SECOND DIVISION
November 10, 2014

No. 1-13-0081

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. 11 CR 20859
	)	
SHATARA FUNCHES,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for unlawful possession of a stolen motor vehicle was affirmed when she failed to establish she was deprived of effective assistance of counsel in her bench trial when her trial counsel conceded she lacked authority to take possession of the allegedly stolen vehicle.

¶ 2 Following a bench trial, defendant Shatara Funches was convicted of possession of a stolen motor vehicle and sentenced to three years in prison. On appeal, defendant contends her trial attorney was ineffective when he conceded during closing argument that defendant did not have the authority to take possession of the allegedly stolen motor vehicle. We affirm.

¶ 3 Defendant was charged by indictment with possession of a stolen 2005 Hyundai Tucson SUV, the property of Khaleel Al-Shawabkeh, doing business as Manny's Auto Sales, knowing the vehicle to have been stolen.

¶ 4 At trial, it was established that Khaleel Al-Shawabkeh was the owner of Manny's Auto Sales, a used car dealership on North Western Avenue in Chicago. On September 27, 2011, he sold a black 2005 Hyundai Tucson SUV to Shemeka Ariyo[1]. The written bill of sale stated that the total purchase price was $10,185 with a down payment of $3,000, and that $2,000 cash was tendered on that date with a promise to pay the $1,000 balance of the down payment on October 3, 2011. The bill of sale provided Al-Shawabkeh with a security interest in the vehicle and provided for repossession of the vehicle if the down payment was not received and cleared by the bank. Al-Shawabkeh gave Ariyo possession of the vehicle on September 27. Ariyo failed to pay the remaining $1,000 of the down payment by October 3 as agreed. Al-Shawabkeh phoned Ariyo several times and she would promise to come to the dealership with the $1,000, but she would fail to show up.

¶ 5 A few days after October 3, Al-Shawabkeh hired Robert Esparza to repossess the Hyundai. Esparza repossessed the vehicle and returned it to the Manny's Auto Sales lot. Ariyo pleaded with Al-Shawabkeh and again promised to pay the $1,000. Al-Shawabkeh again gave Ariyo possession of the vehicle and extended the deadline to tender the balance of the down payment. When Ariyo once more failed to tender the $1,000, Al-Shawabkeh again asked Esparza to repossess the vehicle.

[1] In the record on appeal, her surname is variously spelled Ariyo or Aiyro.

¶ 6 On October 17, between 4:30 and 5:30 a.m., Esparza went to 2216 South Keeler Avenue and repossessed the Hyundai, which was towed back to Manny's Auto Sales. Al-Shawabkeh was at his dealership when defendant came to his lot. He saw and spoke with defendant, who came with other people. Al-Shawabkeh called the police and defendant was removed from the premises. He also phoned Esparza, "stating that the young lady had the police there stating the car was repossessed incorrectly." At Al-Shawabkeh's request, Esparza took the repossession paperwork to the dealership where he saw defendant and police officers. Esparza showed the paperwork to the police, who "escorted [defendant] off the property, letting her know that everything was done legally and she needed to leave." The police left the sales lot with her. About 15 minutes later, Esparza was entering Al-Shawabkeh's trailer on the lot when he saw defendant entering the Hyundai. Esparza realized the dealership had no keys for the vehicle. Defendant started the Hyundai and drove it off the lot, smashing into two other vehicles in doing so. Esparza stuck his head in the door of the trailer and told Al-Shawabkeh that "she just stole the car back." Al-Shawabkeh heard the noise of the crash, came out of his office, and noticed the Hyundai was missing. Sometime after October 17, Ariyo brought Al-Shawabkeh additional money to pay for the damage to another car which was struck when the Hyundai was stolen from the lot. Al-Shawabkeh did not give defendant permission to possess the Hyundai.

¶ 7 Chicago Police Officer Wilson testified that at about 7:50 p.m. on October 17, 2011, he and his partner were on routine patrol when they observed a black Hyundai Tucson make a left turn on Quincy Street without signaling the turn. After the officers ran the license plate of the vehicle, they conducted a traffic stop at 4921 West Quincy. Defendant, who was behind the wheel of the vehicle with the keys in the ignition, was arrested for possession of a stolen motor

vehicle. The VIN of that vehicle was the same VIN of the Hyundai stolen from the lot of Manny's Auto Sales. Defendant was transported to the police station, where she made a statement to Wilson and his partner: "She said after the car was repossessed, she went back to the dealer on the 17th [of October] and took the car back. But she said I have the money now. I have a thousand dollars."

¶ 8 After the State rested its case in chief, the defense also rested. In closing argument, defendant's counsel argued:

> "Judge, I think the key testimony is Mr. Al-Shawabkeh saying that he continued to take money from the owner of the car after October 17th. ***
>
> THE COURT: What does that have to do with your client, though? She wasn't the purchaser of the car originally, it was Ms. Aiyro.
>
> DEFENSE COUNSEL: No, Ms. Aiyro is the owner of the car.
>
> THE COURT: Right. *** What's [defendant's] standing *** in the contractual relationship between Ms. Aiyro and Mr. Al-Shawabkeh?
>
> DEFENSE COUNSEL: Seems that [defendant] is present for this and is obviously part and parcel of the original agreement and what subsequently happened after that.
>
> THE COURT: So your theory is that because *** Ms. Aiyro was in good faith continuing to make payments, so the car was not owned by Mr. Al-Shawabkeh?
>
> ASSISTANT STATE'S ATTORNEY: I think that she's the owner.
>
> THE COURT: Okay, Ms. Aiyro is the owner.

ASSISTANT STATE'S ATTORNEY: Yes.

THE COURT: What right does that give [defendant] to take the car is my question?

DEFENSE COUNSEL: By implication she was with Ms. Aiyro when these conversations occurred, and even according to Ms. Esparza, they were there – apparently they were the ones that contacted the police saying the car had been–

THE COURT: Are you saying she's Ms. Aiyro's agent? I'm trying to find a nexus between your client's behavior, the charge, and the contractual relationship between the Manny's Auto personnel and Ms. Aiyro. *What standing does she have to take any car from any lot on behalf of anyone is my question to you?*

DEFENSE COUNSEL: *I guess overall I don't think she does.* I think this would – I think that what I'm –

THE COURT: You're saying the motor vehicle is not stolen because Ms. Aiyro continued to make payments on it? Is that –

DEFENSE COUNSEL: I think that this is – there's on the one hand I think that this contract is unconscionable. On the other hand, we're drawing back all this.

THE COURT: She has no standing to attack the contract between the person and her.

DEFENSE COUNSEL: Herself. I think that's the word we used to do that, that's wrong. But I think that this case is better suited as something that's either

civil in nature or something that's more akin to a trespassing to a vehicle, but not a possession of a stolen motor vehicle. That's the way I see this case."

(Emphasis added.)

¶ 9 Following argument by the parties, the trial court found defendant guilty of possession of a stolen motor vehicle. "Defendant was in possession of a stolen motor vehicle. She had no right to be in that car, to take it off that lot. She was not even the purchaser of that automobile, had no right to be in it. Certainly the people who had superior interest in the case; the most superior was the owner, Mr. Al-Shawabkeh, it having been repossessed. The police telling the defendant it was repossessed. She decided to come back. And self help doesn't apply here because I don't know if she's an agent for the person who thought they [*sic*] still owned the car. She's a third party, not part of a contractual relationship. She took the car, was found in the car, finding of guilty beyond a reasonable doubt."

¶ 10 The court sentenced defendant to three years in prison.

¶ 11 On appeal, defendant contends that her trial counsel rendered ineffective assistance because counsel conceded defendant's guilt when he acknowledged in closing argument that defendant did not have the authority to take the Hyundai. She relies on *People v. Hattery*, 109 Ill. 2d 449 (1985), in which defense counsel conceded his client's guilt of murder and failed completely to subject the State's case to meaningful adversarial testing as required by *United States v. Cronic*, 466 U.S. 648 (1984).

¶ 12 Defendant's claim of ineffective assistance of her trial counsel is guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under that test, a defendant must prove that (1) counsel's performance was deficient, and (2) the deficient performance

prejudiced defendant. When a challenge is raised under *Strickland,* the reviewing court must indulge in a strong presumption that counsel's performance was competent and that the challenged action or inaction of counsel was the product of sound trial strategy and not incompetence. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010). For the reasons that follow, we conclude that defendant has failed to satisfy either prong of *Strickland.*

¶ 13 During the exchange between the court and trial counsel in closing argument, the court inquired about the "standing *** in the contractual relationship between Ms. Aiyro and Mr. Al-Shawabkeh." Specifically, the court's inquiry centered on whether defendant was Ariyo's agent and, if so, whether defendant had "standing *** to take any car from any lot on behalf of anyone." Trial counsel responded, "I guess overall I don't think she does." Defendant asserts that this statement by her trial counsel was a concession that she did not have authority to take the car from the Manny's Auto Sales lot, and she concludes that this amounted to a total concession of guilt to the charge of possession of a stolen motor vehicle. We do not agree.

¶ 14 For a defendant to be convicted of possession of a stolen motor vehicle, the State must prove beyond a reasonable doubt that the defendant was in possession of the vehicle, that the vehicle was stolen, and that the defendant knew the vehicle was stolen. 625 ILCS 5/4-103(a)(1) (West 2010). The State is not required to prove specific ownership of the vehicle, but must prove only that someone other than the defendant had a superior interest in the vehicle. *People v. Smith*, 226 Ill. App. 3d 433, 438 (1992). It may be inferred that a person exercising exclusive unexplained possession over a stolen vehicle has knowledge that the vehicle is stolen. *Id.*; *People*

v. Gentry, 192 Ill. App. 3d 774, 778 (1989). Thus, entering or operating a vehicle without authority is but one element to the offense of unlawful possession of a stolen motor vehicle. Another essential element of the crime is *knowledge* that the vehicle was stolen. This element may be satisfied by circumstantial evidence and reasonable inferences drawn therefrom. *People v. Fernandez*, 204 Ill. App. 3d 105, 109 (1990). However, a defendant may attempt to rebut the inference of knowledge that the vehicle is stolen by offering a reasonable explanation for the defendant's possession. *People v. Miller*, 2013 IL App (1st) 110879, ¶ 55.

¶ 15 Here, counsel conceded that defendant did not have authority to enter or operate the Hyundai—that someone other than she had a superior interest in the vehicle. However, this was not a concession of guilt where counsel sought to overcome the presumption that defendant did not have knowledge that she lacked the authority to possess the Hyundai. Whether or not defendant had the authority, defense counsel argued "that this case is better suited as something that's either civil in nature or something that's more akin to a trespassing to a vehicle, but not a possession of a stolen motor vehicle." A person commits criminal trespass to a vehicle when he knowingly and without authority enters or operates any vehicle. 720 ILCS 5/21-2 (West 2010). The difference between unlawful possession of a stolen motor vehicle, a Class 2 felony, and criminal trespass to a vehicle, a Class A misdemeanor, is that the former offense additionally requires that the defendant possess the vehicle knowing it has been stolen. See *People v. Cook*, 279 Ill. App. 3d 718, 722 (1995), citing *People v. Owens*, 205 Ill. App. 3d 43, 45 (1990). However, the trial court is not required to elevate every theory of innocence to reasonable doubt. *People v. Dabrowski*, 162 Ill. App. 3d 684, 692 (1987). Here, the trial court rejected counsel's suggestion that this was, at most, a case of criminal trespass on a vehicle. Nevertheless, we do

not accept defendant's contention that her trial counsel "fully conceded" defendant's guilt by improperly relying on an invalid defense. Rather, counsel simply relied on a defense which the trier of fact rejected for lack of support. Moreover, counsel's concession that defendant lacked authority to take the Hyundai did not represent a misunderstanding of the law; counsel was merely conceding a fact fully supported by the record but which did not amount to a concession that defendant knew she was not authorized to take the Hyundai. In short, defense counsel was grasping for some basis that would warrant the trial court finding some basis to enter a finding of guilty on a misdemeanor rather than a felony. There are instances where a defense counsel's argument can do no harm and this is one of them, especially where defendant was seen taking a car she did not own and had no interest in and was caught driving it the same day and admitted taking the car.

¶ 16 This case stands in sharp contrast to *Hattery*, 109 Ill. 2d at 458-59, where trial counsel's conduct was *per se* ineffective. There, counsel did concede the defendant's guilt of murder at trial and advanced no theory of defense in the hope of obtaining a more lenient sentence. In the instant case, where counsel attempted to convince the court that defendant was guilty at most of a misdemeanor offense, defendant has failed to establish under the first prong of *Strickland* that her trial counsel's performance fell outside the range of professionally competent assistance.

¶ 17 Defendant has also failed to satisfy the second prong of *Strickland*, requiring that she show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Satisfying the prejudice prong necessitates a showing of actual prejudice, not simply speculation that defendant may have been prejudiced. *People v. Patterson*, 2014 IL 115102, ¶ 81. Defendant must show that, "but for"

counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). In the case *sub judice*, there was no such reasonable probability. The evidence of defendant's guilt was overwhelming.

¶ 18 Defendant argues, however, that she was prejudiced by counsel's failure to pursue alternative strategies or evidence. She asserts that, although Ariyo owned the Tucson, counsel failed to call Ariyo as a witness or to present any evidence that Ariyo authorized defendant to drive the car on November 17. The suggestion that Ariyo could or would have offered testimony helpful to defendant, or that the outcome of the trial might have been different if Ariyo had testified, is speculative at best and cannot satisfy *Strickland*'s prejudice prong and, additionally, is clearly a tactical decision made in light of the overwhelming evidence against the defendant. Counsel's argument, that defendant was guilty of nothing more than misdemeanor criminal trespass to a vehicle, was unsuccessful. Here, however, as in *People v. Ganus*, 148 Ill. 2d 466, 474 (1992), where defendant had no defense and evidence of her guilt was overwhelming, "defense counsel used his imagination and resourcefulness to come up with something where he had nothing to go on." We conclude defendant cannot demonstrate, under the prejudice prong, a reasonable likelihood that, but for defense counsel's action, the result of the trial would have been different. Defendant has met neither prong of the *Strickland* test.

¶ 19 For the reasons stated above, we affirm the judgment of the trial court.

¶ 20 Affirmed.