

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARL LAVONN GATHINGS,

Defendant-Appellant.

UNPUBLISHED

July 7, 2009

No. 283165

Wayne Circuit Court

LC No. 07-007865-FH

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Defendant was found guilty by a jury of copying audio-video recordings for gain, MCL 752.1052; MCL 752.1054(2), and was sentenced to three years' probation and ordered to pay \$3,135 in restitution. He appeals as of right. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E).

A police officer observed defendant sitting at a table in a Wendy's restaurant with a woman. There were DVDs, a DVD player, and a \$20 bill on the table. When the woman saw the officer, she slowly took the \$20 bill and left. When questioned by the officer regarding what he was doing, defendant handed a flyer to him and asked what he wanted. The paper contained a list of 165 DVDs for sale for \$5 each or \$20 for five DVDs. The officer noted that at least one of the movie titles was still playing in the movie theaters. A binder containing 165 DVDs was confiscated and defendant was arrested. A Senior Investigator for Recon Management Group identified the 165 DVDs in defendant's confiscated binder as counterfeit. He further stated that defendant had no authorization from the Motion Picture Recording Industry to duplicate anything on behalf of it or its member companies.

Defendant first argues on appeal that the jury instructions failed to inform the jury of all of the elements of the offense. We disagree.

This Court reviews questions of law, including the applicability of jury instructions, de novo. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). Because he failed to raise this objection at trial, defendant's erroneous jury instruction claim is reviewed for plain error

affecting his substantial rights.¹ *People v Carines*, 460 Mich 750, 763, 766-767; 597 NW2d 130 (1999); *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). We review the instructions as a whole and there is no basis for recovery if the instruction adequately protected the defendant's rights by fairly presenting the issues to be tried to the jury. *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006); *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007). In addition, questions of statutory interpretation are also reviewed de novo. *People v Buehler*, 477 Mich 18, 23; 727 NW2d 127 (2007); *People v Powell*, 278 Mich App 318, 320; 750 NW2d 607 (2008).

The trial court must instruct the jury on all elements of the charged offense, and, on request, on material issues, defenses and theories that are supported by the evidence. *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000); *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867(1975). It is constitutional error to omit an instruction on an element of a crime. *Martin*, *supra* at 338.

There are no standard jury instructions for the offense at issue in this case. However, the instructions agreed to by the parties fairly presented the issues to be tried to the jury, *Martin*, *supra* at 337-338; *Clark*, *supra* at 255-256, and included all of the elements of the offense, *Rodriguez*, *supra* at 472-473; *Reed*, *supra* at 349-350. DVDs, films, and videos are clearly included within the statutory definition of "recording," see MCL 752.1051(c), and the counterfeit recordings statutes, MCL 752.1052 and MCL 752.1054(2), applied to the DVDs that defendant was found guilty of copying – DVDs to which the court made reference to the jury.² Furthermore, omission of the 180-day language included in MCL 752.1054(2) was not erroneous because it was not mandated by the evidence presented. Defendant was arrested with 165 counterfeit DVDs in his possession. There was no accumulation of unauthorized acts over a period of time used to reach the more than seven recordings proscribed by the statute. We find no plain error with regard to the jury instructions.

Defendant next claims there was insufficient evidence to support his conviction for copying audio/video recordings for gain. This argument is also without merit.

Sufficiency of the evidence claims are reviewed de novo on appeal. See *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992); see also *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). When reviewing a sufficiency of the evidence challenge, this Court reviews the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the elements of the charged offense were proven beyond a reasonable doubt. *People v Lundy*, 467

¹ It is arguable that defendant waived this claim of error and thereby extinguished any error. See *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Nevertheless, we will address the claim.

² The court stated that that the jury must find that "the Defendant did possess for the purpose of selling seven (7) or more *audio visual recordings*" (emphasis added).

Mich 254, 257; 650 NW2d 332 (2002); *Wolfe, supra* at 515. As noted earlier, questions of statutory interpretation are reviewed de novo. *Buehler, supra* at 23; *Powell, supra* at 320 (2008).

The evidence established that a police officer observed defendant sitting at a table in a Wendy's restaurant with a binder containing 165 DVDs. A woman was sitting with defendant, with \$20 on the table in front of her, but slowly took her money and left when she saw the officer. When questioned, defendant handed a flyer to the officer and asked what he wanted. The paper contained a list of 165 DVDs for sale. The officer noted that at least one of the movie titles was for a movie that was still playing in the theaters. Considering that defendant possessed 165 DVD recordings, he was showing one to the woman who had \$20 on the table in front of her before she left after noticing the police officer, and he handed a flyer to the officer which advertised DVDs for sale, one could infer that defendant possessed the recordings for the purpose of selling them, and one could also infer that the recordings contained sounds. In addition, a Senior Investigator for Recon Management Group identified the 165 DVDs as being counterfeit. Finally, defendant had no authorization from the Motion Picture Recording Industry to duplicate anything on behalf of it or its member companies. Based on this evidence, a rational trier of fact could have found that the elements of the charged offense were proven beyond a reasonable doubt. *Lundy, supra* at 257; *Wolfe, supra* at 515. There was sufficient evidence to support defendant's jury-based conviction of copying audio/video recordings for gain, MCL 752.1052; MCL 752.1054(2).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto