STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEANGELO WRIGHT,

Defendant-Appellant.

UNPUBLISHED
September 16, 2008

No. 279239
Wayne Circuit Court
LC No. 07-003342-01

Before: Whitbeck, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529, being a felon in possession of a firearm, MCL 750.224f, receiving or concealing stolen property worth $20,000 or more, MCL 750.535(2)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to serve a term of imprisonment of two years for the felony-firearm conviction, consecutive to and followed by concurrent terms of imprisonment of 107 months to 25 years for armed robbery, one to five years for felon in possession, and one to ten years for receiving or concealing stolen property. Defendant appeals as of right. We vacate defendant's conviction of, and sentence for, receiving or concealing, but affirm the remaining convictions and sentences.

I. Facts

The victim testified that at approximately 11:45 on the night of December 7, 2006, he and a recent acquaintance were parked in his Corvette in front of the acquaintance's home in Detroit, when a man with a rifle and mask approached and demanded that he open the door and then lie down outside the car. The victim complied, upon which the car began to roll away because the victim had left it in drive. Another man, also masked and armed with a rifle, appeared and chased after the car to stop it, then took the victim's money, coat, and boots. The second, "skinnier," assailant then left the scene in the victim's car, and the first one departed in a van which the victim described as "probably an '88 Caravan."

The victim additionally testified that he recognized the voice of the "skinnier guy" as that of a person he had known for about three years "[f]rom a barber shop" as "Dre." Defendant's girlfriend and mother of his child testified that defendant had a cousin named Dre, who had died on December 17, 2006, and that the two had spent much time together and were very close.

A Detroit Police officer testified that he was on duty, driving a police car, early in the morning on the night in question when he noticed a Corvette proceeding slowly with its lights out. The officer identified defendant as the driver, and noted that he had spoken with defendant on a previous occasion. The officer continued that when he executed a U-turn to make a traffic stop, defendant sped off. The officer pursued, and then found the Corvette in front of a church, with its right front fender against the wall and the driver's door open. A routine check of the vehicle license plate turned up that the victim of the instant crime was the registered owner. The officer continued that among the other vehicles parked nearby was an "early '90s model" Caravan, which he investigated and left for the abandoned vehicle officer.

Defendant was charged with carjacking, MCL 750.529a, along with armed robbery, felon in possession, and felony-firearm. In closing argument, the prosecuting attorney suggested that the trial court, if it did not find defendant guilty of carjacking, find defendant guilty instead of receiving or concealing stolen property. As noted above, the court did just that.

On appeal, defendant argues that the prosecution failed to present sufficient evidence to support his convictions, and that the trial court erred in considering receiving or concealing stolen property as an alternative to carjacking. We disagree with the former argument, but agree with the latter.

II. Sufficiency of the Evidence

A valid criminal conviction requires proof beyond a reasonable doubt of the essential elements of every crime. *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970); *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). This Court reviews a challenge to the sufficiency of the evidence de novo, to determine whether the evidence presented, considered in the light most favorable to the prosecution, was sufficient to permit a reasonable trier of fact to conclude that 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).

Defendant's presence behind the wheel of the victim's car shortly after it was stolen is good circumstantial evidence that he was involved in its theft, as was the discovery of a van fairly matching the description of the one driven by the other assailant near the location of the stolen vehicle. "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). That defendant had been driving slowly and then sped off when the police showed an intention to pursue him also constitutes circumstantial evidence that defendant was involved in the theft. "It is well established that evidence of flight is admissible to show consciousness of guilt. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001).

Defendant asserts that the trial court concluded that the Dre of whom the victim spoke was the robber who left in the victim's car, and emphasizes that the evidence did not suggest that Dre and defendant were one and the same. We disagree.

The trial court did not declare that defendant was Dre. Instead, it simply noted that defendant had been close to a cousin with that name, and concluded that that relationship was

"circumstantial evidence that sports [*sic*, supports] the People's case in that regard." Considered in the light most favorable to the prosecution, as the test for sufficiency of the evidence requires, the witness implicated defendant by associating his voice with that witness's experiences with a cousin to whom defendant was very close. The close familial and personal relationship between defendant and Dre would make it unremarkable if the two had similar voices or speaking patterns. Further, the victim could have simply confused those two close relatives and friends when thinking he recognized the voice of one of them. The trial court thus did not err in regarding the identification of defendant's voice as that of Dre as further evidence linking defendant to the crime. For these reasons, we conclude that the trial court had a sufficient evidentiary basis for finding defendant guilty of the robbery and weapons offenses of which he was convicted.

III. Receiving or Concealing

Defendant protests that the trial court erred in considering, and convicting him of, receiving or concealing stolen goods as an alternative to carjacking. Plaintiff confesses error in this regard, but argues that it was harmless in this instance.

There was no defense objection when the prosecuting attorney encouraged the trial court to consider receiving or concealing as an alternative to carjacking, or when the court delivered its verdict including that alternative conviction. This issue thus comes to this Court unpreserved. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Upon request, a trial court must instruct a jury on a necessarily included lesser offense as an alternative to the greater offence, if such an instruction comports with a rational view of the evidence. *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002). However, an instruction on a cognate lesser included offense is not permitted. *Id.* at 359. In this case, as plaintiff admits, receiving or concealing is not even a cognate lesser offense of carjacking, as the two crimes have no elements in common.

That plain error occurred in this instance is beyond dispute. However, plaintiff argues that it was harmless, on the ground that the trial court's decisions in this regard may be characterized as a decision to add receiving or concealing to the charges against defendant.

A court may allow amendment of a criminal information or indictment to conform to the evidence, see MCL 767.76; MCR 6.112(H). However, such an amendment may not change the offense of which defendant stands charged, or charge defendant with a new offense. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008); *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001). Further, we think it would work a continuing harm to the fairness, integrity, or public reputation of our judicial proceedings if erroneous instructions on, or consideration of, uncharged and virtually unrelated offenses as alternative lesser included offenses were approved simply through the device of characterizing each such irregularity as a de facto amendment of the information or indictment.

In this case, the trial court clearly treated receiving or concealing as an alternative, lesser offense of carjacking:

> As to count two, the carjacking, I find him not guilty of the carjacking; however, I think receiving and concealing stolen property, those elements are met. So I find him not guilty of the carjacking, but guilty of the lesser, receiving and concealing stolen property.

Because receiving or concealing is not a lesser included offense of carjacking, the court violated defendant's substantial rights by treating it as if it were and convicting him of, and sentencing him for, that offense.

This is particularly so considering that the conviction in question requires that the stolen property be worth at least $20,000, while in this case there was no evidence concerning the subject car's value.[1] Accordingly, even if we were to excuse the consideration of that offense as a permissible fictional amendment of the information, we would nonetheless be obliged to vacate the conviction for want of sufficient evidence.

For these reasons, we vacate defendant's conviction of and sentence for receiving or concealing, only, and remand this case to the trial court with instructions to issue an amended judgment of sentence so reflecting. We affirm defendant's remaining convictions and sentences.

We affirm in part, vacate in part, and remand. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio

---

[1] Plaintiff argues that the description of the Corvette in question as a 2005 vehicle with some expensive options constituted good evidence that the car met the statutory value threshold. We disagree. There was no evidence concerning the mileage or the condition of the engine, transmission, brakes, etc.