both as issued and those refused. Zarif also contends he was denied a fair trial because he was denied his sixth and fourteenth amendment rights (U.S. Const., amend. VI, XIV) to the effective assistance of trial counsel regarding the jury instructions. We will address Zarif's arguments in turn.

I. Defining Stolen Property and Theft

A. Ineffective Assistance of Counsel

Zarif claims his trial counsel was ineffective in failing to seek jury instructions defining stolen property and theft, where the State presented evidence that Zarif participated in the initial taking of the Buick. Generally, in order to show ineffective assistance of counsel, a defendant must establish: (1) counsel's representation fell below an objective standard of reasonableness; and (2) counsel's alleged deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We must show great deference to the attorney's decisions, given a strong presumption that an attorney has acted adequately. *Strickland*, 466 U.S. at 689. A defendant must overcome the strong presumption the challenged action or inaction

"might have been the product of sound trial strategy." *E.g.*, *People v. Evans*, 186 Ill. 2d 83, 93 (1999) (and cases cited therein). Every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. To satisfy the prejudice prong of the *Strickland* test, a defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceedings. *Strickland*, 466 U.S. at 694. Thus, the prejudice component of *Strickland* entails more than an "outcome-determinative test"; rather, the defendant must show that counsel's deficient performance rendered the trial result unreliable or rendered the proceeding fundamentally unfair. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). If a reviewing court finds the defendant did not suffer prejudice, it need not decide whether counsel's performance was constitutionally deficient. *People v. Buss*, 187 Ill. 2d 144, 213 (1999).

In order for a person to be convicted of possession of a stolen motor vehicle, the State must prove beyond a reasonable doubt that defendant possessed the vehicle, that he was not entitled to possession of the vehicle, and that he knew the vehicle was stolen. *People v. Anderson*, 188 Ill. 2d 384, 389 (1999); 625 ILCS 5/4-103(a)(1) (West 2008). The jury was so instructed in this case. Zarif argues his trial counsel was ineffective for failing to request further pattern instructions defining stolen property as "property over which control has been obtained by theft" (IPI Criminal 4th No. 13.33G), and theft as knowingly obtaining or exerting unauthorized

control over property with the intent "to deprive the owner permanently of the use or benefit of the property" (IPI Criminal 4th No. 13.01).

There is no authority that intent to permanently deprive is an element of the offense of possession of a stolen motor vehicle, and the defendant's mental state in this respect is generally irrelevant. *People v. Washington*, 184 Ill. App. 3d 703, 708 (1989). However, a conviction under section 4-103(a)(1) of the Illinois Vehicle Code (Code) (625 ILCS 5/4-103(a)(1) (West 2008)) may be predicated upon possession by the same individual who allegedly committed the theft of the motor vehicle and, in such a case, proof of that person's mental state inconsistent with that required for theft would prevent a conviction under section 4-103(a) of the Code based on possession of a stolen motor vehicle. *Id.* (citing *People v. Cramer*, 85 Ill. 2d 92, 100 (1981)). Zarif primarily relies on two cases, both of which proceeded on the theory that the defendant stole the car.

The first case he relies on is *People v. Cozart*, 235 Ill. App. 3d 1076 (1992), where the trial court refused three instructions offered by a defendant charged with possession of a stolen vehicle. The instructions included the definitions of theft, the phrase "exerts control," and the phrase "permanently deprive." *Cozart*, 235 Ill. App. 3d at 1079. The defense theory was that defendant took the car, but either the car was taken with the driver's permission, or, at worst, the defendant took the car for a joyride. *Id.* The *Cozart* court held the trial court erred in refusing the proffered instructions. Because the evidence showed defendant was the person who stole the car, the State was required to prove intent to permanently deprive the owner of the use of her car. *Id.* at 1081.

The second case Zarif relies on is *People v. Pollards*, 367 Ill. App. 3d 17 (2006), which involved a stolen taxicab. The taxicab company's dispatcher broadcasted a reward for reporting the location of the cab. The dispatcher received a call from the stolen vehicle saying the caller had found the cab. The dispatcher then notified police of the cab's location. *Pollards*, 367 Ill. App. 3d at 18. When police arrived at the location, the defendant, who was sitting in the cab and possessed its keys, asked the police about the reward. *Id.* at 19. Pollards was arrested and ultimately convicted of possession of a stolen motor vehicle. *Id.*

On appeal, the *Pollards* court ruled defense counsel was ineffective in failing to request the jury instructions defining theft and stolen property. *Pollards*, 367 Ill. App. 3d at 21. The court explained that the committee note to IPI Criminal 4th No. 23.35 (defining possession of a stolen motor vehicle) now directs that the instructions defining theft and stolen property should be given. *Id.* The committee note for IPI Criminal 4th No. 23.35 was changed in response to *Cozart*. IPI Criminal 4th No. 23.35, Committee Note, at 214; see *Pollards*, 367 Ill. App. 3d at 23. In addition:

> "The note for IPI Criminal 4th 23.36 [listing the issues to prove possession of a stolen vehicle] states that where 'it is alleged, or the evidence shows, that [defendant] participated in the actual taking of the vehicle, it *may be necessary* to include the phrase "intent to permanently deprive" in the definition and issues instructions.' (Emphasis added.) Although the note says 'may be necessary,' we believe the instruction was necessary under the factual circumstances. The prosecutor alleged during his opening statement and closing argument that defendant was the person who stole the taxicab and

drove off with it. The prosecutor argued defendant was driving the car when he called the dispatcher, based on [the dispatcher's] testimony that he heard traffic noise and wind in the background while he was talking to the defendant. The State's contention that defendant's intent to permanently deprive the owner of his vehicle was not at issue in this case is belied by the prosecutor's approach at trial. The State made it an issue when it introduced evidence and argued that defendant had stolen the vehicle." *Id.* at 21-22. Accordingly, the *Pollards* court concluded the defendant's trial counsel was ineffective:

"Whether the defendant possessed the intent to deprive the owner permanently of the use and benefit of the cab was made a pivotal issue in this case. His intent was not clearly established. Even a casual reading of the Committee Notes to IPI Criminal 4th Nos. 23.35 and 23.36 should have led defense counsel to the realization that the jury required guidance on the issue of the defendant's intent. Had counsel offered the instructions pursuant to the mandate of the Committee Notes we are confident they would have been given. Trial counsel has a duty to conduct both factual and legal investigations on behalf of a client. [Citation omitted.] This court has held a defense counsel's ignorance of the law may be objectively unreasonable and fall below the standard of representation required by *Strickland* where that ignorance results in harm to the client. [Citation omitted.] This is such a case.

As for the second *Strickland* prong, the State contends the defendant was not prejudiced by the alleged error because the defense theory was that the defendant never had possession of the car. True, the issue of possession was not close. However, the

> State made an issue of defendant's intent to permanently deprive when it alleged at trial that defendant stole the car. On that issue, the evidence was close. There is a reasonable probability the trial would have had a different outcome had the jury received the instructions of the definitions of stolen property and of theft. That probability is sufficient to undermine confidence in the outcome of the case." *Pollards*, 367 Ill. App. 3d at 23.

Zarif sees his case as no different from *Pollards*. Zarif asserts "it is undisputed that from the very opening of the trial until the last lines of its closing rebuttal argument, the State vigorously maintained that [he] was the driver of the stolen vehicle." The State responds that it did not allege, argue or attempt to prove that Zarif stole the Buick. Zarif notes the State adduced evidence that the Buick was 'hot wired." The State responds that the evidence of damage to the car and the presence of the screwdrivers is circumstantial evidence that Zarif knew the Buick was stolen, not proof that Zarif stole it or intended to permanently deprive King of it. A review of the trial transcript shows that the State has accurately described its arguments and theory of the case. Accordingly, *Pollards* and *Cozart* are distinguishable.

In sum, the State did not argue or produce evidence showing Zarif stole the Buick. Thus, the State was not required to prove Zarif intended to permanently deprive King of his use of the Buick. Therefore, Zarif cannot show a reasonable probability the trial would have had a different outcome had the jury received the instructions with the definitions of stolen property and of theft. For these reasons, the claim of ineffective assistance of counsel on this point fails.

B. Trial Court Error

Zarif argues in the alternative that the trial court erred in failing to give the jury instructions defining stolen property and theft *sua sponte*. It is the parties' responsibility to prepare jury instructions and tender those instructions to the trial court. *People v. Underwood*, 72 Ill. 2d 124, 129 (1978). "Generally, the trial court is under no obligation either to give jury instructions not requested by counsel or to rewrite instructions tendered by counsel." *Underwood*, 72 Ill. 2d at 129. In addition, a party may not raise on appeal the failure to give a jury instruction unless that party tendered the instruction. Ill. S. Ct. R. 366(b)(2)(I) (eff. Feb.1, 1994). However, substantial defects in jury instructions are not waived for failure to make a timely objection if the interests of justice require. Ill. S. Ct. R. 451(c) (eff. July 1, 2006). "Rule 451(c)'s exception to the waiver rule for substantial defects applies when there is a grave error or when the case is so factually close that fundamental fairness requires that the jury be properly instructed." *People v. Hopp*, 209 Ill. 2d 1, 7 (2004). Under both prongs of the plain error doctrine, " 'the burden of persuasion remains with the defendant.' " *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (quoting *People v. Herron*, 215 Ill. 2d 167, 187 (2005)).

The first step is to determine whether any error was committed. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008). As noted in *Pollards*, the committee note to IPI Criminal 4th No. 23.35 (defining possession of a stolen motor vehicle) directs that the instructions defining theft and stolen property should be given. *Pollards*, 367 Ill. App. 3d at 21. The user's guide to IPI Criminal 4th states: “If a Committee Note indicates to give another instruction, that is a

mandatory requirement." IPI Criminal 4th, User's Guide, at VIII. Thus, it was error for the court to fail to give the additional instructions. See *Hopp*, 209 Ill. 2d at 7. However:

> "[T]he erroneous omission of a jury instruction rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Hopp*, 209 Ill. 2d at 8.

Here, the absent instructions would have defined stolen property as "property over which control has been obtained by theft" (IPI Criminal 4th No. 13.33G), and theft as knowingly obtaining or exerting unauthorized control over property with the intent "to deprive the owner permanently of the use or benefit of the property" (IPI Criminal 4th No. 13.01). As noted earlier, in many cases, intent to permanently deprive is not an element of the offense of possession of a stolen motor vehicle. Cases like *Pollards* and *Cozart* hold the additional instructions must be given where the State proceeds on the theory the defendant also stole the vehicle, for the reasons explained earlier. However, for the reasons already stated, *Pollards* and *Cozart* are not applicable to this case because the State did not proceed on the theory that Zarif stole the Buick.

Furthermore, even in cases where the State is required to prove the intent to permanently deprive, that element may be inferred from the lack of any evidence of an intent to return the property or to leave it in a place where the owner could safely recover it. *People v. Pozdoll*, 230 Ill. App. 3d 887, 890 (1992); *People v. Henry*, 203 Ill. App. 3d 278, 280 (1990). In this case, the evidence shows Zarif abandoned the Buick to flee from the police. There was no evidence Zarif intended to return the Buick or to leave it in a place where King could safely recover it. Thus,

there is not a serious risk that the jury incorrectly convicted Zarif or misunderstood the applicable law. Accordingly, the failure to give the instructions was not plain error.[1]

II. Identification

A. Ineffective Assistance of Counsel

Zarif next argues his trial counsel was ineffective for objecting to giving the pattern jury instruction on identification because the defense theory was misidentification. Zarif cannot show prejudice from the failure to object *per se*, as the trial judge gave a version of the pattern instruction to the jury. Alternatively, Zarif argues counsel was ineffective for objecting to the inclusion of the fourth and fifth factors from the standard patten instruction because the trial judge ultimately gave the instruction without those factors.

The assessment of identification testimony is now customarily conducted by application of the factors set forth in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), and adopted in Illinois. See *People v. Slim*, 127 Ill. 2d 302, 307 (1989). These factors are:

> "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification

[1] Although cited by neither party, we note that in *People v. Alvine*, 173 Ill. 2d 273, 296-98 (1996), the Illinois Supreme Court rejected similar claims of instructional error and ineffective assistance of counsel, precisely because there was ample evidence the defendant stole the car at issue.

> confrontation; and (5) the length of time between the crime and the identification confrontation." *People v. Lewis*, 165 Ill. 2d 305, 356 (1995) (citing *Slim*, 127 Ill. 2d at 307-08).

These *Biggers* factors are the same factors listed in IPI Criminal 4th No. 3.15, which we previously quoted. Although all five factors are generally required, the IPI permits a trial court to omit a particular factor, if such an omission is warranted by the evidence in that individual case. *People v. Rodriguez*, 387 Ill. App. 3d 812, 824 (2008). The IPI committee states the trial judge should give only those "numbered paragraphs that are supported by the evidence." IPI Criminal 4th No. 3.15, Committee Note. In 2003, the IPI committee added a paragraph to its notes stating: " 'The jury should be instructed on only the factors with any support in the evidence. Other factors should be omitted.' " *Herron*, 215 Ill. 2d at 191 (quoting IPI Criminal 4th No. 3.15, Committee Note (Supp. 2003)).

In this case, defense counsel argued that the references to "confrontation" in factors four and five of the instruction would confuse the jury because there was no identification confrontation by Officer Novalez. However, Officer Novalez identified Zarif in court. The drafters of IPI Criminal 4th No. 3.15 may have intended the fourth *Biggers* factor to refer only to the initial identification. However, courts, including our own supreme court, have considered the witness' certainty at trial when applying this factor. *Rodriguez*, 387 Ill. App. 3d at 825-26. The same logic would extend to the fifth *Biggers* factor.

Nevertheless, it does not necessarily follow that counsel was ineffective in objecting to the inclusion of the fourth and fifth factors. Courts have applied such factors in performing a

Biggers analysis, but the references to an identification confrontation could be considered confusing to a jury in a case where there was no lineup or one-on-one showup in evidence. Moreover, in this case, defense counsel chose to distinguish the in-court identification from a lineup or one-on-one showup to attack Officer Novalez's credibility. Defense counsel argued:

> "Let me ask you one more important question, did you hear any evidence that Officer Novalez came over to that house and said, yes, that's the man. Any evidence of that? Was he placed in a lineup for them to – for her to identify, yes, that's the same person I saw? Uh-uh, not a single identification, nothing that you heard, because Sergeant Baker wasn't there when the two people jumped out of the car."

Thus, the record shows trial counsel sought the exclusion of the fourth and fifth *Biggers* factors as part of a sound trial strategy to emphasize the arguable weaknesses in the identification procedure. Accordingly, Zarif cannot show ineffective assistance of counsel on this point.

B. Trial Court Error

Zarif argues in the alternative that the trial court erred in failing to instruct the jury on all five *Biggers* factors. Zarif's posttrial motion argued that the trial court erred in giving IPI Criminal 4th No. 3.15. Zarif thus forfeited the issue by failing to raise it at trial and in his posttrial motion. *E.g.*, *People v. Banks*, 161 Ill. 2d 119, 143 (1994). However, if the interests of justice require it, substantial defects in jury instructions are not waived for failure to make a timely objection and will be reviewed for plain error. *Hopp*, 209 Ill. 2d at 7.

As noted earlier, courts have considered in-court identifications when addressing *Biggers* identification issues. However, the drafters of IPI Criminal 4th No. 3.15 may have intended the

fourth and fifth factors refer only to pretrial identifications. Thus, it is unclear the trial court erred in excluding those factors from the instruction in this case.

Assuming *arguendo* the trial judge erred in his limited interpretation of the instruction, we again note that such error rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they misunderstood the applicable law. *Hopp*, 209 Ill. 2d at 8. In this case, the jurors were instructed, consistent with Illinois Pattern Instruction No. 1.02 (Illinois Pattern Instructions, Criminal, Nos. 23.25 and 23.36 (4th ed. 2000)):

> "Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case."

The jury was instructed to judge the certainty of the identifications made in court and to weigh them in terms of memory, which necessarily implicates the passage of time between the events at issue and the trial. Accordingly, there was no serious risk that the jury misunderstood the law. For these reasons, Zarif cannot show plain error on this point.

III. Criminal Trespass to a Vehicle

A. Trial Court Error

Zarif next claims the trial judge erred in refusing to give jury instructions on criminal trespass to a vehicle as a lesser-included offense of possession of a stolen motor vehicle. Zarif concedes he forfeited the issue by failing to raise it in his posttrial motion. Thus, the issue will be reviewed for plain error.

Although a defendant generally may not be convicted of an offense for which he has not been charged, a defendant may be entitled to an instruction on an uncharged lesser-included offense in some instances. *People v. Phillips*, 383 Ill. App. 3d 521, 540 (2008). The State does not dispute that criminal trespass to a vehicle is a lesser-included offense of possession of a stolen motor vehicle. See *People v. Cook*, 279 Ill. App. 3d 718, 722 (1995). Rather, the State argues that Zarif was not entitled to the instruction in this case.

The identification of a lesser-included offense does not automatically entitle a defendant to have the jury instructed on that offense. *Phillips*, 383 Ill. App. 3d at 540. Instead, a court must examine the evidence presented at trial to determine whether the evidence rationally supports a conviction for the lesser-included offense. *People v. Kolton*, 219 Ill. 2d 353, 361 (2006). "A defendant is entitled to a lesser-included offense instruction only if the evidence at trial is such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." *People v. Medina*, 221 Ill. 2d 394, 405 (2006).

The offense of criminal trespass is committed when a person knowingly and without authority enters any part of or operates any vehicle. (720 ILCS 5/21-2 (West 2008)), while the

offense of unlawful possession of a stolen vehicle is committed when a person not entitled to the possession of a vehicle possesses it knowing it to be stolen (625 ILCS 5/4-103(a)(1) (West 2008)). In this case, the Buick's passenger side door lock had been punched out, its steering column was peeled, screwdrivers were on the floor of the driver and passenger sides, and the ignition was on the floor on the driver's side, along with a piece of the steering column. "The condition of the vehicle is one of the most significant factors which courts consider in determining whether or not the defendant had knowledge of the vehicle's theft." *People v. Abdullah*, 220 Ill. App. 3d 687, 691 (1991). Moreover, Zarif attempted to flee the police, both in the car and on foot, which is further evidence of Zarif's knowledge the Buick was stolen. See *People v. Wheatfield*, 214 Ill. App. 3d 446, 454-55 (1991) (and cases cited therein). Given the record, a jury could not have rationally found him guilty of criminal trespass, but acquitted him of unlawful possession.

Zarif argues the instructions on criminal trespass to a vehicle should have been given because "the evidence at trial presented a classic case of joyriding." Zarif relies on *People v. Woods*, 17 Ill. App. 3d 835 (1974). *Woods*, which involved a defendant who pleaded guilty to the offense of theft of an automobile, dealt, in pertinent part, with whether the trial court had properly determined there was a factual basis for a guilty plea before accepting the plea. *Woods*, 17 Ill. App. 3d at 837. In deciding the issue, this court noted that when the trial court had sought to determine whether the defendant understood the nature of the charge against him, the defendant stated he and his friends were going joyriding on the night of the offense. The court reasoned the defendant's use of the term "joyriding" suggested the intent element of the offense

of theft did not exist. *Id.* The court concluded that, because the trial court had relied entirely upon the defendant's statement to establish a factual basis for his guilty plea, it had not properly determined there was a factual basis for a guilty plea. *Id.* at 838. This case does not involve the intent element of theft. Accordingly, *Woods* is inapplicable here.

Zarif also argues a serious question existed regarding Officer Novalez's testimony that he was the driver. Zarif contends that if he was merely a "passive occupant" of the Buick, he could not be guilty of possession of a stolen motor vehicle. See *People v. Anderson*, 188 Ill. 2d 384, 392-93 (1999). Zarif points to the fact that Officer Novalez did not give any features distinguishing the driver and passenger at the time of the incident or in her police reports. However, the State correctly notes there is no evidence Zarif was the passenger.

Zarif further argues the trial judge implicitly acknowledged the evidence was sufficient to support an instruction on the lesser-included offense because he questioned only the issue of whether criminal trespass to a vehicle was a lesser-included offense of possession of a stolen motor vehicle. However, the standard analysis of this issue, as demonstrated in *Medina, Bolton* and *Phillips,* is to first determine whether the proposed instruction states a lesser-included offense and, if so, whether it should be given in a particular case. Thus, the trial court's ruling does not necessarily imply the trial judge believed the evidence was sufficient to support the instruction in this case.

In sum, given the record before us, the trial judge's refusal to give jury instructions on criminal trespass to a vehicle as a lesser-included offense of possession of a stolen motor vehicle was not plain error.

B. Ineffective Assistance of Counsel

Lastly, Zarif argues that his trial counsel was ineffective for failing to provide the trial judge with cases like *Cook* to establish that criminal trespass to a vehicle is a lesser-included offense of possession of a stolen motor vehicle. However, given our conclusion that Zarif was not entitled to the instructions, he cannot show he was prejudiced by counsel's performance in this respect.

CONCLUSION

In short, we conclude Zarif's trial counsel was not ineffective in failing to seek jury instructions defining stolen property and theft. The trial court's failure to give jury instructions defining stolen property and theft *sua sponte* was not plain error. Zarif's trial counsel was not ineffective for objecting to giving the pattern jury instruction on identification in whole or in part. The trial court's failure to instruct the jury on all five of the standard factors for judging witness identifications was not plain error in this case. The trial judge's refusal to give jury instructions on criminal trespass to a vehicle as a lesser-included offense of possession of a stolen motor vehicle also was not plain error in this case. Zarif's trial counsel was not ineffective in failing to provide the trial judge with case law ruling that criminal trespass to a vehicle is a lesser-included offense of possession of a stolen motor vehicle. For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.