STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2001
v	No. 218490 Oakland Circuit Court
CLIFFORD VARDIMAN, Defendant-Appellant.	LC No. 98-162278-FH

Before: Doctoroff, P.J., and Holbrook, Jr., and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of seven counts of receiving or concealing stolen property over $100, MCL 750.535; MSA 28.803. He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to concurrent terms of 2-1/2 to 7-/12 years' imprisonment for each count. We remand and direct that the judgment of sentence be amended to reflect a single conviction of receiving or concealing stolen property.

Defendant's convictions stem from the theft of seven car radios on the night of September 16, 1998. On that night, defendant drove to a location in Pontiac with two other men. The truck they rode in belonged to the father of one of these two men. While their stories of the robberies differed, each of the other two men testified that defendant remained behind in Pontiac while the radios were taken from cars located in the city of Birmingham. Later on, defendant and the other two men were arrested while out riding in the aforementioned truck. The radios were concealed on the back seat floor of the passenger compartment. Defendant was charged with seven counts of larceny from a motor vehicle, MCL 750.356a; MSA 28.588(1). Ultimately, defendant was found guilty of the cognate lesser offense of receiving and concealing.

Defendant's sole claim is that his seven convictions for receiving or concealing stolen property over $100 violates his constitutional protection against double jeopardy. Below, defendant argued that his convictions violated the plain meaning of the receiving and concealing statute. Because defendant did not present this precise constitutional claim to the trial court, we review the alleged error under the plain error rule. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice . . . ." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only

when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."'" *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

Legislative intent is the determining factor for purposes of the double jeopardy analysis. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997). The Legislature has the authority to define a single criminal act or offense. *Id at* 709. When addressing defendant's statutory argument, the trial court ruled that the fruits of each separate larceny incident could give rise to a separate charge of receiving or concealing stolen property. While the trial court's reasoning could arguably apply in a circumstance where the defendant was found to have participated in each theft as either a principal or an aider or abettor, we conclude that such a holding is not warranted under the circumstances of this case.

In determining whether separate offenses were intended by the Legislature, we consider the part of the statute that the defendant's conduct violates. See *People v Harajli*, 161 Mich App 399, 407; 411 NW2d 765 (1987). Here, because the jury found defendant not guilty of the charged larceny from a motor vehicle offenses, we conclude that the time and place of the thefts is not relevant in analyzing this defendant's conduct. The proper focus is on the time and place of defendant's own conduct that gave rise to his convictions.

Because defendant's violation of the receiving or concealing statute arose out of his assistance to the thief (acting alone or aided and abetted by another), or his related receipt or possession of the stolen property, at a single time and place, namely, the vehicle where the seven stolen radios were concealed, we hold that only a single conviction was intended under the facts presented. While defendant possessed items taken from seven separate persons, under the facts of this case, defendant's possession was the result of a simultaneous and singular transaction. See *State v Goins*, 705 SW2d 648 (Tenn, 1986) (only one conviction for receiving or concealing stolen property permitted under Tennessee Code, even though items were taken in three separate burglaries, where there was no evidence of separate receiving or concealing transactions).[1]

Because only a single conviction was intended under the circumstances of this case, we conclude that the imposition of seven separate convictions and sentences constituted a plain violation of the constitutional prohibition against double jeopardy and that defendant's substantial rights were affected by the error. *Carines, supra* at 763. We conclude that the appropriate remedy is to vacate six of defendant's convictions and sentences. *People v Johnson*, 176 Mich App 312, 315; 439 NW2d 345 (1989); *People v Feldscher*, 146 Mich App 49, 53; 380 NW2d 50 (1985). We deny defendant's request for resentencing on the remaining conviction because defendant has not shown that the number of convictions had any determinative effect on the

[1] However, the gravity of that single offense could be determined by the aggregate total value of the seven radios. *People v Miller*, 406 Mich 244, 249; 277 NW2d 630 (1979); *People v Toodle*, 155 Mich App 539, 553; 400 NW2d 670 (1986). Otherwise, a defendant who comes into simultaneous possession of items stolen from several persons would potentially be provided with what amounts to an exemption for the "excess" thefts.

sentences imposed by the trial court. *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1992).

Affirmed in part, vacated in part, and remanded for entry of an amended judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra