

NOTICE  
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2013 IL App (4th) 111109-U

NO. 4-11-1109

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED  
July 30, 2013  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

|                                      |   |                        |
|--------------------------------------|---|------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from            |
| Plaintiff-Appellee,                  | ) | Circuit Court of       |
| v.                                   | ) | McLean County          |
| ALPHONSO DAVIS,                      | ) | No. 11CF236            |
| Defendant-Appellant.                 | ) |                        |
|                                      | ) | Honorable              |
|                                      | ) | Rebecca Simmons Foley, |
|                                      | ) | Judge Presiding.       |

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JUSTICE HARRIS delivered the judgment of the court.  
Justices Knecht and Turner concurred in the judgment.

### ORDER

¶ 1 *Held:* (1) The jury instruction defining the offense of theft was erroneous but (2) such error was not plain error.

¶ 2 In September 2011, a jury convicted defendant, Alphonso Davis, of theft (720 ILCS 5/16-1(a)(4)(C) (West 2010)). The trial court sentenced defendant to two years' imprisonment.

¶ 3 Defendant appeals, arguing his conviction for theft must be reversed and the case remanded for a new trial because the jury was given inconsistent jury instructions. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On March 24, 2011, the State charged defendant by a single-count information with theft (720 ILCS 5/16-1(a)(4) (West 2010)), an offense for which defendant was extended-term eligible. A superseding indictment was filed on March 30, 2011. Neither charging

instrument included a mental state as set forth in subsections (A) through (C) of the theft statute (720 ILCS 5/16-1(a)(4)(A)-(C) (West 2010)). On September 13, 2011, count I was nol-prossed and an additional count II was added referencing subsection (C) of the theft statute, alleging defendant "abandoned the property knowing the abandonment would probably deprive the owner permanently of such use or benefit." See 720 ILCS 5/16-1(a)(4)(C) (West 2010).

¶ 6 At defendant's September 2011 trial, Patsy Mayer testified that on November 23, 2010, she lived with her daughter, Janie. Janie invited two friends, defendant and Donny Bevers, to sleep in the basement of their home on November 23, 2010. Patsy left for work the following morning. When she returned home, she noticed various pieces of jewelry missing from her dresser. Patsy visited several pawnshops in an effort to locate the jewelry. She found a pair of earrings at Midwest Exchange pawnshop. She did not locate any of the other stolen items.

¶ 7 Janie Mayer testified that she invited defendant and Bevers to her home on November 23, 2010. Defendant and Bevers slept in the basement. Bevers woke Janie at around 11 a.m. on November 24, 2010, and asked to borrow her car. Janie agreed.

¶ 8 William Risoli testified he was employed by Midwest Exchange pawnshop. Risoli explained that individuals can sell items to Midwest Exchange. The owner loses all interest in the item once it is sold to Midwest Exchange. To complete a sale, the seller must provide identification and sign a document. The entire transaction is videotaped. According to Risoli, law enforcement requires all items sold to Midwest Exchange to be held for four days before placing them for sale in the pawnshop.

¶ 9 Risoli identified People's exhibit No. 2 as a bill of sale used at Midwest Exchange, documenting the sale of the stolen earrings to Midwest Exchange on November 27, 2010, by

defendant. Risoli testified that he was working on December 1, 2010, when Patsy Mayer came into the pawnshop. Patsy identified a pair of earrings as those that had been stolen from her home. The trial court admitted into evidence a video recording of defendant selling the earrings to Midwest Exchange and allowed the State to play the recording for the jury.

¶ 10 Evan Morgan testified she is defendant's girlfriend. She and defendant were at Eastland Mall on November 27, 2010. They were walking around the mall when Bevers approached and "pulled [defendant] away." According to Morgan, Bevers and defendant left the mall and returned approximately 30 minutes later.

¶ 11 On September 14, 2011, a jury found defendant guilty of theft. On November 18, 2011, the trial court denied defendant's posttrial motion and sentenced defendant to two years in prison.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Section 16-1 of the Criminal Code of 1961 states in relevant part:

"(a) A person commits theft when he knowingly:

\* \* \*

(4) Obtains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen; \*\*\*

\*\*\* and

(A) Intends to deprive the owner permanently of the use or benefit of the property; or

(B) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(C) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit." 720 ILCS 5/16-1(a)(4)(A)-(C) (West 2010).

¶ 15 Defendant argues the jury was not properly instructed because the tendered jury instruction defining theft (Illinois Pattern Jury Instructions, Criminal, No. 13.23 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 13.23)) referenced subsection (A) of the theft statute, and not subsection (C) as charged in count II of the information. Defendant admits the issues instruction for theft (Illinois Pattern Jury Instructions, Criminal, No. 13.24 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 13.24)) correctly set forth the elements of the charged offense. Defendant asserts he suffered prejudice from the inconsistent instructions, warranting a new trial.

¶ 16 Whether the jury instructions accurately conveyed to the jury the applicable law is reviewed *de novo*. *People v. Parker*, 223 Ill. 2d 494, 501, 861 N.E.2d 936, 939 (2006).

¶ 17 The trial court instructed the jury, in part, as follows:

"A person commits the offense of theft when he knowingly obtains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe the property was stolen, *and he intends to*

*deprive the owner permanently of the use or benefit of the property.*

To sustain a charge of theft, the State must prove the following propositions. The first proposition, that Patsy Mayer was the owner of the property in question. And the second proposition, that the defendant knowingly obtained control over the earrings in question. And the third proposition, that the defendant knew the earrings had been stolen by another or that the defendant obtained control under such circumstances as would reasonably induce him to believe the earrings were stolen. And the fourth proposition, that the defendant *abandoned the earrings knowing that the owner will thereby probably be deprived permanently of its use or benefit.*

And 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 the evidence, that each one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

(Emphases added.)

¶ 18 Defendant acknowledges he failed to preserve this issue but maintains the issue may be addressed by this court under the plain-error doctrine. In *People v. Sargent*, 239 Ill. 2d 166, 188-89, 940 N.E.2d 1045, 1058 (2010), our supreme court stated:

"Supreme Court Rule 366(b)(2)(i) (155 Ill. 2d R. 366(b)(2)(i)) expressly provides that '[n]o party may raise on appeal the failure to give an instruction unless the party shall have tendered it.' In addition, our court has held that a defendant will be deemed to have procedurally defaulted his right to obtain review of any supposed jury instruction error if he failed to object to the instruction or offer an alternative at trial and did not raise the issue in a posttrial motion. *People v. Piatkowski*, 225 Ill. 2d 551, 564[, 870 N.E.2d 403] (2007).

Limited relief from this principle is provided by Supreme Court Rule 451(c) (177 Ill. 2d R. 451(c)), which states that 'substantial defects' in criminal jury instructions 'are not waived by failure to make timely objections thereto if the interests of justice require.' \*\*\*

The purpose of Rule 451(c) is to permit correction of grave errors and errors in cases so factually close that fundamental fairness requires that the jury be properly instructed. The rule is coextensive with the plain-error clause of Supreme Court Rule 615(a) (134 Ill. 2d R. 615(a)) \*\*\*."

¶ 19 The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

"(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." *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1058.

¶ 20 We begin our plain-error analysis by first determining whether any error occurred at all. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059. If error did occur, this court then considers whether either of the two prongs of the plain-error doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. Under both prongs, the defendant bears the burden of persuasion. *Sargent*, 239 Ill. 2d at 190, 940 N.E.2d at 1059.

¶ 21 We observe that "the several 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, 850 N.E.2d 199, 203 (2006). But the different methods of performance may nonetheless require proof of different elements. Central to subsections (A) through (C) is the concept of permanently depriving the owner of the use or benefit of her property. *People v. Haissig*, 2012 IL App (2d) 110726, ¶ 29, 976 N.E.2d 1121.

¶ 22 It is undisputed that the instruction defining theft, given to the jury here, referred to the mental state in subsection (A) ("Intends to deprive the owner permanently of the use or benefit of the property"), and not subsection (C) ("Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of

such use or benefit"), as charged in count II of the information. However, the error was not so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process. See *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1058.

¶ 23 To sustain the charge of theft in the present case, the State had to prove the following four elements beyond a reasonable doubt: (1) Patsy was the owner of the earrings; (2) defendant knowingly obtained control over the earrings; (3) defendant knew that the earrings had been stolen or obtained control of the earrings under such circumstances as would reasonably induce him to believe that the earrings were stolen; and (4) defendant abandoned the earrings knowing Mayer would probably be deprived permanently of their use or benefit. See 720 ILCS 5/16-1(a)(4)(C) (West 2010); IPI Criminal 4th No. 13.24.

¶ 24 During *voir dire*, the trial court read to the jury from the information stating:  
"The defendant is charged with the offense of theft by possession.  
The State alleges that on or about November 24th of 2010, he, or one for whose conduct he was legally responsible, possessed jewelry belonging to Patsy Mayer, knowing such property to be stolen or under such circumstances as would reasonably induce him to believe that the property was stolen, *and that he abandoned the property, knowing the abandonment would probably deprive the owner permanently of such use or benefit.*" (Emphasis added.)

¶ 25 The defense position at trial was that defendant did not know the earrings were stolen. Both the prosecutor and defendant in opening statements and closing arguments repeatedly identified the issue in the case as whether defendant knew the earrings were stolen or

obtained control of the earrings under such circumstances as would reasonably induce him to believe that the earrings were stolen. As to this element of the charge, the two instructions *are* consistent. Both instructions informed the jury that in order to find the defendant guilty of theft, it had to find he knowingly obtained control over the earrings knowing they were stolen or under such circumstances as would reasonably induce him to believe they were stolen. Therefore, the parts of the two instructions on which defendant based his defense, that he did not know the earrings were stolen or have reason to believe they were stolen, were consistent and correct. The inconsistency between the instructions went to an element of the charge upon which there was ample proof, that the defendant sold or pawned the earrings thus depriving the owner permanently of their use or benefit.

¶ 26 Further, the evidence which established defendant committed a theft was not closely balanced. Patsy undisputedly was the owner of the earrings. Patsy testified that when she returned home from work on November 23, 2010, she noticed various pieces of jewelry missing from her dresser. Defendant and Bevers had spent the night in her basement. Patsy found a pair of her earrings at Midwest Exchange on December 1, 2010. A bill of sale and video recording showed defendant sold the earrings to Midwest Exchange on November 27, 2010. Thus, we find no plain error to excuse defendant's forfeiture of this issue.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 29 Affirmed.