STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 7, 2011
v	No. 296566 Wayne Circuit Court
DAVID LASTON, Defendant-Appellant.	LC No. 09-018998-FC

Before: SAAD, P.J., and JANSEN and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions for assault with intent to murder, MCL 750.83, carjacking, MCL 750.529a, assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

On January 19, 2009, at approximately 4:45 p.m., complainant Thomas Rettig was shot in the parking lot of a Murray's Auto Parts store in Detroit. Rettig was backing out of a parking space when he heard a metallic tapping on his car window. Through the driver's side window, Rettig saw a man pointing a .38 caliber revolver at Rettig's face. The man was motioning Rettig to get out of his car and attempting to open the driver's side door. Rettig, an off-duty Windsor police officer, thought the man was attempting to steal his car. As Rettig turned to put the car into park, the man shot Rettig twice through the closed window of the vehicle. Rettig survived the shooting and defendant was later identified by Detroit police officers as the perpetrator. As noted, defendant was convicted of assault with intent to murder, carjacking, assault with intent to rob while armed, felon in possession of a firearm, and felony-firearm.

II. ASSAULT WITH INTENT TO ROB AND CARJACKING

Defendant contends that the prosecutor presented insufficient evidence to prove that he had the requisite intent to carjack or rob the complainant. As our Supreme Court explained in *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010):

> In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor. "[T]he question on appeal is whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002).

We hold that defendant waived his argument that the prosecutor presented insufficient evidence of carjacking and assault with intent to rob. During his closing argument, defense counsel specifically told the jury:

> You listened to the victim here who was shot. I'm not going to waste a lot of time on whether or not he was car jacked or someone tried to rob him. That is quite obvious. What isn't obvious is who did it.

Thus, defendant took the position at trial that, while the evidence showed that someone committed the crimes of assault with intent to rob and carjacking, the prosecutor failed to show that defendant was the person who committed those crimes. This waived the question of whether there was sufficient evidence to establish the elements of the crimes. "[A] defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial. To do so would allow a defendant to harbor error as an appellate parachute." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Moreover, it is well-settled that, "because it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). Neither criminal statute requires that a theft must be completed in order to sustain a conviction. MCL 750.89; MCL 750.529a. Evidence presented at trial showed that, while disguised by a large hooded coat and bandana, defendant crept up to Rettig's vehicle as Rettig started to back out of his parking space. A witness testified that defendant pointed the gun at Rettig and told Rettig to open the door and get out of the vehicle. Two witnesses testified that, as he pointed the gun at Rettig, defendant was trying to pull open the car door. Rettig testified that defendant pointed the gun at him and motioned for him to get out of the car. Rettig also recalled that his car door was not fully closed but was locked, so that when defendant pulled on the door handle, he could not open the door. Rettig testified that he realized defendant was trying to steal his car and that he would have to give it to defendant. Rettig told defendant to "hang on" but, as he turned to put the car into park, defendant shot Rettig through the window. Defendant then fled the scene on foot. This evidence was clearly sufficient to establish that defendant intended to rob or carjack defendant.

III. FELON IN POSSESSION

Defendant argues that this Court should reverse his conviction for felon in possession of a firearm because the predicate felony convictions used at trial do not qualify under the felon in possession statute, MCL 750.224f. The prosecutor concedes that defendant was wrongly convicted of felon in possession of a firearm. We agree with defendant and the prosecutor that it was error to use defendant's prior crime of assault with intent to rob unarmed as the predicate felony for the felon in possession charge because defendant was placed on probation under the

Holmes Youthful Trainee Act (HYTA). "An assignment to youthful trainee status does not constitute a conviction of a crime unless the court revokes the defendant's status as a youthful trainee." *People v Dipiazza*, 286 Mich App 137, 141-142; 778 NW2d 264 (2009). Because there was no revocation of defendant's youthful trainee status, the assault could not serve as the underlying felony for purposes of the felon in possession charge. *Id*., citing MCL 762.12. Moreover, defendant's conviction for resisting and obstructing a police officer, MCL 750.81d(1), did not qualify as a predicate felony because it is punishable by imprisonment for two years, not four years as required by the felon in possession statute. MCL 750.224f(5). For these reasons, we reverse defendant's conviction for felon in possession of a firearm, and remand this case to the trial court for further proceedings.

Defendant further contends that his lawyer was ineffective for failing to object to the use of his prior crimes for purposes of the felon in possession charge. "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). As discussed, defendant's prior crimes did not qualify as prior felonies for purposes of MCL 750.224f, and his conviction for that crime is reversed. However, we reject defendant's claim that the error denied him a fair trial on the remaining charges. The record reflects that, other than an unembellished stipulation placed on the record for the felon in possession charge, the matter was not discussed or argued by counsel in front of the jury. Further, the trial court specifically instructed the jury that it should only consider the stipulation for purposes of the felon in possession charge. The trial court also admonished the jury as follows:

> You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the Defendant is a bad person or that he is likely to commit crimes. You must not convict the Defendant here because you think he is guilty of other bad conduct. All the evidence must convince you beyond a reasonable doubt that the Defendant committed the alleged crime charged in this case or you must find him not guilty.

"It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, defendant fails to show that, absent counsel's error, "there is a reasonable probability that the result of the proceedings would have been different." *Swain*, 288 Mich App at 643. Particularly in light of the trial court's thorough and appropriate instructions, nothing in the record suggests that the jury would have found defendant innocent of the assault, carjacking, or felony-firearm convictions had they not heard that defendant had a prior felony conviction. Accordingly, we reject defendant's claim of error.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly