

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLTON EARL MCPHAIL,

Defendant-Appellant.

UNPUBLISHED

April 26, 2007

No. 268951

Wayne Circuit Court

LC No. 05-011428-01

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant was convicted by a jury of receiving or concealing a stolen motor vehicle, MCL 750.535(7), and attempted unauthorized driving away an automobile (UDAA), MCL 750.92 and MCL 750.413. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 46 months to 20 years for the receiving stolen property conviction and 46 months to 15 years for the attempted UDAA conviction. He now appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the evidence was insufficient to convict him of receiving or concealing a stolen motor vehicle because (1) there were no eyewitnesses or other direct evidence placing him in the stolen truck, (2) no evidence was recovered from the car he was stopped in to connect him to the crime scene, and (3) he did not make any incriminating admissions. We disagree.

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be reviewed in a light most favorable to the prosecution. *Id.* at 514-515. Circumstantial evidence and any reasonable inferences that arise from the evidence may be sufficient to prove the elements of a crime. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

At the time of the offense, MCL 750.535(7) provided, in relevant part:¹

A person shall not buy, receive, possess, conceal, or aid in the concealment of a stolen motor vehicle knowing that the motor vehicle is stolen, embezzled, or converted.

Thus, receiving or concealing a stolen motor vehicle requires proof of the following elements: (1) a motor vehicle was stolen; (2) the defendant bought, received, possessed, concealed, or aided in the concealment of the vehicle; and (3) the defendant knew the vehicle was stolen when he bought, received, possessed, concealed, or aided in the concealment of it.

The prosecution argued that defendant was guilty as either a principal or an aider and abettor. To convict a defendant under an aiding and abetting theory, the prosecution must show that (1) the crime charged was committed by the defendant or another person, (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); see also *People v Kevin Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). An aider and abettor's state of mind may be inferred from all of the facts and circumstances of the crime. *Carines*, *supra* at 757. Factors that can be considered include a close association between the principal and the defendant, the defendant's participation in the planning and execution of the crime, and evidence of flight after the crime. *Id.* at 757-758. "Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor." *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992).

Defendant argues that the evidence was insufficient to identify him as a perpetrator of the charged crimes. We disagree. When a neighbor drove by the Dodge Ram truck shortly after 2:00 a.m., he observed two men walk away from the truck and later saw a third man hiding in the truck before running off. The neighbor identified one of the men as wearing a white hat. The neighbor also saw an older model vehicle leave the crime scene. The police stopped a vehicle that matched the neighbor's description approximately a quarter mile from the scene and defendant, who was driving, was wearing a white hat. Inside defendant's vehicle was a Husky tool set, but there was no hammer in the spot for a hammer. A Husky hammer was found inside the Dodge Ram truck and it did not belong to the owner of the truck. Viewed in a light most favorable to the prosecution, the evidence was sufficient to connect defendant to the stolen Dodge Ram truck. Furthermore, the damage to the truck's steering column and ignition supported an inference that defendant was aware that the vehicle had been stolen. See *People v Biondo*, 89 Mich App 96, 98; 279 NW2d 330 (1979).

We also reject defendant's argument that there was insufficient evidence to convict him of attempted UDAA.

¹ MCL 750.535(7) was amended by 2006 PA 374, effective October 1, 2006, but the amendment does not apply to this case.

The elements of UDAA are “(1) possession of a vehicle, (2) driving the vehicle away, (3) that the act is done wilfully, and (4) the possession and driving must be done without authority or permission.” *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993), aff’d 446 Mich 435 (1994). Defendant argues that it was mere speculation to conclude that he intended to drive the vehicle away rather than hide inside it or take something from the vehicle. We disagree.

An attempt “consists of (1) an attempt to commit an offense prohibited by law, and (2) any act towards the commission of the intended offense.” *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001). The defendant must commit some act that goes beyond mere preparation. *People v Mearl Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). “Mere preparation is distinguished from an attempt in that the former consists of making arrangements or taking steps necessary for the commission of a crime, while the attempt itself consists of some direct movement toward commission of the crime that would lead immediately to the completion of the crime.” *Id.*

The damage to the steering column and removal of the ignition supports an inference that defendant and his accomplices intended to start the truck without the keys and drive off, but were interrupted when they were spotted by a neighbor. A jury reasonably could have found that it would not have been necessary to damage the steering column if defendant only intended to steal items from the truck or hide there. Moreover, the owner testified that nothing was missing from the truck. Furthermore, the damage to the truck went beyond mere preparation, but rather involved taking direct steps necessary to complete the crime. Thus, the evidence was sufficient to support defendant’s conviction of attempted UDAA.

Defendant next argues that his dual convictions for attempted UDAA and receiving or concealing a stolen motor vehicle violate double jeopardy protections, US Const, Am V; Const 1962, art 1, § 15. We disagree.

Both the federal and state constitutions prohibit twice placing a defendant in jeopardy for a single offense. Here, defendant is challenging the protection against multiple punishments for the same offense. A defendant’s interest against multiple punishments is a protection against having more punishment imposed than the Legislature intended. Thus, the Legislature’s intent is determinative. *People v Conley*, 270 Mich App 301, 311; 715 NW2d 377 (2006). If the Legislature clearly intended to allow multiple punishments for the same transaction, then there is no double jeopardy violation because the Double Jeopardy Clause acts only as a restraint on the prosecutor and the courts, not the Legislature. *People v Shipley*, 256 Mich App 367, 378; 662 NW2d 856 (2003).

At the time of this offense, MCL 750.535(7) provided:

A person shall not buy, receive, possess, conceal, or aid in the concealment of a stolen motor vehicle knowing that the motor vehicle is stolen, embezzled, or converted. A person who violates this subsection is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$10,000.00 or 3 times the value of the motor vehicle purchased, received, possessed, or concealed, whichever is greater, or both imprisonment and a fine. A person who is charged with, convicted of, or punished for a violation of this subsection shall not be convicted of or punished for a violation of another

provision of this section arising from the purchase, receipt, possession, concealment, or aiding in the concealment of the same motor vehicle. *This subsection does not prohibit the person from being charged, convicted, or punished under any other applicable law.* [Emphasis added.]

The emphasized language demonstrates a clear intent by the Legislature to allow for multiple punishments for similar offenses arising out of the same transaction. *Conley, supra* at 311-312; *Shiple, supra* at 378. Thus, defendant's convictions for both attempted UDAA and receiving or concealing a stolen motor vehicle do not violate double jeopardy protections.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Stephen L. Borrello