STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 25, 2011
v	No. 297838 Saginaw Circuit Court
JOHN HENRY GRANDERSON, Defendant-Appellant.	LC No. 09-032961-FH

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I concur with the majority that defendant's convictions must be reversed in light of the inaccurate instruction on the knowledge element provided for in MCL 750.535b. However, rather than remanding the case for retrial with proper instructions, I would vacate the conviction because sufficient evidence on yet another element was not proffered.

Defendant was convicted under MCL 750.535b(2), which requires that at the time a defendant "receives, conceals, stores, barters, sells, disposes of, pledges or accepts [a firearm] as security for a loan" he know that the firearm was stolen. No evidence was submitted that, when defendant had a gun, he "conceal[ed], store[d], barter[d], [sold], dispose[d] of, [or] pledge[d] or accept[ed] [it]. . . as security for a loan." The sole evidence that defendant "receive[d]" the firearm was the fact that two photographs were discovered of him holding the weapon.

MCL 760.535, the general receiving and concealing statute, unlike MCL 750.535(b), also makes it a crime to "possess" stolen property. While one may argue that a jury could reasonably find that holding the weapon long enough simply to take a photo does not constitute possession, it is also clear that a reasonable jury could so find and that such evidence would be sufficient to convict assuming the other elements were present. Accordingly, had defendant been charged under MCL 760.535, a conviction would have been proper. However, I do not believe that two photographs of defendant holding a firearm is sufficient to conclude that he "received" the weapon, as required by MCL 760.535b.

The majority concludes that "receipt" means "to accept possession of property" and therefore equates receipt with simple possession. I disagree. When the Legislature adopted MCL 760.535b in 1991, it chose not to include mere possession, even though it had specifically amended MCL 760.535 to include mere possession in 1979 and could certainly have included the same language in MCL 760.535b. In addition, the 1979 amendment was adopted following

the decision in *People v Kyllonen*, 402 Mich 135; 262 NW2d 2 (1978), which held that the term "receiving" in the pre-amended version of MCL 750.535 did *not* include mere possession. Rather, the Supreme Court held that the term "received" related to "those persons who assist the thief or others in the disposition or concealment of the stolen property." *Id.* at 145. See also, *People v Botzen*, 151 Mich App 561, 564; 391 NW2d 410 (1986) (prior to the 1979 amendment, "the statute was directed towards those who assisted the thief or others in the disposition or concealment of stolen property").

The sole evidence in this case, i.e., two photographs of defendant holding the gun while in a friend's bedroom, is not sufficient to demonstrate participation in the disposition or concealment of the weapon, which, under *Kyllonen*, is required to show "receiving," and the statute does not proscribe mere "possession." Accordingly, I would vacate defendant's convictions.

/s/ Douglas B. Shapiro