NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 0813

STATE OF LOUISIANA

VERSUS

KELLY DARDAR

Judgment Rendered: NOV 07 2014

Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche, State of Louisiana
Trial Court Number 506,788

Honorable Walter I. Lanier, III, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON AND HIGGINBOTHAM, JJ.

WHIPPLE, C.J.

The defendant, Kelly Dardar, was charged by bill of information with unauthorized use of a motor vehicle, a violation of LSA-R.S. 14:68.4. The defendant pled not guilty and, following a jury trial, was found guilty as charged. He was sentenced to ten years imprisonment at hard labor. The defendant now appeals, designating two assignments of error. We affirm the defendant's conviction and sentence.

FACTS

On July 12, 2011, someone stole Teresa Larmeu's 1999 blue Nissan pickup truck from her home in Galliano, Louisiana. She was able to retrieve the truck eight days later from a tow yard in Colfax, Grant Parish. According to Teresa's testimony, her truck had been "trashed" and "beat up." The ignition had been removed and the license plate had been removed. The insurance and registration, which she kept in the truck, were gone. Neither Teresa nor her husband authorized anyone to use the truck.

The defendant and Chantelle Smith had been living in Galliano off and on since 2006. Chantelle stated that "in the middle of the night," Timmy Autin came to their house with a truck. After the defendant spoke with Timmy in the kitchen, the truck was left at the house. Chantelle testified that the truck came with keys. When asked about the damaged steering column - the ignition had been removed - Chantelle stated that the ignition "fell out." She explained that "[a]ll those curves and stuff like that" when they were driving to north Louisiana in the truck caused the ignition to fall out. They had to use a screwdriver to start the truck. When they were parked in the truck at a park in Pollock, Louisiana, Officer James Bruce, with the Pollock Police Department, approached the defendant and Chantelle and later discovered the truck had been stolen. Chantelle pled guilty to theft of the truck.

Officer Bruce testified that when he saw the Nissan truck on July 19, 2011 in the Kisatchie National Forest Park not in the designated camping site, he approached Chantelle and the defendant. When he asked for insurance and registration on the truck, Officer Bruce learned that they had no such documentation. When the officer ran the license plate, he discovered that the plate was not a match for the blue truck. Instead, the plate on the truck was a cancelled Louisiana farm plate for a 1999 black Nissan pickup truck. An NCIC check of the truck's VIN indicated it was a stolen vehicle. Officer Bruce also observed the ignition switch had been tampered with and took pictures of the damaged steering column. Officer Bruce did not find any keys for the truck.

The defendant did not testify at trial.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the court erred in denying his cause challenges of three prospective jurors. Specifically, the defendant contends that the answers provided by the prospective jurors indicated they could not be fair and impartial.

An accused in a criminal case is constitutionally entitled to a full and complete voir dire examination and to the exercise of peremptory challenges. LSA-Const. art. I, § 17(A). The purpose of voir dire examination is to determine prospective jurors' qualifications by testing their competency and impartiality and discovering bases for the intelligent exercise of cause and peremptory challenges. State v. Burton, 464 So. 2d 421, 425 (La. App. 1st Cir.), writ denied, 468 So. 2d 570 (La. 1985). A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to law may be reasonably implied. See LSA-C.Cr.P. art. 797; State v. Martin, 558 So. 2d 654, 658 (La. App. 1st Cir.), writ denied, 564 So. 2d 318 (La. 1990). A trial

court is accorded great discretion in determining whether to seat or reject a juror for cause, and such rulings will not be disturbed unless a review of the voir dire as a whole indicates an abuse of that discretion. State v. Martin, 558 So. 2d at 658.

A defendant must object at the time of the ruling on the refusal to sustain a challenge for cause of a prospective juror. LSA-C.Cr.P. art. 800(A). Prejudice is presumed when a challenge for cause is erroneously denied by a trial court and the defendant has exhausted his peremptory challenges. To prove there has been error warranting reversal of the conviction, the defendant need only show: (1) the erroneous denial of a challenge for cause; and (2) the use of all his peremptory challenges. State v. Robertson, 92-2660 (La. 1/14/94), 630 So. 2d 1278, 1280-81. A defendant who has not exhausted his peremptory challenges must establish that he was prejudiced by a ruling denying a cause challenge, e.g., that he was forced to hoard his remaining peremptory challenges at the cost of accepting a juror he would have peremptorily challenged. See State v. Vanderpool, 493 So. 2d 574, 575 (La. 1986).

Prospective juror Priscilla Loupe testified that while she understood the defendant's right not to testify, she thought the defendant should have something to say on his own behalf. When asked by defense counsel if she thought the defendant was hiding something if he did not testify, Loupe stated, "No, not necessarily." Defense counsel then asked if it meant she thought he should be convicted, and Loupe stated, "No." Defense counsel challenged her for cause, the trial court denied the challenge, and defense counsel used one of the six peremptory strikes allotted to him to strike Loupe.

Prospective juror Betty Molaison testified that she was a first cousin of Teresa Larmeu (the person who had her truck stolen). Molaison testified that the fact that she was related to Larmeu would not influence her ability to stay objective. She also indicated she could be fair and impartial. Defense counsel

challenged her for cause, the trial court denied the challenge, and defense counsel peremptorily struck Molaison.

Prospective juror Denise Cornish testified that she would be starting employment (apparently as a commissioned deputy) the following week with the Lafourche Parish Sheriff's Office. When asked by the trial court if she could nevertheless be a fair and impartial juror, Cornish stated, "Yes." When defense counsel challenged her for cause, the trial court spoke with Cornish. The trial court asked her if she could be a fair and impartial juror given her upcoming employment with the Sheriff's Office. Cornish responded, "Yes." The trial court denied the cause challenge. The six-person jury with one alternate was selected before the trial court ever got to Cornish's name, so defense counsel did not have to strike her.

The defendant argues in brief that LSA-C.Cr.P. art. 800 removed the requirement that a defendant exhaust all of his peremptory challenges before he can complain of a ruling refusing to grant a challenge for cause.[1] While Article 800 does not contain an exhaustion requirement, our supreme court has consistently held that the defendant's failure to exhaust his peremptory challenges bars review on appeal of a claim of an improperly denied peremptory challenge. State v. Jones, 2003-3542 (La. 10/19/04), 884 So. 2d 582, 591. See also State v. Wessinger, 98-1234 (La. 5/28/99), 736 So. 2d 162, 178, cert. denied, 528 U.S. 1050, 120 S. Ct. 589, 145 L. Ed. 2d 489 (1999) (Where the defendant exercised only eight of the twelve peremptory challenges, "we are not required to reach the issue of whether the trial judge erroneously denied the challenges for cause that are the subject of this assignment of error."); State v. Koon, 96-1208 (La. 5/20/97),

[1]Article 800(A) provides: "A defendant may not assign as error a ruling refusing to sustain a challenge for cause made by him, unless an objection thereto is made at the time of the ruling. The nature of the objection and grounds therefor shall be stated at the time of objection." Prior to its amendment by La. Acts 1983, No. 181, § 1, Article 800 provided: "A defendant cannot complain of a ruling refusing to sustain a challenge for cause made by him, unless his peremptory challenges shall have been exhausted before the completion of the panel."

704 So. 2d 756, 767, cert. denied, 522 U.S. 1001, 118 S. Ct. 570, 139 L. Ed. 2d 410 (1997) ("[W]e need not reach the issue of whether failure to dismiss [a prospective juror] for cause was error because the defense did not use all its peremptory challenges."); State v. Mitchell, 94-2078 (La. 5/21/96), 674 So. 2d 250, 254, cert. denied, 519 U.S. 1043, 117 S. Ct. 614, 136 L. Ed. 2d 538 (1996) ("In the instant case, we need not reach the issue of whether there was an erroneous denial of defendant's challenge for cause, since the record reveals that defendant failed to use all his peremptory challenges."); and State v. Williams, 98-651 (La. App. 5th Cir. 2/10/99), 729 So. 2d 14, 17-18.

In the instant matter, when the jury was selected, defense counsel had used only four of the defendant's six peremptory challenges.[2] Accordingly, we need not reach the issue of whether the court's rulings denying the cause challenges of Loupe and Molaison were correct. (The cause challenge denial of Cornish is moot because the jury was chosen before either side had to consider accepting or striking her). See State v. Davis, 97-2750 (La. App. 1st Cir. 11/6/98), 722 So. 2d 1049, 1051, writ denied, 99-3521 (La. 6/16/00), 764 So. 2d 960. See also Koon, 704 So. 2d at 767. None of the challenged jurors served, no objectionable juror was seated, defense counsel had two peremptory strikes left, and, despite given the opportunity, defense counsel chose not to use any back strikes. Even if the trial court should have granted the cause challenge of the prospective jurors, the defendant has not shown, and the record does not reflect, that he was forced to accept a questionable juror by holding any peremptory challenges to exclude

[2]The crime of unauthorized use of a motor vehicle is punishable by imprisonment with or without hard labor. LSA-R.S. 14:68.4(B). Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict. LSA-C.Cr.P. art. 782(A). In trials of offenses punishable necessarily by imprisonment at hard labor, each defendant shall have twelve peremptory challenges. In all other cases, except those punishable by death, each defendant shall have six peremptory challenges. See LSA-C.Cr.P. art. 799.

Loupe and Molaison. Also, he has not otherwise established the requisite prejudice under Vanderpool. See Davis, 722 So.2d at 1051-52.

As such, we find no abuse of the trial court's discretion in denying the defendant's challenges for cause. Because the defendant failed to establish that he exhausted his peremptory challenges and that the trial court erroneously denied his challenges for cause, no prejudice is presumed and no reversible error exists. See State v. McKnight, 98-1790 (La. App. 1st Cir. 6/25/99), 739 So. 2d 343, 355, writ denied, 99-2226 (La. 2/25/00), 755 So. 2d 247.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in declining his requested jury charges. Specifically, the defendant contends that the trial court should have included in its jury instructions jury charges on intent and guilty knowledge.

The trial court shall charge the jury as to the law applicable to the case. LSA-C.Cr.P. art. 802(1). The State and the defendant shall have the right to submit special jury charges. The court shall give a requested special jury charge if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. However, it need not be given if it is included in the general charge or in another special charge to be given. LSA-C.Cr.P. art. 807. See State v. Tate, 2001-1658 (La. 5/20/03), 851 So. 2d 921, 937, cert. denied, 541 U.S. 905, 124 S. Ct. 1604, 158 L. Ed. 2d 248 (2004). Failure to give a requested jury charge constitutes reversible error only when there is a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. Id.

Defense counsel filed proposed jury charges with an attached memorandum that listed the four charges he sought to have the trial court provide to the jury as

part of its jury instructions. At the charge conference, the trial court denied each requested charge by defense counsel, explaining that the standard language it was using, including language from a treatise on criminal law and language taken directly from the criminal code, would adequately cover all the relevant law. On review, we see no reason to disturb the trial court's rulings on the proposed jury charges.

The record reflects that defense counsel suggested the following charges:

> 1.
>
> The entire paragraph in the proposed Post Trial Jury Instructions which lists the elements of 14:68.4 should be removed and replaced with the elements listed below.
>
> The essential elements of the crime of unauthorized use of a motor vehicle are:
>
> 1. the intentional taking or use
> 2. of a motor vehicle
> 3. which belongs to another
> 4. without the other's consent or by fraudulent conduct, practices, or representations.
>
> 2.
>
> Violation of the statute requires a showing of mens rea or criminal intent, since the "evil" state of mind of the actor distinguishes criminal acts (punishable by the state alone) from mere civil wrongs (actionable by private individuals against one another).
>
> 3.
>
> If the State cannot prove the taking of the vehicle by Kelly Dardar, the State must prove that Kelly Dardar knew the vehicle was taken without authorization.
>
> 4.
>
> Possession of Teresa Larmeu's truck does not create a presumption that Kelly Dardar received it with knowledge that it was stolen by someone else. The State must prove that Kelly Dardar knew or had good reason to believe that the truck had been stolen before a conviction can be attained.
>
> 5.
>
> The sentence, "Unauthorized use of a motor vehicle is a specific intent crime" should be inserted immediately following the explanation of "specific criminal intent."

(Citations omitted).

The defendant argues in brief that the requested jury charges (except for the charge in the fifth paragraph, wherein defense counsel conceded that he incorrectly

stated that unauthorized use of a motor vehicle required specific criminal intent) should have been included because the whole defense "rested on whether [the defendant] reasonably believed he was authorized to use the truck." According to the defendant, the "State should have been required to prove beyond a reasonable doubt that [he] knew or should have known that the truck was stolen."

In its instructions to the jury, the trial court read the definition of unauthorized use of a motor vehicle: "the intentional taking or use of a motor vehicle which belongs to another, without the consent of the other or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of the motor vehicle is not essential." In the first paragraph of his proposed jury charges, defense counsel simply restates the elements of the crime as a numbered list. It is not clear why he argued at the charge conference that this language should be included, given that it is precisely the law as it was read to the jurors by the trial court. In any event, the argument that this language from the first paragraph should have been included is baseless.

Regarding the second paragraph of the proposed jury charges, the trial court informed defense counsel it would instruct the jury on criminal intent and, in fact, provided the jury with the definitions of specific and general criminal intent. At the charge conference, the trial court informed defense counsel that it would not use the word "evil" in describing the state of mind because the law does not require such a term to be used. The trial court explained that as such, it would decline to use the definition of intent offered by the defense and would use the language from the legal treatise. The trial court provided the correct law to the jury, and we find no error or abuse of discretion in its refusal to include the word "evil."

In the third and fourth paragraphs of the proposed jury charges, which are essentially the same, defense counsel stated that if the State could not prove the defendant took the truck, then the State had to prove he knew the truck was taken

without authorization or knew or had good reason to believe the truck had been stolen. This language was unnecessary because the trial court instructed the jury that if it found the defendant in possession of recently stolen property and that such possession was reasonably consistent with innocence, then the defendant must be found not guilty. Moreover, as noted by the trial court at the charge conference, the very language of the crime itself required the taking or use of another person's vehicle to be *intentional*. Since the intentional element of the crime is in the disjunctive (intentional taking or use of a motor vehicle), a guilty verdict would indicate that the jurors concluded the defendant either took the truck without authorization or that he used it without authorization (or both). See State v. Gustavis, 2000-1855 (La. App. 4th Cir. 5/30/01), 788 So. 2d 1242, 1248, writ denied, 2001-1828 (La. 5/10/02), 815 So. 2d 833.

Under LSA-R.S. 14:68.4, knowledge by a defendant (or good reason to believe) the vehicle was stolen is not a necessary (although it may be a sufficient) condition to satisfy the intent element of the crime. Furthermore, the element of "knew or had good reason to believe that the thing" was stolen is the guilty knowledge element of the crime of illegal possession of stolen things. See LSA-C.Cr.P. art. 14:69(A); State v. Calloway, 2007-2306 (La. 1/21/09), 1 So. 3d 417, 422 (per curiam). Defense counsel conflated the required elements with those of another crime and, as such, the trial court properly declined to use the language in the third and fourth paragraphs of the proposed jury charges. If the evidence in this case showed the defendant intentionally used Teresa's truck without her consent (without the intent to deprive her of it permanently), then the defendant committed the crime of unauthorized use of a motor vehicle. See State ex rel. L.V., 2010-1789 (La. App. 4th Cir. 5/25/11), 66 So. 3d 558, 563; Gustavis, 788 So. 2d at 1248. Accordingly, we find the trial court did not err or abuse its discretion in denying these proposed jury charges.

Moreover, even if the trial court had improperly excluded the proposed jury charge or charges (particularly those in paragraphs three and four), such error would be deemed harmless. An invalid instruction on the elements of an offense is harmless if the evidence is otherwise sufficient to support the jury's verdict and the jury would have reached the same result if it had never heard the erroneous instruction. State v. Hongo, 96-2060 (La. 12/2/97), 706 So. 2d 419, 421. The determination is based upon whether the guilty verdict actually rendered in this trial was surely unattributable to the error. Id. See Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993).

The evidence clearly established a violation of LSA-R.S. 14:68.4 given that: (1) the defendant took possession of the truck in the middle of the night; (2) there were no keys; (3) the steering column had been damaged; (4) there was no paper work (registration or insurance) on the truck; and (5) the truck's license plate had been switched. Thus, even if there were an erroneous jury instruction, the error would have been harmless in light of the overwhelming evidence presented at trial establishing that not only did the defendant not reasonably believe he was authorized to use the truck, but that he knew the truck was stolen when he was using it, given the drastic alterations made to the vehicle. See State v. Bishop, 2001-2548 (La. 1/14/03), 835 So. 2d 434, 439-40.

This assignment of error also lacks merit.

CONCLUSION

For the above and foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.