2015 IL App (1st) 130204-U

SECOND DIVISION
February 24, 2015

No. 1-13-0204

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 14849
	)	
KALVIN CLARK,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

¶ 1 *Held*: The trial court did not abuse its discretion by refusing defendant's request for a jury instruction on possession of a stolen vehicle as a lesser-included offense of aggravated vehicular hijacking; defendant's conviction affirmed; mittimus corrected.

¶ 2 Following a jury trial, defendant Kalvin Clark was found guilty of aggravated vehicular hijacking, and sentenced to 23 years in prison. On appeal, defendant contends that he was denied a fair trial because the trial court refused to instruct the jury on possession of a stolen motor vehicle as a lesser-included offense. He now asks this court to reverse his conviction, remand his

cause for a new trial, and for a corrected mittimus to reflect his entitlement to credit for 461 days of presentence custody.

¶ 3 The incident leading to defendant's arrest occurred on July 18, 2011, on the far southwest side of Chicago. Following his arrest, the State charged defendant by information with one count of aggravated vehicular hijacking and one count of aggravated unlawful restraint. As pertinent to this appeal, the State alleged that on July 18, 2011, defendant "knowingly took a motor vehicle, from the person or the immediate presence of Michael Heath, by the use of force or by threatening the imminent use of force, and he carried on or about his person, or was otherwise armed with a firearm."

¶ 4 At trial, Michael Heath, Jr. testified that after he finished work about 11 p.m., he ran errands before driving home and parking his car outside his house in the 11700 block of South Laflin Street. As he began to text his girlfriend, Aisha Polk, a man, later identified as defendant, approached his vehicle, opened the door, pointed a gun at him, and told him to get out of the car. Heath, Jr. complied, leaving the keys in the ignition, and walked to the sidewalk. Defendant got into his car and drove northbound on Laflin Street.

¶ 5 After defendant left, Heath, Jr. walked to Polk's house nearby and described the incident and the offender to her. She provided him with defendant's name based on that description. Heath, Jr. then called his father, Michael Heath, Sr., and the police. When the police arrived, Heath, Jr. described the man who had stolen his car as "heavy-set," light skinned, with a short haircut. He also told police that he had seen defendant in the neighborhood and knew that his family lived across the street from Polk. Heath, Jr. testified that when he drove down Justine Street to Polk's house one or two weeks prior to the incident, defendant told him that he did not

like the way he was driving. They did not have a physical altercation at that time, and Heath, Jr. testified that the earlier incident did not bother him, and that he did not see defendant again until the night of the current incident.

¶ 6 About 9 a.m. the next morning, Polk called Heath, Jr. and told him that she had seen defendant driving his car down the street. Heath, Jr., and his father then drove to the area of 119th Street and Ashland Avenue to look for defendant, and saw Heath, Jr.'s car parked on Ashland Avenue. The pair approached defendant, who was walking away from the car towards a black PT Cruiser, and Heath, Sr. asked defendant why he took his son's car. Defendant responded that it was because of the way Heath, Jr. drove the car and the way he spoke to him in front of his friends. Heath, Sr. asked defendant for the keys to his son's car and the stereo faceplate, which defendant tendered to him before driving off with another individual in the PT Cruiser.

¶ 7 After defendant left, Heath, Jr. and his father called police, and the car was returned to him after it was processed for fingerprints. On July 22, 2011, Heath, Jr. spoke with a detective, and provided an additional description of defendant. He subsequently identified defendant as the man who stole his car in a photo array, and a lineup.

¶ 8 Aisha Polk testified that she lived on Justine Street at the time of the incident, and that she knew defendant, who had lived across the street from her for over nine years. Polk testified that she was at home around 11:30 on the night in question, when she received a phone call from her boyfriend, Heath, Jr., telling her that a "caramel, short, big boy" had hijacked his car at gunpoint, and that he lived across the street from her. Based on that description, Polk gave him defendant's name. About 9 a.m. the next morning, Polk saw defendant driving Heath, Jr.'s car

down the street, and called Heath, Jr. to inform him of this situation. She subsequently identified defendant from a lineup as the person she saw driving Heath, Jr.'s car.

¶ 9 Michael Heath, Sr. testified that his son, Heath, Jr., called him around midnight on the night of the incident, and told him that someone had taken his car. He picked his son up from Polk's house and brought him to his house. Following Polk's call the next morning, Heath, Sr. and his son drove to 119th Street and Ashland Avenue, where they saw the car parked. As they exited their vehicle, they saw defendant walking towards the car with the stereo faceplate in his hands. Heath, Sr. asked defendant why he pulled a gun on his son, and defendant responded that Heath, Jr. "was talking shit" to him and his friends. Heath, Sr. told him that it did not give him the right to pull a gun on someone, and asked if he had a gun at that moment. Defendant denied having a gun, and Heath, Sr. asked for the car keys and the stereo faceplate back. Defendant complied, and then drove off with another person in a black PT cruiser. Heath, Sr. and his son called police, who dusted the car for fingerprints. Heath, Sr. subsequently identified defendant from a lineup as the man he talked with and who he received the car keys from.

¶ 10 Evidence technician Kelly Comiskey testified that she processed Heath, Jr.'s car and was unable to retrieve any fingerprints. Chicago police detective Brian Casey testified that he was assigned to investigate the incident, and put together a photo array after interviewing Heath, Jr., Heath, Sr., and Polk. Heath, Jr. identified defendant as the individual who held him at gunpoint and stole his car. After defendant's arrest, Detective Casey advised him of his *Miranda* rights, and defendant asked, "Since I returned the car, does that mean I get in less trouble[?]"

¶ 11 Detective Casey subsequently conducted a physical lineup at which Heath, Jr. identified defendant as the man who stole his car at gunpoint, Polk identified defendant as the man she saw

driving Heath, Jr.'s car the next morning, and Heath, Sr. identified defendant as the man who returned his son's car keys and stereo faceplate to him.

¶ 12 The defense then called Jessie Strong, who testified that he had known defendant for 12 years, and was a friend of defendant's family and dating defendant's sister. He and defendant's sister lived in Kankakee, as did some of defendant's family members.

¶ 13 Strong further testified that he was a construction worker at the time, and would often drive from Kankakee to Chicago for work. On July 4, 2011, defendant came to visit Strong and his family in Kankakee, and he saw him every day during the two weeks defendant stayed with them. Strong testified that he had to be in Chicago for work by 9 a.m. on July 19, 2011, and defendant had to be in school by at 8 a.m. that same day. They played a videogame until 1:30 a.m. and then drove to Chicago, where he dropped off defendant and his sister at their grandfather's house about 2:15 a.m. Then he went to his mother's house to get some sleep before work.

¶ 14 On cross-examination, Strong testified that he discovered defendant had been arrested in September 2011, but that he did not approach the police because he did not know why defendant had been arrested. Strong also refused to speak to an investigator from the Cook County State's Attorney's office about his testimony.

¶ 15 At the jury instruction conference, defendant requested the court to instruct the jury on possession of a stolen vehicle as a lesser-included offense of aggravated vehicular hijacking. Defense counsel argued that there was "uncontroverted evidence" that defendant was in possession of the car the next morning, however, there was a factual dispute as to whether he took the car at gunpoint in light of the alibi witness who placed him in Kankakee at the time of

the hijacking. Counsel further argued there was precedent in *People v. Eggerman*, 292 Ill. App. 3d 644 (1997), that possession of a stolen vehicle was a lesser-included offense of aggravated vehicular hijacking.

¶ 16 The State objected to the instruction, and argued that the case cited by defendant was factually distinguishable because it involved a double jeopardy issue, and the court applied the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932). The State also argued that possession of a stolen vehicle was not a lesser-included offense of aggravated vehicular hijacking because each offense had distinct elements, that the evidence only supported the offense of aggravated vehicular hijacking on that date, and that defendant was not charged in connection with events that occurred the following day.

¶ 17 The court denied defendant's request to instruct the jury on possession of a stolen vehicle. In doing so, it noted that the holding in *Eggerman* was limited to the double jeopardy context in which it arose, and that here, there was no disputed factual element regarding the hijacking charge, like defendant was not in possession of a gun, or that he found the car and kept it. The court also noted that the crime was completed on July 18, 2011, and the fact that defendant had the car the next day did not mean it was a lesser-included offense, nor did the legislature intend that result. The court observed that if the jury believed defendant's alibi witness, it would acquit defendant of the hijacking charge.

¶ 18 Following the arguments by counsel and deliberation, the jury found defendant guilty of aggravated vehicular hijacking. Defendant filed a post-trial motion requesting a new trial, arguing, *inter alia*, that the trial court erred in failing to instruct the jury on possession of a stolen vehicle because it was a lesser-included offense of aggravated vehicular hijacking. The court

denied the motion, noting that it believed its prior ruling on the issue was correct, and that under the circumstances in this case, which were distinguishable from the *Eggerman* case, possession was not a lesser-included offense of the hijacking. The court then sentenced defendant to 23 years in prison.

¶ 19 In this appeal from that judgment, defendant does not challenge the sufficiency of the evidence to convict him, or the length of his sentence. He solely contends that he was denied his right to a fair trial because the trial court failed to instruct the jury on possession of a stolen motor vehicle as a lesser-included offense of aggravated vehicular hijacking.

¶ 20 The giving of jury instructions is a matter within the sound discretion of the trial court, and instruction on a lesser offense is justified when there is some credible evidence to support the giving of the instruction. *People v. Jones*, 219 Ill. 2d 1, 31 (2006). Where some evidence supports the instruction, the court's failure to give the instruction constitutes an abuse of discretion (*People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998)), however, whether a charged offense encompasses another as a lesser-included offense is a question of law, which this court reviews *de novo*. *People v. Kolton*, 219 Ill. 2d 353, 361 (2006).

¶ 21 Defendant contends that possession of a stolen motor vehicle is a lesser-included offense of aggravated vehicular hijacking in this case, relying on *Eggerman*, as he did in the circuit court. In *Eggerman*, this court decided that defendant, who had already pled guilty to, and was convicted of possession of a stolen vehicle in one county on a particular set of facts, could not then be tried and convicted of aggravated vehicular hijacking on the same set of facts in a different county. *Eggerman*, 292 Ill. App. 3d at 647. In reaching that conclusion, this court applied the test set forth in *Blockburger*, 284 U.S. at 304, which focuses on the proof necessary

to prove the statutory elements of each offense to assess whether rules against double jeopardy are violated. *Eggerman*, 292 Ill. App. 3d at 647. As the circuit court correctly observed in reaching its conclusion in this case, the reasoning in *Eggerman* is not controlling in the case at bar, where the issue is whether possession of a stolen vehicle is a lesser-included offense of armed vehicular hijacking in the context of jury instructions. See, *e.g.*, *People v. Poe*, 385 Ill. App. 3d 763, 770 (2008) (the lesser-included crime analysis applicable in a particular case depends on the context). In order to determine whether a charged offense encompasses another as a lesser-included offense in the context of jury instructions, we apply the charging instrument approach, as mandated by the supreme court. *Kolton*, 219 Ill. 2d at 367.

¶ 22 Under this approach, we analyze whether: (1) the charging instrument includes "a broad foundation or main outline" of the lesser-included offense so that it can be considered a lesser-included offense; and (2) the evidence at trial rationally could support a conviction for the lesser-included offense. *People v. Davis*, 213 Ill. 2d 459, 476 (2004). "A lesser offense will be 'included' in the charged offense if the factual description of the charged offense describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the indictment can reasonably be inferred." *Kolton*, 219 Ill. 2d at 367. This decision must be made on a case-by-case basis using the factual description of the charged offense in the indictment. *Id.*

¶ 23 Defendant contends that by alleging that he took Heath, Jr.'s car from him, the State necessarily alleged that he obtained possession of it, knowing it to be stolen. We disagree. The State alleged that defendant committed the crime of aggravated vehicular hijacking, in that he "knowingly took a motor vehicle, from the person or the immediate presence of Michael Heath,

by the use of force or by threatening the imminent use of force, and he carried on or about his person, or was otherwise armed with a firearm." 720 ILCS 5/18-4(a)(4) (West 2010). To prove possession of a stolen motor vehicle, on the other hand, the State would be required to prove that defendant was in possession of a motor vehicle, that he knew the vehicle to be stolen, and that he was not entitled to possess it. 625 ILCS 5/4-103(a)(1)(West 2010).

¶ 24 The crime of aggravated vehicular hijacking thus proscribes the forceful "taking" of a car while armed, a single act, whereas possession of a stolen vehicle proscribes "having" a vehicle, despite knowledge that it is stolen, a continuing act of exerting control. As the trial court noted in denying defendant's request for the lesser-included instruction, the offense of hijacking was completed when defendant took the vehicle from Heath, Jr. on the night of July 18, 2011, and the fact that defendant had it the next day did not mean his possession of it was a lesser-included offense of aggravated vehicular hijacking. The court also observed that if the jury believed defendant's alibi witness, defendant would be acquitted of the hijacking charge. Given these distinctions, we find that aggravated vehicular hijacking and possession of a stolen vehicle are separate offenses, referring to different conduct, and, as charged, the former does not provide a broad foundation or main outline of the latter. *Davis*, 213 Ill. 2d at 476. As such, it is not a lesser-included offense of armed vehicular hijacking in this case, and thus, we need not reach the second step of the charging instrument approach to determine whether the evidence at trial could rationally support a conviction for possession of a stolen vehicle. *Id.* at 476-77.

¶ 25 That said, defendant further argues that the jury could have rationally acquitted him of armed vehicular hijacking, and convicted him of the less serious offense of possession based on the testimony of several witnesses that he was in possession of Heath, Jr.'s car the following day.

We observe, however, that although that evidence could prove an additional offense of possession of a stolen vehicle, which is a less serious offense than aggravated vehicular hijacking, the State did not charge defendant for his conduct the next morning, and he was thus not entitled to an instruction on that offense. See *Davis*, 213 Ill. 2d at 479 ("[A] trial court need not allow a defendant's request to have the jury instructed on offenses that are less serious, but not included, offenses to those offenses for which he or she was charged regardless of whether the evidence at trial could support the less serious offense.").

¶ 26 Under these circumstances, we conclude that the trial court did not abuse its discretion by refusing to give defendant's instruction because possession of a stolen vehicle is not a lesser-included offense of aggravated vehicular hijacking in this case, and defendant was not entitled to have the jury instructed on a less serious, but not included offense of the one with which he was charged. *Davis*, 213 Ill. 2d at 480. Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 27 Defendant contends, the State concedes, and we agree, that his mittimus should be corrected to reflect his entitlement to 461 days of pre-sentence custody credit, rather than 459 days as currently reflected therein. Pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct his mittimus to that effect.

¶ 28 Affirmed; mittimus corrected.