2017 IL App (1st) 143690-U

FOURTH DIVISION
May 18, 2017

No. 1-14-3690

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 19227
	)	
DESHAUN GUY,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

O R D E R

Held: Defendant's conviction for possession of a stolen motor vehicle is affirmed where inadmissible hearsay testimony was not used to establish an element of the offense.

¶ 1 Following a bench trial, defendant, Deshaun Guy, was convicted of possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2012)) and sentenced to Cook County Department of Corrections boot camp. On appeal, defendant contends that his conviction must be reversed because inadmissible hearsay testimony was used to establish an element of the offense. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 The indictment charged defendant, in relevant part, with possession of a stolen motor vehicle in that "he, not being entitled to the possession of a motor vehicle, to wit: 2012 Ford Fusion, property of the Hertz Corporation, possessed said vehicle knowing it to have been stolen or converted."

¶ 4 At trial, Cicero police officer Mario Alegria testified that, at approximately 3:50 a.m. on August 20, 2012, he was on patrol. In response to a radio dispatch, Alegria drove to 1201 47th Avenue, where he observed Officer Garrity approaching a white Ford Fusion with the license plate number N443822. Alegria followed Garrity and saw defendant in the driver's seat of the vehicle. Garrity asked defendant to exit the vehicle. Defendant stepped out of the vehicle, shut the door and began to run. The officers chased after him, eventually restraining him after he tripped and fell to the ground. As the officers handcuffed defendant, he told them that he ran because "he knew the car was stolen" and explained that a friend had lent the vehicle to him.

¶ 5 James Kuzynowski, corporate security manager for the Hertz Corporation (Hertz), testified that he was aware of how Hertz kept and maintained its business records during the ordinary course of business. Hertz maintained two computerized systems, "ASAP" and "Car Rent." Kuzynowski explained that, when Hertz would rent a vehicle, the renter would be assigned a unique rental number. This number could be used to access certain information, including the vehicle's license plate number, the vehicle's identification number and the name of the renter. When the rental is made, the number would automatically be entered into Hertz's ASAP system.

¶ 6 Kuzynowski identified People's Exhibit No. 1 as a rental agreement for Advantage Car Rental, a subsidiary of Hertz. He testified that the agreement was kept and maintained during the ordinary course of business and pertained to a 2012 Ford Fusion with the license plate number

N443822. According to Kuzynowski, the agreement stated that the vehicle had been rented by Gerald Carrao and no one else was authorized to drive the vehicle. Kuzynowski specifically stated that, based on his review of the agreement, defendant was not authorized to drive the vehicle. The agreement had not been amended to add any other drivers. The agreement was dated July 21, 2012, and bore an "end time" of August 22, 2012, the date the vehicle had been returned to Hertz.

¶ 7 During the State's examination of Kuzynowski, the following colloquy occurred:

"Q. With respect to this vehicle, did the Hertz Corporation receive any information that this vehicle was stolen?

A. Yes, they did.

Q: And based on your review of People's Exhibit 1, how did they receive that information?

A. I'm sorry. I didn't hear you.

Q. When did they receive that information about the vehicle being stolen?

A. On August 6th, we subscribed to the NICB, which notified us that there was a stolen alarm that was entered into the nationwide database as a stolen vehicle. We were notified on August 6th.

* * *

Q. Sir, you just testified a moment ago that you learned that the vehicle was reported stolen. That was August 6th of what year?

A. 2012."

Kuzynowski further testified that Hertz required its customers to show a valid driver's license before being allowed to rent and drive a Hertz vehicle. The State entered the rental agreement into evidence without objection.

¶ 8 On cross-examination, defense counsel asked Kuzynowski who triggered the alarm from "NICB," and Kuzynowski responded that "[t]he renter reported it stolen on August the 5th." Kuzynowski "believe[d]" this report was made to the Elmwood Park Police Department. Kuzynowski added that, every morning, Hertz would receive a printout from "NICB, which is associated with LEADS and NCIC and the Federal Law Enforcement System," detailing "all vehicles that were stolen or reported stolen or recovered."

¶ 9 Defendant testified that, at approximately 4 a.m. on August 20, 2012, he was asleep inside the Ford Fusion while waiting for a friend to come out of a nearby house. Defendant had borrowed the vehicle from another friend named "Kewan," who gave defendant the vehicle's key, which bore a Hertz rental emblem. In exchange, defendant allowed Kewan to borrow his 1987 Cutlass Supreme, which had 24-inch rims, a stereo in the trunk and "a candy paint." Defendant explained that he "swapped" vehicles with Kewan because he was going shopping in the suburbs and felt he would blend in more by driving the Ford Fusion. Defendant did not want to draw attention to himself because his license was suspended. Defendant had known Kewan for a few years but did not know his last name or exact address. Kewan did not tell defendant the vehicle was stolen, and defendant had no reason to believe it was stolen.

¶ 10 While defendant was asleep, he heard a knock on the window and saw flashing lights. After an officer asked defendant to exit the vehicle, he stepped out from the driver's seat, but tripped over his feet. An officer then "tackled [defendant] to the ground." Defendant denied trying to run or telling the officers he knew the vehicle was stolen. Instead, he told them that he

borrowed the vehicle from a friend, though he did not specifically mention Kewan, and that he did not know it was stolen.

¶ 11 The parties stipulated to the Cicero Police Department's motor vehicle property inventory report for the Ford Fusion. Specifically, they stipulated that the vehicle was inventoried on August 20, 2012, and that the vehicle exhibited exterior and interior damage, the keys were in the vehicle, and the windows were not broken. The parties also stipulated that defendant had a prior felony conviction for possession of a controlled substance in case number 10 CR 16394.

¶ 12 Following argument, the trial court found defendant guilty of possession of a stolen motor vehicle. The court stated that the State's witnesses were credible and observed that Kuzynowski had "no reason to lie" and simply testified that the "car was reported stolen and [Hertz] got notice of that." On the other hand, the court noted that defendant's credibility was "an issue." It found "it a little bit unbelievable" that defendant would loan his "pretty nice tricked out '87 Cutlass" to somebody that he did not really know for a Hertz rental vehicle. The court also observed that defendant demonstrated a "guilty *mens rea*" when he ran from the police officers.

¶ 13 Defendant filed a motion for new trial, arguing, *inter alia*, that the State failed to show the vehicle was stolen or that defendant was not entitled to possess the vehicle because the renter of the Ford Fusion did not testify. At the hearing on the motion, defense counsel argued the State's case suffered from a "proof problem" and asserted that it needed to present evidence explaining how the vehicle was reported stolen and who reported it stolen.

¶ 14 The trial court denied defendant's motion, noting the State had put "on the Hertz folks to say that on such and such a date the car was stolen, that there was no other authorized driver other than the person who rented the vehicle." It further observed that defendant fled from the

officers and made a statement to them admitting that he knew the vehicle was stolen. The court subsequently sentenced defendant to Cook County Department of Corrections boot camp.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 Defendant contends that he did not receive a fair trial and his conviction for possession of a stolen motor vehicle must be reversed because inadmissible hearsay was used to satisfy an element of the offense. Specifically, defendant argues that, in proving the Ford Fusion was stolen, Kuzynowski testified that he "learned" it was stolen from a "nationwide database" and "believe[d]" Gerald Carrao reported it as stolen to the police.

¶ 18 Recognizing that his defense counsel failed to explicitly object to Kuzynowski's testimony at issue, defendant urges us to review his claim of error pursuant to the plain-error doctrine. The doctrine allows a reviewing court to consider unpreserved error when a clear or obvious error has occurred, and either (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error or (2) the error was so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Smith*, 2016 IL 119659, ¶ 39. Defendant bears the burden of persuasion under both prongs of the doctrine. *People v. Wilmington*, 2013 IL 112938, ¶ 43. The first step in a plain-error analysis is to determine whether an error occurred "because absent reversible error, there can be no plain error." *Smith*, 2016 IL 119659, ¶ 39.

¶ 19 To prove defendant guilty of possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2012)), the State was required to show that he: (1) possessed the vehicle; (2) was not entitled to possess the vehicle; and (3) knew the vehicle was stolen. *People v. Cox*, 195

Ill. 2d 378, 391 (2001); *People v. Anderson*, 188 Ill. 2d 384, 389 (1999). Given that defendant was in the driver's seat of the vehicle when approached by the police and made a statement to them admitting his knowledge of the vehicle being stolen, he does not dispute that the State proved the first and third elements of the offense with admissible evidence.

¶ 20 However, defendant argues that the State used inadmissible hearsay to prove "that the Fusion was actually stolen," seemingly equating this with the second element of the offense. Defendant asserts that Kuzynowski's testimony that he "believe[d]" Carrao reported the vehicle as stolen to the police and Kuzynowski's testimony that he learned the vehicle was stolen from a "nationwide database" was not within his personal knowledge and thus inadmissible hearsay. The State responds, arguing that Kuzynowski's testimony was not offered to show defendant stole the vehicle but rather to show that it "had been reported stolen by" Carrao and Hertz's "records indicated [Carrao] no longer had possession of the vehicle." The State accordingly contends that the testimony was not offered for the truth of the matter asserted and thus was not hearsay. In the alternative, the State argues that, even if Kuzynowski's testimony was hearsay, it was admissible under the business records exception.

¶ 21 Hearsay is a statement, other than one made by the declarant while testifying at trial, offered into evidence to prove the truth of the matter asserted. Ill. R. Evid. 801(c) (eff. Jan. 1, 2011); *People v. Caffey*, 205 Ill. 2d 52, 88 (2001). Due to its lack of reliability, hearsay evidence is generally inadmissible unless it falls within an exception to the hearsay rule. *Caffey*, 205 Ill. 2d at 88. One such exception is for business records. Ill. R. Evid. 803(6) (eff. Jan. 1, 2011); *People v. Leach*, 2012 IL 111534, ¶ 70. To satisfy the business-records exception, the party seeking to admit the business record must show that: (1) "the record was made as a memorandum or record of the act;" (2) "the record was made in the regular course of business;" and (3) "it was the

regular course of the business to make such a record at the time of the act or within a reasonable time thereafter." *People v. Nixon*, 2015 IL App (1st) 130132, ¶ 110. This foundation must be established through testimony by someone "familiar with the business and its procedures." *People v. Hutchison*, 2013 IL App (1st) 102332, ¶ 21.

¶ 22 Kuzynowski's testimony about the rental agreement and who was authorized to drive the Ford Fusion was admissible under the business records exception to the hearsay rule, a fact defendant acknowledges, given Kuzynowski's job and familiarity with Hertz's procedures related to the agreements. See *People v. Mormon*, 97 Ill. App. 3d 556, 565-67 (1981), *aff'd*, 92 Ill. 2d 268 (1982). However, we agree with defendant that Kuzynowski's testimony about how he learned the Ford Fusion had been reported stolen from the "NICB" database was inadmissible hearsay because it was offered to prove the truth of the matter asserted and Kuzynowski did not testify that he had any personal knowledge of how NICB compiles and maintains its database to make such evidence admissible under the business records exception. See *Hutchison*, 2013 IL App (1st) 102332, ¶ 21. Moreover, his testimony that he believed Gerald Carrao had reported the vehicle stolen to the police was also hearsay. See *People v. Tucker*, 186 Ill. App. 3d 683, 691 (1989).

¶ 23 Regardless, because other properly admitted evidence showed that defendant "was not entitled to possess the vehicle" to satisfy the second element of the offense (see *Cox*, 195 Ill. 2d at 391; *Anderson*, 188 Ill. 2d at 380), he was not denied a fair trial. Kuzynowski testified about the rental agreement made between Hertz's subsidiary, Advantage Car Rental, and the renter, Carrao. Kuzynowski stated that the agreement only authorized Carrao to drive the Ford Fusion and specifically noted that defendant had not been authorized to drive it. Kuzynowski further stated the agreement had not been amended to authorize any additional drivers. Consequently,

this evidence, coupled with defendant's admission to the police that he knew the vehicle was stolen, proved that he was not entitled to possess the Ford Fusion rented to Carrao, thereby establishing the second element of the offense. See *Cox*, 195 Ill. 2d at 391; *Anderson*, 188 Ill. 2d at 389.

¶ 24 Although in its findings of fact, the trial court mentioned that Kuzynowski testified the vehicle "was reported stolen and [Hertz] got notice of that," the record does not show that this was the only evidence the court relied on in finding defendant guilty. Notably, the court also highlighted defendant's admission to the police. Additionally, when defense counsel raised a potential "proof problem" with the State's evidence after trial, the court noted that Kuzynowski testified that the Ford Fusion had been reported stolen, but also added that no one was authorized to drive the vehicle except Carrao. Therefore, given the other properly admitted evidence proved that defendant was not entitled to possess the Ford Fusion, the admission of the allegedly inadmissible hearsay cannot constitute reversible error (see *People v. Yancy*, 368 Ill. App. 3d 381, 385 (2005)), and defendant, in turn, was not denied a fair trial. Because no reversible error occurred, no plain error occurred. See *Smith*, 2016 IL 119659, ¶ 39.

¶ 25 Defendant's alternative contention that his defense counsel was ineffective for failing to object to Kuzynowski's alleged inadmissible hearsay testimony must also be rejected. We review claims of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010). Pursuant to *Strickland*, defendant must show that his counsel's performance was deficient and he suffered prejudice as a result. *Strickland*, 466 U.S. at 687. To show that his counsel's performance was deficient, defendant must establish that his "counsel's performance 'fell below an objective standard of reasonableness.' " *People v. Valdez*, 2016 IL 119860, ¶ 14 (quoting

Strickland, 466 U.S. at 688). To show he suffered prejudice, defendant must establish that a reasonable probability exists "that, but for counsel's errors, the result of the proceedings would have been different." *Id.* Defendant must satisfy both prongs of the *Strickland* test to succeed on his claim of ineffective assistance of counsel. *Id.*

¶ 26 Given our conclusion that other properly admitted evidence proved that defendant was not entitled to possess the Ford Fusion, he cannot show a reasonable probability exists that the trial court would have acquitted him absent defense counsel's alleged error. Consequently, defendant cannot show he suffered prejudice and therefore cannot demonstrate his counsel was ineffective.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.