

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN HENRY GRANDERSON,

Defendant-Appellant.

UNPUBLISHED

August 25, 2011

No. 297838

Saginaw Circuit Court

LC No. 09-032961-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of receiving or concealing a stolen firearm, MCL 750.535b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to a term of nine months to two years' imprisonment for the stolen firearm conviction, and two years for the felony-firearm conviction, to be served consecutively. Defendant appeals as of right. We reverse and remand.

I. BACKGROUND

Defendant's receiving or concealing a stolen firearm conviction stems from the theft in February 2009 of six weapons owned by Robert and Shelia Burk—two rifles, an AR-15 and an "AK-47 style," as well as four handguns, a Springfield XD-9 (a 9-millimeter), a Springfield XD-45 (a .45), a Walther P-22, and a Ruger SP101 (a .357). The theft was detected on February 13, 2009, when the owner of the home where the weapons were stored in a gun safe discovered his home had been burglarized.

Several of the weapons were ultimately used in shootings on February 24, 2009 at Bridgeport High School, and on March 5, 2009 in Saginaw, Michigan. The Springfield XD-45, Springfield XD-9, and Ruger .357 were recovered by police from a vehicle after a fight at BASE alternative school in Bridgeport on February 26, 2009. The car from which they were recovered was registered to codefendant Aaron Smith's parents. The "AK-47 style" rifle was recovered from a backyard after the March 5, 2009 shooting.

Officers investigating these incidents became aware of photographs posted on MySpace of Alontae Smith, Aaron's Smith's brother, holding the rifle. The user's profile name was "King Lontae."¹ According to statements made by "King Lontae" on MySpace, the photographs of the weapons were removed because "[t]hey were aware that the police were looking into it."

The police then obtained a search warrant for Alontae Smith's home because:

Alontae Smith's name came up in the shots fired, in the fight at the high school, and the fact that both Alontae Smith and Aaron Smith were arrested in Bridgeport where the three recovered handguns were found by Bridgeport where the three recovered handguns were found by Bridgeport Township officers.

In light of the pictures that had been posted on the internet that showed a room and some individuals, including Aaron Smith, holding weapons, the police were looking for both photographs and weapons.

Aaron and Alontae Smith were both at the home when the warrant was executed, as were their parents and another brother. The room in the pictures turned out to be Aaron Smith's bedroom. It was located in the basement and was easily identifiable because it was bright red with black blinds. No weapons were found in the room, but a camera, cell phone, laptop, and other items were seized from the home. The camera was taken from Aaron Smith's pants' pocket. The computer was retrieved from Aaron Smith's bedroom. The computer was believed to be Aaron Smith's because his father called "wanting to know when I [Alontae] was going to be finished with the computer because Aaron needed it back for school."

The prosecution admitted pictures into evidence that had been on the camera. The people in the photographs, one of whom was defendant, appeared to be posing and an officer indicated that the fingers they were holding up were gang signs. One of the photographs was of Alontae Smith holding the "AK-47 style" rifle with codefendant Clarence Thomas on the bed apparently reaching out for it. The photographs had what appeared to be a date-stamp of 3/1/09, but no one was certain whether that was when the pictures were taken.

Although defendant appeared in the photographs, the officers were unfamiliar with him, so a photograph was broadcast on several television stations to ask for help determining his identification. That information led the police to defendant. Defendant's mother, Lorise Granderson, identified defendant in two photographs in which he was holding a firearm. She testified that defendant was 19 at the time of the photograph, that she had not seen the firearm before, and that she had not known him to own or purchase such a weapon.

Defendant, Clarence Thomas, and Aaron Smith were all tried together before a single jury. Each defendant stated on the record that he did not want to testify. Each was charged with

¹ It appears that the photograph was actually the user-profile's icon and, therefore, was extremely small, but had the same background (i.e. Aaron Smith's bedroom) as the other photographs.

receiving or concealing stolen property and felony-firearm. The jury found Clarence Thomas not guilty, but found defendant and Aaron Smith both guilty on both counts.

Defendant filed a motion for a new trial making the same arguments he now makes on appeal, namely that there was insufficient evidence that defendant knew the weapon was stolen, that the standard provided to the jury that defendant “knew or should have known” was improper, and that, because there was no evidence that defendant did not steal the weapon, there was insufficient evidence that he received the firearm. The trial court denied defendant’s motion. Defendant now appeals.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to sustain his conviction. We disagree. We review de novo a claim of insufficient evidence, taking the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime were proved beyond a reasonable doubt. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff’d 466 Mich 39 (2002). “Circumstantial evidence and reasonable inferences drawn from it may be sufficient to establish the elements of a crime. Minimal circumstantial evidence is sufficient to prove an actor’s state of mind.” *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

Defendant was charged under MCL 750.535b(2), which provides:

A person who receives, conceals, stores, barter, sells, disposes of, pledges, or accepts as security for a loan a stolen firearm or stolen ammunition, knowing that the firearm or ammunition was stolen, is guilty of a felony, punishable by imprisonment for not more than 10 years or by a fine of not more than \$5,000.00, or both.

Thus, the elements the prosecution was required to prove in this case were “that defendant (1) received, [or] concealed . . . (2) a stolen firearm . . . (3) knowing that the firearm . . . was stolen.” *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004).

Defendant argues that the prosecution failed to present sufficient evidence of the first and third elements. That is, instead of showing receipt or concealment, the prosecution simply showed mere possession, and instead of actual knowledge, it showed simply that defendant had reason to know or reason to believe that the weapon was stolen, which was insufficient.

Looking first at defendant’s argument regarding receiving or concealing versus mere possession, the evidence in this case consisted of two photographs showing defendant holding the rifle while in the bedroom of his codefendant Aaron Smith. Defendant argues that this is simply evidence of possession, not receiving. We disagree. Under CJI 26.2(2), “[t]o receive means to accept possession of property.” Here, defendant has conceded possessing the weapon. In addition, there were photographs of other individuals holding the rifle, leading to the reasonable inference that defendant accepted possession of the rifle from someone else. Therefore, there was sufficient evidence of defendant’s receiving the stolen rifle.

Defendant contends that, absent evidence showing he was not the thief, he cannot be found guilty of receiving the property. Although that was previously the rule, see *People v Kyllonen*, 402 Mich 135; 262 NW2d 2 (1978), in *People v Hastings*, 422 Mich 267; 373 NW2d 533 (1985), our Supreme Court held that the Legislature's amendment to the general receiving or concealing statute, immediately following the decision in *Kyllonen*, to include possession and concealment to the statute, evidenced an intent to permit a thief to also be charged under the receiving or concealing statute. *Hastings*, 422 Mich at 268-272. All of the cases cited by defendant in his brief in support of his proposition all predate *Hastings* and, therefore, are inapplicable.

Defendant does not cite *Hastings*, but does recognize the Legislature's 1979 amendment to the general receiving or concealing statute. Defendant argues that the amendment is inapplicable because the amendment added the word "possesses," which was not added to MCL 750.535b. There are two problems with this argument. First, MCL 750.535b was added in 1991, after *Hastings* was decided. Second, defendant ignores that the amendment to MCL 750.535² added both "possesses" and "conceals," and that "conceals" is part of MCL 750.535b, as are the verbs "sells" and "disposes of," among others. Thus, the reasoning behind the former prohibition against also charging a thief with MCL 750.535³ has never applied to MCL 750.535b, and the reasoning behind *Hastings*⁴ permits the conclusion that the thief is intended to be included.

Finally, even assuming that the prohibition applied, absent any evidence that defendant was, in fact, the thief, there is no prohibition on charging with defendant with receiving or concealing. Given that defendant goes to great lengths to indicate that there is no evidence that he knew the weapons were stolen, there is clearly no evidence that he was the thief and, therefore, nothing that precluded him from being charged or convicted of receiving or concealing a stolen weapon.

² The current version of MCL 750.535(1) provides, "A person shall not buy, receive, possess, conceal, or aid in the concealment of stolen, embezzled, or converted money, goods, or property knowing, or having reason to know or reason to believe, that the money, goods, or property is stolen, embezzled, or converted." The previous version provided, in relevant part, "A person who buys, receives, or aids in the concealment of any stolen, embezzled, or converted money, goods, or property knowing the same to have been stolen, embezzled, or converted . . . is guilty of a felony . . ." *Hastings*, 422 Mich at 269.

³ To wit, "To interpret the words 'buys,' 'receives,' or 'aids in the concealment' of stolen property to mean the buying or receiving from one's self or aiding one's self in concealment is needlessly to corrupt a forthright and harmonious statute." *Kyllonen*, 402 Mich at 145.

⁴ "The everyday understanding of the language presently employed in the statute now includes the person who committed the larceny." *Hastings*, 422 Mich at 271. "Prosecution of the thief for possessing or concealing stolen property does not torture the language of the statute, as it would have to have to read the former prohibition on buying, receiving, or aiding in the concealment of stolen property." *Id.*

Defendant next argues that there was insufficient evidence that he knew the rifle was stolen. Before we can determine whether the evidence was sufficient, we must first determine what type of knowledge is necessary for conviction. Thus, we must determine what the statute requires when it states that the receiving or concealing must be done “knowing that the firearm . . . was stolen.”

We located no cases, and defendant has cited none, where the specific knowledge requirement of MCL 750.535b is discussed. However, given that, until the 2006 amendment, the knowledge requirement under MCL 750.535 and MCL 750.535b was identical, i.e. “knowing [the property] was stolen,” we conclude that cases interpreting the knowledge requirement of MCL 750.535 prior to its amendment are the most applicable to this situation.

In *People v Tantenella*, 212 Mich 614, 612; 180 NW 474 (1920), our Michigan Supreme Court held, “Guilty knowledge means not only actual knowledge, but constructive knowledge, through notice of facts and circumstances from which guilty knowledge may be fairly inferred.” However, in *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192; 694 NW2d 544 (2005), the Court clarified its *Tantenella* holding:

Although the *Tantenella* Court characterized its analysis of these facts as examining the defendant’s constructive knowledge, the Court was, in fact, determining that the defendant had knowledge, proven by circumstantial evidence, that the car was stolen. . . . The *Tantenella* Court used the term “constructive knowledge” synonymously with knowledge proven through circumstantial evidence. This, the Court’s use of the term “constructive knowledge” is a misnomer; what the Court really meant was knowledge proven by circumstantial evidence. [*Id.* at 199-200.]

Although the Court in *Echelon Homes* was interpreting the knowledge requirement under MCL 600.2919a, see *id.* at 200, the statute involved liability that only occurred “when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property *knew that the property was* stolen, embezzled, or converted” MCL 600.2919a (emphasis added). Because that statutory language parallels the language of MCL 750.535 prior to its amendment, and the *Tantenella* case which the Court was clarifying involved a conviction under MCL 750.535, we conclude that the holding in *Echelon Homes* is dispositive of the knowledge requirement necessary for MCL 750.535b. Accordingly, we agree with defendant that constructive knowledge is insufficient and that actual knowledge is required.

Nevertheless, case law is also clear that actual knowledge may be proven by circumstantial evidence. *Echelon Homes*, 472 Mich at 199-200; see also *People v Westerfield*, 71 Mich App 618, 621; 248 NW2d 641 (1976) (“Guilty knowledge, as with most states of mind, cannot generally be proved by direct evidence absent admission by the defendant. By the very nature of the element, it must usually be inferred from all of the various circumstances of the case.”). After reviewing the record and taking the evidence in the light most favorable to the prosecution, we hold that there was sufficient circumstantial evidence from which a reasonable jury could conclude that defendant had actual knowledge that the weapon was stolen.

One factor in assessing whether guilty knowledge existed in a receiving or concealing case is whether the defendant possessed the article shortly after it was stolen. *People v Salata*, 79 Mich App 415, 421; 262 NW2d 844 (1977). Although this factor cannot support a conviction by itself, see *People v White*, 22 Mich App 65, 68; 176 NW2d 723 (1970), it can be considered with other evidence in order to sustain a conviction. *People v Staples*, 68 Mich App 220, 223; 242 NW2d 74 (1976).

Here, the photographs of defendant with the rifle appeared to be dated March 1, 2009, which was shortly after the weapons had been stolen from the Burks and before the rifle was used in, and disposed of after, the shooting on March 5, 2009. In addition, defendant's mother testified that she had not seen the weapon and had not purchased it for defendant. There was no evidence to suggest that defendant or either of the codefendants possessed the ability or capacity to acquire the weapon legally. Codefendants Smith and Thomas were both photographed at the same location as defendant—Smith's house—and both were found in vehicles containing the other stolen firearms. Given that the three men were together and posing with the rifle, it is reasonable to infer that defendant spoke with his codefendants regarding the rifle, and also reasonable to infer that they told him it was stolen—hence, wanting to be photographed it. Although this circumstantial evidence is far from overwhelming, it was sufficient to permit a reasonable jury to infer that defendant had actual knowledge that the rifle was stolen.

Thus, we conclude that there was sufficient evidence in the record from which a reasonable jury could find defendant guilty of receiving and concealing stolen property.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his counsel was ineffective for failing to realize that under MCL 750.535b, simple possession was insufficient and that actual knowledge was required. We agree.

“To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different.” *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Defendant bears the burden to overcome the presumption that counsel's performance constituted sound trial strategy. *Id.*

As previously noted, MCL 750.535, the general receiving or concealing statute, and MCL 750.535b, the statute under which defendant was charged, have significant differences based on amendments to MCL 750.535, which occurred in 2006. Namely, MCL 750.535 provides for conviction for “possession” of the stolen property where a defendant “knew or had reason to know or reason to believe that the property was stolen.” MCL 750.535b provides for conviction for “receiving” or “concealing,” among others, but does not include “possession” and also requires actual, not constructive, knowledge.

The trial court gave CJI2d 26.1, 26.2, and 26.3, all of which are patterned on the language in MCL 750.535 and, therefore, include the elements of “possession” and “had reason to know or reason to believe,” neither of which are contained in MCL 750.535b. Accordingly, the jury was instructed as to elements which are not, in fact, part of MCL 750.535b. Although errors in jury

instructions do not necessarily require a new trial, here, the jury was misinstructed as to the elements of the charge and what the prosecution was required to prove.

Because juries are presumed to follow their instructions, *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008), and the erroneous instruction actually lessened the prosecution's burden on the knowledge requirement, the instructional error undermined the reliability of the verdict. Although there was sufficient evidence to find defendant received the weapon with actual knowledge that it was stolen, it was even easier for the jury to conclude that when defendant possessed the weapon he had reason to know or reason to believe that it was stolen. Thus, it is possible that a jury would find enough evidence to convict of possession with constructive knowledge, but not receiving with actual knowledge. Consequently, the error was outcome determinative. See *People v Hawthorne*, 474 Mich 174, 181-182; 713 NW2d 724 (2006) ("An error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict" [quotation marks and citations omitted].).

Having concluded that the erroneous instructions were outcome determinative error, and being unable to think of a strategic reason for permitting jury instructions that lessen the prosecution's burden to prove defendant's guilt,⁵ counsel's failure to recognize that the jury instructions were wrong and to object to them constituted ineffective assistance of counsel. *Jordan*, 275 Mich at 667. Accordingly, defendant is entitled to a new trial.

III. CONCLUSION

There was sufficient evidence from which a reasonable jury could convict defendant of receiving or concealing a stolen firearm with actual knowledge that it was stolen. However, the jurors were improperly instructed as to the elements of MCL 750.535b and defense counsel's failure to recognize and object to the erroneous instructions constituted ineffective assistance of counsel, entitling defendant to a new trial. Accordingly, we reverse defendant's conviction and remand for a new trial. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ E. Thomas Fitzgerald

⁵ In all fairness to both defense counsel and the trial court, there are neither separate instructions for, nor notes indicating a need to alter the general instructions to match the elements of, MCL 750.535b. It appears that the parties and the trial court were simply not aware that MCL 750.535b had different elements than MCL 750.535. On remand, we remind the trial court and the parties to alter the jury instructions to appropriately match the elements of MCL 750.535b.