

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN WESLEY ASHFORD HARVEY,

Defendant-Appellant.

UNPUBLISHED
October 11, 1996

No. 172058
LC No. 93-1856-FH

Before: Reilly, P.J., and Cavanagh, and R.C. Anderson,* JJ.

PER CURIAM.

Defendant was convicted by a jury trial of receiving and concealing a stolen firearm, MCL 750.535b; MSA 28.803(2), carrying a pistol in a motor vehicle, MCL 750.227(2); MSA 28.424(2), discharge of a firearm from a motor vehicle, MCL 750.234a; MSA 28.431(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent prison terms of one to ten years, one to five years and one to four years, respectively, to be served after a two-year prison sentence for the felony-firearm conviction. He appeals his convictions as of right. We reverse in part, and affirm in part.

Defendant contends that the trial court erred by denying defendant's motion for a directed verdict on the receiving and concealing charge because the prosecutor failed to establish defendant's knowledge that the firearm was stolen. We agree.

Knowledge that the firearm or ammunition was stolen is required for conviction under MCL 750.535b; MSA 28.803(2). As recognized by the prosecution, mere possession of stolen goods is not sufficient to establish guilty knowledge. *People v Lauzon*, 84 Mich App 201, 207; 269 NW2d 524 (1978). Guilty knowledge can be inferred if possession is combined with other circumstances. *People v Scott*, 154 Mich App 615, 617; 397 NW2d 852 (1986). Possession and use of stolen merchandise near in time to its theft is some evidence of guilty knowledge. *People v Brewer*, 60 Mich App 517, 521; 231 NW2d 375 (1975).

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

The prosecution asserts that evidence that defendant did not have a permit for the gun and circumstantial evidence that he threw the weapon out of the car window is sufficient to infer defendant's guilty knowledge beyond a reasonable doubt. However, the gun was stolen over two years before the present offense. Even if we infer from the circumstantial evidence that defendant threw the weapon from the car, a further inference that defendant did so because he knew the gun was stolen would be speculation. Assuming that defendant threw the gun out of the window, it is just as likely that he did so to avoid being accused of possessing the gun in the car or having fired the gun from the car. The evidence did not rise above the level of conjecture, *People v Fisher*, 193 Mich App 284, 289; 483 NW2d 452 (1992), and even when viewed in the light most favorable to the prosecution, it was not sufficient to warrant a rational juror in concluding defendant's guilty knowledge was proven beyond a reasonable doubt. The trial court erred by denying defendant's motion for a directed verdict. Therefore, defendant's conviction and sentence for receiving and concealing a stolen weapon are reversed.

Defendant next contends that the trial court erred by denying his motion for a directed verdict on the discharge of a firearm from a motor vehicle charge. We agree.

MCL 750.234a; MSA 28.431(1) states in pertinent part:

(A)n individual who intentionally discharges a firearm from a motor vehicle, a snowmobile, or an off-road vehicle in such a manner as to endanger the safety of another individual is guilty of a felony

The issue is whether the evidence was insufficient to establish beyond a reasonable doubt that the firearm was discharged "in such a manner as to endanger the safety of another individual." The prosecution argues that there were houses and a railroad work yard where, according to Lieutenant Foster, "there is usually someone out in that area." Thus, the prosecution asserts, "one can infer from this evidence that a gun fired toward the north side of the [s]treet could do serious damage to anyone in those homes or in the work yard."

We reject the prosecution's argument. There was no evidence to support the predicate of the prosecution's argument, e.g. that the gun was fired toward the north side of the street. Lieutenant Foster candidly admitted that he could not testify as to whether the person who fired the shots was inside or outside of the car. He could see that the flashes were outside of the car on the passenger (north) side. Foster did not testify that he could see who fired the gun, the position of the gun when it was fired or the direction the shots were fired. Likewise, the firearms expert testified that he could not tell by the distribution of the cartridge cases whether the weapon was fired up in the air, to the right or to the left. Thus, there is no evidence from which one can reasonably infer that the gun was discharged in the direction of the houses or the railroad yard, as opposed to being fired up in the air or west towards the woods. Without some evidence about the direction of the shots, a conclusion that the gun was discharged in a manner as to "endanger the safety of another individual" is speculation. Viewed in the light most favorable to the prosecution, the evidence is insufficient to establish the element of endangerment of another individual. The trial court erred by denying defendant's motion for a directed

verdict. Accordingly, the conviction and sentence for discharge of a weapon from a motor vehicle are reversed.

We disagree with defendant's contention the trial court erred by denying his motion for a directed verdict on the charge of carrying a pistol in a vehicle. Defendant argues that the evidence was insufficient to establish that he carried or possessed the gun. However, the circumstantial evidence indicated that defendant, rather than the driver of the car, fired the gun. Therefore, defendant carried or possessed it at least for the period of time in which it was fired. Defendant's conviction for carrying a pistol in a motor vehicle is affirmed.

Defendant contends that the trial court erred by allowing a police officer to testify concerning the law governing the licensing of firearms and the fact that he could find no record that defendant had complied with these laws. In light of our reversal of defendant's conviction for receiving and concealing a stolen firearm, we conclude that any error in the admission of this testimony was harmless.

Because of our reversals of defendant's convictions for receiving and concealing a stolen firearm and discharging a firearm from a vehicle, defendant's felony-firearm conviction must also be reversed. A violation of MCL 750.227; MSA 28.424 is excepted from the felonies upon which a felony-firearm conviction may be based. MCL 750.227b(1); MSA 28.424(2)(1). Because a felony-firearm conviction may not be based on defendant's conviction of carrying a pistol in a vehicle, MCL 750.227(2); MSA 28.424(2), defendant's conviction and sentence for felony-firearm are reversed.

Affirmed in part and reversed in part.

/s/ Maureen Pulte Reilly

/s/ Mark J. Cavanagh

/s/ Robert C. Anderson