STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARVEY JOHNSON, JR.,

Defendant-Appellant.

UNPUBLISHED
December 10, 1996

No. 185762
LC No. 94-009721

Before: Doctoroff, C.J., and Corrigan and Danhof,* JJ.

PER CURIAM.

Defendant appeals by right his convictions of carrying a concealed weapon, MCL 750.227; MSA 28.424; possession of narcotics under twenty-five grams, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(3)(a)(v); felon in possession of a firearm, MCL 750.224f; MSA 28.421(6); possession of a stolen firearm, 750.535b; MSA 28.803(2); possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2); failure to obey police directions to stop a vehicle, MCL 750.479a; MSA 27.646a; malicious destruction of personal property under $100, MCL 750.377a; MSA 28.609(1); malicious destruction of trees, shrubs, grass, turf and soil, MCL 750.382; MSA 28.614; possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d); and habitual offender, third offense, MCL 769.11; MSA 28.1083. On appeal, defendant argues that the trial court erred in denying defendant's motion to sever the felon in possession charge from the remaining charges. Defendant also contends that the charge of receiving and concealing a stolen firearm was not supported by sufficient evidence. Finally, defendant claims the trial court erred in ordering him to complete the maximum sentence of a previous offense for which he had been paroled. We affirm in part, reverse in part and remand for resentencing.

Defendant's arrest occurred as follows: On July 29, 1994, at approximately 7:00 p.m., Michigan State Police trooper Rashelle Albright was on routine patrol in Saginaw County. She observed defendant driving a 1970 blue Dodge with a badly cracked windshield. She attempted to make a traffic stop of the vehicle due to its defective equipment. The driver did not stop, but proceeded down a residential street at a high rate of speed, and, at one point, he drove across lawns to avoid a

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

blockage in the street. After defendant's automobile struck and damaged a mailbox post and another automobile, defendant and a passenger got out of the car and fled the scene. Albright was unsuccessful in following them, so she returned to the vehicle to seize it for inventory purposes. Inside the car she found a .40 caliber handgun, an extra magazine for the gun, a quarter of a gram of cocaine, an unspecified amount of marijuana and several documents bearing defendant's name. In a statement to police which defendant signed, he admitted that he struck mailboxes, but denied hitting another car. He claimed that the gun belonged to his passenger, Michael Jones, and he denied having knowledge of the presence of cocaine or marijuana in the car.

At trial, Joseph Huell testified that he noticed in March 1994, that both of his handguns were missing from his house, one of which was a .40 caliber. He testified that the handgun found in defendant's car was his, stating that he recognized it because it was "big black and ugly." After the prosecution rested, defendant moved for a directed verdict on the ground of insufficient evidence. The trial court denied the motion. Defendant then testified, stating that the car belonged to his mother but that he never used it because he was not licensed to drive. He denied that he had read the police statement which he signed, and he denied the accuracy of the statement. He admitted that he had been convicted of carrying a concealed weapon in 1991 and of possession of cocaine in 1990.

On appeal, defendant first claims that the trial court abused its discretion in denying defendant's motion for severance of the charge of felon in possession of a firearm from the remaining counts. Defendant claims that he was denied a fair trial by the prosecutor's repeated references to the prior convictions that formed the basis for the charge of felon in possession of a firearm. Defendant contends that he was particularly prejudiced because the prior convictions involved a firearm and the possession of cocaine, as did the charges against him in this case.

MRE 404 prevents the admission of evidence of other crimes for the purpose of showing action in conformity therewith. In this case, the evidence of defendant's prior convictions was introduced for the purpose of showing that he was a "felon" under the felon in possession of a firearm statute, MCL 750.224f; MSA 28.421(6). Because the evidence of the prior convictions would have been inadmissible if not for the charge of felon in possession of a firearm, defendant argues that the trial on that charge should have been severed from the remaining charges. Defendant contends that the jury might assume that, because defendant had been previously convicted of possession of cocaine and an offense involving a weapon, he was more likely to be guilty of the similar offenses with which he was charged. This argument is not without merit. However, we find that defendant's motion for severance was not timely, and thus we find no abuse of discretion.

Defendant did not file his motion for severance until after the jury had been read the information and after several potential jurors had been questioned during voir dire. Presumably, the prosecutor had already prepared to try the felon in possession charge with the other charges. Thus, we find that defendant's motion for severance of the felon in possession charge was untimely. Accordingly, the trial court did not abuse its discretion in denying the motion. We make no determination as to the merits of defendant's claim had his motion been timely.

In the alternative, defendant contends that the prosecutor should have been permitted to prove that defendant had been previously convicted of a specified offense without naming the offense. However, the jury instructions for this offense state that the prosecutor must prove that the defendant was convicted of the *named* offense.[1] CJI2d 11.38 (emphasis added). In addition, we are unable to determine how the prosecution could prove that defendant had committed a previous offense without producing evidence of the particular offense he had committed. Accordingly, we are unpersuaded by defendant's argument.

Defendant next argues that there was insufficient evidence to support a finding that the gun was stolen or that defendant knew it was stolen. We agree that insufficient evidence was presented regarding whether defendant had knowledge that the gun was stolen.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). A person who "transports or ships a stolen firearm or stolen ammunition, *knowing that the firearm was stolen*, is guilty of a felony." MCL 750.535b; MSA 28.803(2) (emphasis added). It is clear from the language of the statute that knowledge that the gun was stolen is an element of the crime. At trial, the prosecution presented evidence which would allow the jury to infer that the gun in defendant's automobile had been stolen. However, no evidence was introduced which could establish, either directly or by inference, that defendant knew the gun was stolen. At most, the prosecution established that a stolen firearm was in defendant's vehicle. There was no evidence to suggest that defendant had reason to know it was stolen. Thus, the prosecution failed to present evidence regarding an element of the crime, and defendant's conviction under MCL 750.535b; MSA 28.803(2) is reversed due to insufficient evidence. This holding has the same effect as an acquittal in the lower court and retrial is barred. *People v Jasman*, 92 Mich App 81, 87; 284 NW2d 496 (1979).

Finally, defendant argues that he is entitled to resentencing because the trial court improperly ordered him to complete the maximum term of the parole sentence. We agree and remand for resentencing.

MCL 768.7a(2); MSA 1030(1) provides in part:

> If a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.

The trial court in this case ordered defendant to serve the maximum sentence for the previous offense before beginning the consecutive sentences for the instant offense. At issue is whether the statutory language "remaining portion of the term of imprisonment imposed for the previous offense" refers to the minimum or the maximum term imposed.

This issue was addressed by our Supreme Court in *Wayne County Prosecutor v Department of Corrections*, 451 Mich 569; 548 NW2d 900 (1996). In that case, the Court held that MCL 768.7a(2); MSA 1030(1) requires only that the minimum sentence be completed. *Id.* at 581, 587. Accordingly, the trial court in this case erred in ordering defendant to complete the maximum sentence for the previous offense before beginning the sentences for the current convictions. We remand for resentencing in accordance with the Supreme Court's recent decision in *Wayne County Prosecutor*.

Affirmed in part, reversed in part and remanded for resentencing.

/s/ Martin M. Doctoroff
/s/ Maura D. Corrigan
/s/ Robert J. Danhof

[1] We recognize that the Michigan Criminal Jury Instructions do not have the official sanction of the Supreme Court, *People v Vaughn*, 447 Mich 217, 235 n 13; 524 NW2d 217 (1994), and thus we cite them only as persuasive authority.