2018 IL App (2d) 160821-U
No. 2-16-0821
Order filed November 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 15-CF-796
DEWAYNE LEEDWARD STEWART,	)	Honorable John S. Lowry,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Hudson and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Although the State misstated the evidence during its rebuttal argument, the error was not reversible, as the trial court instructed the jury that the comment was not evidence and the State immediately restated the evidence correctly.

¶ 2 Following a jury trial in the circuit court of Winnebago County, defendant, Dewayne Leedward Stewart, was found guilty of possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2014)) and was sentenced to a 10-year prison term. Defendant argues on appeal that he is entitled to a new trial because the State misstated the evidence during its rebuttal argument. We affirm.

¶ 3 We begin with a brief summary of the evidence at trial that is germane to the resolution of this appeal. Richard Penzek testified that on April 1, 2015, he was working at Capable Cars, which was a used car lot in Loves Park. Shortly before 10 a.m., a young man came to the lot and looked at some vans. The man and another individual arrived at the lot in a Chevrolet Impala. Penzek showed the man a Chevy Uplander van. The man indicated that he wanted to take the Uplander for a test drive. Penzek testified that Capable Cars does not allow a customer to test-drive vehicles unless he or she arrives in a vehicle. Capable Cars makes copies of customers' driver's licenses before permitting them to test-drive vehicles. The man who wanted to test-drive the Uplander supplied an ID card and Penzek made a copy. After putting dealer plates on the Uplander, Penzek permitted the man to drive away in it. A few minutes later, Penzek noticed that the Impala was gone. Penzek then contacted the police to report that the Uplander had been stolen. Penzek provided the police with the copy of the ID card.

¶ 4 Rockford police officer Jeremiah Cizerle testified that on the evening of April 1, 2015, he was on patrol in a marked car. At about 7:20 p.m., Cizerle saw the Uplander. He was aware that it had been reported stolen. Cizerle drove up behind the Uplander, which then took off at a high speed. Cizerle attempted to follow the vehicle. Although he lost sight of it at some point, he later observed that the Uplander had struck a Chrysler Concord (which was on fire) and had crashed into a house. The Uplander had been abandoned. Cizerle did not attempt to apprehend the Uplander's driver. He advised a dispatcher of the incident and rendered aid to a person in the Concord.

¶ 5 Jeff Schroder, a detective with the Rockford Police Department, responded to Cizerle's report that he was pursuing the Uplander. Schroder observed two men jumping over a fence. Another officer at the scene, Daryn Streed, chased the men and apprehended one of them. Streed

identified defendant as the man he apprehended. Defendant was placed under arrest and an ID card issued to Thaddios Winfield was found on defendant's person. Thaddios Winfield was the name on the ID card that Penzek photocopied.

¶ 6 After defendant was arrested, Brian Cascio, a detective with the Loves Park Police Department, interviewed him. Defendant told Cascio that he told someone named J. Reed that he needed money. Reed told defendant that he needed a car and he offered defendant $50 to go to Capable Cars and get one for him. Reed drove defendant to Capable Cars. Defendant presented someone else's ID card before driving away in the Uplander. Defendant did not recall where he obtained the ID card. After defendant left Capable Cars, Reed did not want the vehicle. Later that day, he and Reed were in the Uplander. Reed was driving.

¶ 7 The trial court instructed the jury on the lesser included offense of criminal trespass to a motor vehicle (720 ILCS 21-2(a) (West 2014)). During closing argument, defendant acknowledged that he entered the Uplander without authority. However, he contended that the State failed to prove that he intended to permanently deprive Capable Cars of the Uplander. In rebuttal, the prosecutor stated, without objection, that "defendant told Detective Cascio he went to Capable Cars *** with the intention of stealing a vehicle." The prosecutor later stated that defendant's use of an ID card that did not belong to him "support[ed] the statements that he made to Detective Cascio *** two days after the vehicle was stolen by him, that he intended to go in there and steal the car." Defendant objected that the prosecutor had mischaracterized Cascio's testimony. The trial court responded as follows:

> "It's argument. Ladies and gentlemen, you shall recall the evidence that you heard. What the attorneys say in argument is not evidence; so please recall the evidence. Overruled."

The prosecutor then stated, "Well, he admitted he went in; he used someone else's ID; he did it for 50 bucks; he took the vehicle, and he never returned it."

¶ 8 Pursuant to section 5/4-103(a)(1) of the Illinois Vehicle Code (625 ILCS 5/4-103(a)(1) (West 2014)), it is a crime for a person who is not entitled to the possession of a vehicle to possess the vehicle knowing it to be stolen. The State's theory was that defendant possessed a vehicle that he had stolen himself. As we have observed:

> "A person may be charged with possession of a stolen motor vehicle even if he is the one who has stolen it. In such a case, defendant would have to know he had stolen the vehicle, that is, he would have to have stolen it before he could be found guilty." *People v. Cozart*, 235 Ill. App. 3d 1076, 1080 (1992).

Furthermore, "where the evidence show[s] that it was the person charged who had taken the owner's car, the State is obliged to prove that the defendant knowingly exerted control over the car in such a manner as to permanently deprive the owner of its use, or, in effect, to prove the defendant committed the theft." *Id.* (citing *In re T.A.B.*, 181 Ill. App. 3d 581 (1989)). Here, defendant contends that the prosecutor mischaracterized the evidence when she told the jury that defendant told Cascio that he intended to steal the Uplander. Defendant contends that the question of whether he was guilty of possession of a stolen motor vehicle or merely of criminal trespass to a motor vehicle hinged on his intent.

¶ 9 Although prosecutors enjoy wide latitude in closing argument, "a prosecutor cannot make arguments that have no basis in the evidence." *People v. Murray*, 2017 IL App (2d) 150599, ¶ 75. Had defendant told Cascio that he went to Capable Cars with the intent to steal the van, his statement would have been tantamount to a full confession. Defendant is correct, however, that there is no evidence that he told Cascio that he intended to steal the van. Defendant admitted all

of the elements of theft except for the crucial element of the mental state with which he acted. He did not confess as the prosecutor's remark suggested.

¶ 10 Defendant is therefore correct that the prosecutor's comment during her rebuttal argument was improper. However, improper comments are not grounds for reversal unless they were a material factor in the conviction or caused substantial prejudice to the defendant. *Id.* That is not the case here. Defendant's admission that he took the Uplander for Reed, and that Reed had offered him money to do so, created a strong inference that defendant intended to permanently deprive Capable Cars of the use of the Uplander. Although the trial court overruled defendant's objection to the prosecutor's comment, the court advised the jury that the comment was not evidence. Furthermore, after the trial court overruled defendant's objection, the prosecutor stated that "[defendant] admitted he went in; he used someone else's ID; he did it for 50 bucks; he took the vehicle; and he never returned it." Presumably, the jurors would have regarded that remark as a clarification of what defendant actually told Cascio. Finally, in assessing the effect of the prosecutor's improper remark, we find it significant that, although a number of witnesses testified at trial, the testimony occupies only 100 pages of the report of proceedings and Cascio was the last witness to testify. Cascio's testimony should have been fresh in the jurors' memories.

¶ 11 Defendant cites *People v. Jackson*, 2012 IL App (1st) 102035, to support his argument that the prosecutor's misstatement of the evidence requires reversal. We agree with the State that *Jackson* is distinguishable. In *Jackson*, the defendant was charged with unlawful use of a weapon, which required proof that the defendant knowingly carried in his vehicle a loaded, uncased, immediately accessible gun. *Id.* ¶ 19. The prosecutor told the jury that the defendant had told officers that he had found a gun in his car. The only evidence that the defendant knew

of the gun was contested testimony that he fled from police during a traffic stop. *Id.* The circumstantial evidence in this case that defendant intended to steal the Uplander was stronger than the circumstantial evidence of the defendant's knowledge in *Jackson*. Moreover, unlike in *Jackson*, the evidence in question was uncontested.

¶ 12 For the foregoing reasons, the prosecutor's misstatement of the evidence is not grounds for reversal. Accordingly, the judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 13 Affirmed.