

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN KEITH WHITE,

Defendant-Appellant.

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UNPUBLISHED

August 18, 2005

No. 253607

Midland Circuit Court

LC No. 01-009859-FH

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

This case is before this Court following an order of remand from our Supreme Court to the trial court. See *People v White*, 469 Mich 944; 670 NW2d 672 (2003). On remand, a judgment of conviction for malicious destruction of property greater than \$200 but less than \$1,000 (“misdemeanor-MDOP”) was entered against defendant, MCL 750.377a(1)(c)(i). Defendant was sentenced to one year in jail for his conviction, to be served concurrently with a two-year prison term for possession of a firearm during the commission of a felony, MCL 750.227b. Defendant asserts that the trial court misinterpreted our Supreme Court’s order of reversal and remand. We agree and reverse the trial court’s entry of judgment of conviction and remand for further proceedings.

This case is before us a second time. Defendant was originally charged with two counts of assault with a dangerous weapon, MCL 750.82; malicious destruction of property over \$1,000 but less than \$20,000 (“felony-MDOP”), MCL 750.377a(1)(b)(i); and felony-firearm, MCL 750.227b. Defendant was convicted of the felony-MDOP and felony-firearm charges, but was acquitted of the assault charges. Defendant appealed his convictions to this Court, asserting that the trial court improperly denied his request for a jury instruction on misdemeanor-MDOP. *People v White*, unpublished opinion per curiam of the Court of Appeals, issued February 28, 2003 (Docket No. 238735), slip op p 1. Defendant asserted that because the remedy for the instructional error was vacating his felony-MDOP conviction, his felony-firearm conviction also had to be vacated. *Id.* In a divided opinion, this Court affirmed defendant’s convictions. *Id.*

Thereafter, defendant sought leave to appeal to our Supreme Court. In lieu of granting leave to appeal, our Supreme Court reversed the judgments of this Court and the trial court and remanded this case “for entry of a judgment of conviction of malicious destruction of property over \$200, but less than \$1,000, and for resentencing.” *White, supra* at 944. The Court further stated:

If, however, the prosecuting attorney is persuaded that the ends of justice would be better served, on notification to the Midland Circuit Court before resentencing, the Midland Circuit Court must vacate the judgment of conviction and grant a new trial on the charge that the defendant committed the crime of malicious destruction of property over \$1,000, but less than \$20,000, and felony-firearm. [*Id.*]

On remand, the prosecution elected to allow entry of the judgment of conviction of misdemeanor-MDOP. The trial court proceeded to sentence defendant to one year in jail for the misdemeanor-MDOP conviction and ordered that that sentence be served concurrent to the felony-firearm conviction, which the trial court failed to vacate despite defendant's personal inquiry and request to do so. The trial court explained that this was in keeping with its reading of our Supreme Court's directive. Defense counsel concurred. The trial court granted defendant credit for time served.

On appeal, defendant asserts that the trial court was required to vacate his felony-firearm conviction under the Supreme Court's order. We agree. Although defense counsel agreed with the trial court's interpretation of the Supreme Court's order, we conclude that defendant's contrary protestations sufficiently preserved this issue for review in light of the manifest injustice that would result were we to fail to review this issue. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). The proper interpretation of a court order is a question of law that we review de novo. See *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

The Supreme Court's order of remand specifically states that "the judgments of the Court of Appeals and of the Midland Circuit Court are reversed." *White, supra* at 944. The order does not indicate that any portion of the trial court judgment was exempt from the order of reversal. Accordingly, we conclude that the language of the Supreme Court's order indicates that it intended to reverse defendant's convictions for both felony-MDOP and felony-firearm. This conclusion is supported by *People v Burgess*, 419 Mich 305, 311-312; 353 NW2d 444 (1984), in which our Supreme Court held that appellate courts may not reach inconsistent results by reversing a judgment of conviction for a felony supporting a felony-firearm conviction while affirming the felony-firearm conviction, because the reversal of the underlying felony conviction undermines the jury's factual finding that the underlying felony was committed. "Absent such a finding, the felony-firearm conviction must also be reversed." *Id.* at 312. In this case, the jury's factual finding that defendant committed a felony may not be relied on because of the trial court's instructional error.

Plaintiff attempts to differentiate this case from *Burgess* by noting that in *Burgess* it was the identified predicate felony for the felony-firearm conviction that had been reversed on appeal, *Burgess, supra* at 308, while in this case the jury was presented alternative theories supporting the felony-firearm conviction, i.e., felonious assault and felony-MDOP. Plaintiff asserts that in this case the jury might have found that defendant committed the felonious assault crimes with which he was also charged, and, as such, the inconsistent verdict would have been permissibly rendered by the jury rather than the appellate courts.

Plaintiff's reasoning is flawed, however, in that it discounts this Court's responsibility to find a logical interpretation for the verdicts rendered where possible. On this point, *People v Tombs*, 472 Mich 446, 462-463; 697 NW2d 494 (2005), is instructive:

[A]lthough inconsistent jury verdicts may be legally permissible, it does not follow that [appellate courts] should find verdicts inconsistent when it is possible to find them consistent. See *Lagalo v Allied Corp*, 457 Mich 278, 282; 577 NW2d 462 (1998) (“[i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury, the verdict is not inconsistent.”) (Citation omitted.)

There is no disagreement that, here, the jury specifically acquitted defendant of using a computer to distribute child sexually abusive material, and it convicted him of distributing such material. It could have found him guilty of distributing the material in one of two ways: (a) finding that he shared the material with others on the Internet, or (b) finding that he distributed it by returning the computer to Comcast. The former would be inconsistent with the jury's verdict concerning the “use of a computer to distribute child sexually abusive material” charge; the latter would not be. Because we presume that the verdicts are consistent, we conclude that the jury convicted defendant of distributing the material by returning the computer to Comcast.

Here, the jury could have found defendant guilty of felony-firearm in one of two ways: (1) finding that he committed assault even though it did not convict him of the crime, and tying the felony-firearm conviction to this crime; or (2) finding that he had committed and should be convicted of felony-MDOP, and tying the felony-firearm conviction to that crime. Because this Court must presume consistent verdicts, this Court must presume the jury followed the latter reasoning. This interpretation of the jury verdict is the most logical explanation and avoids finding that the jury acted inconsistently. Thus, with the factual finding supporting the commission of the underlying felony gone, defendant's felony-firearm conviction must be reversed.

Defendant asserts in the alternative that he was denied effective assistance of counsel. Having found defendant's primary assertion of error was sufficiently preserved for review, we decline to address this issue.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper  
/s/ Richard A. Bandstra  
/s/ Kirsten Frank Kelly