

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW LEE-LEO HILL,

Defendant-Appellant.

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UNPUBLISHED

October 16, 2008

No. 278239

Kent Circuit Court

LC No. 06-012569-FH

Before: Markey, P.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for larceny by conversion. MCL 750.362. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 48 months to 20 years imprisonment and was ordered to pay \$600 restitution for attorney fees. We affirm in part, vacate in part, and remand for further proceedings.

I. Basic Facts

In October 2006, defendant went to a car dealership and took a vehicle for a test drive. Defendant did not return the vehicle. Several days later, a police officer apprehended defendant and defendant admitted to the officer that he had taken the vehicle. Defendant was charged with larceny by conversion and false pretenses. Defendant elected to represent himself until the day of trial, when the court appointed a “stand-by counsel” to assist defendant.

At trial, the sole issue with respect to larceny by conversion was whether defendant had intended to “permanently deprive” the dealership of the vehicle. The trial court provided the standard jury instructions for larceny by conversion, CJI2d 23.10. During deliberations, however, the jury requested further guidance regarding the term “permanently,” specifically asking whether it would be considered permanent “if the defendant was openly in possession of the vehicle until he was pulled over by police and . . . surrendered the vehicle without resistance.” The trial court provided the following additional instruction:

First of all, the part with—without resistance has no relevancy. Okay? In defining the word, “permanent” that’s not a special term that has any huge legal connotations. You should use your own common sense, your own experience. You should look at the totality of the circumstances, put your—I would suggest you put yourself in both—both sides of the place. If someone takes a car without

permission, if that's the situation, do you think that that person intends to give it back? On the other side, if you take a car without permission, is it generally your intent to give it back [sic]. So just look at the totality of the circumstances, use your collective intelligence and determine whether or not you feel the word, "permanent" applies based on the instruction that we've given you.

The jury convicted defendant of larceny by conversion. At sentencing, the court assessed \$600 in attorney fees against defendant without considering, or noting, defendant's financial situation. On appeal, defendant contends that the trial court committed an instructional error and improperly assessed costs for the court-appointed counsel.

## II. Standards of Review

We review defendant's preserved claims of instructional error de novo. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). When reviewing jury instructions, we must view the lower court's instructions as a whole, rather than piecemeal. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). Defendant's unpreserved claims of error are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

## III. Jury Instructions

Defendant first claims that the trial court erred when it provided examples<sup>1</sup> similar to defendant's conduct in its supplemental instruction. Specifically, defendant argues that the examples removed the factual determination regarding the element of permanently deprive from the jury's consideration and, in effect, rendered a directed verdict for the prosecution. We disagree. Jury instructions must clearly present the case and the applicable law to the jury, including all the elements of the charged offense and must not exclude other material issues if supported by the evidence. *Milton, supra* at 475. Although an instruction may be somewhat imperfect, "there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Henry, supra* at 151. However, the trial judge's instructions must not exclude from the jury's consideration any material issues, including factual determinations to be made regarding the elements of the crime. *People v Gaydosh*, 203 Mich App 235, 238; 512 NW2d 65 (1994).

After reviewing the supplemental instruction, we cannot conclude that the trial court's examples made a determination regarding the element at issue. In providing the examples, the trial court explained to the jury that it should put itself "in both sides" of the issue, i.e., to imagine what it would mean if the jury, as individuals, had taken the vehicle versus if someone had taken the vehicle from them. In addition, both before and after providing these examples, the trial court told the jury to consider the totality of the circumstances and to use its collective common sense and experiences. Although the court's examples were rather unartful, the

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<sup>1</sup> In particular, defendant refers to the trial court's statement: "If someone takes a car without permission, if that's the situation, do you think that that person intends to give it back? On the other side, if you take a car without permission, is it generally your intent to give it back [sic]."

instructions as a whole adequately and fairly presented the issue, and sufficiently protected the defendant's rights. *Henry, supra* at 151. In sum, it cannot be said, as defendant contends, that the jury was denied the right view the evidence as it saw fit.

Lastly, defendant contends that the trial court erred when it stated that "resistance" was irrelevant to the jury's inquiry. Because defendant did not preserve this issue below, he must show plain error affecting his substantial rights. *Carines, supra* at 763-764. We find that plaintiff cannot show such an error. First, defendant provides no argument, other than a conclusory statement, on appeal that the instruction was erroneous. A party may not merely announce his position and expect this Court to discover and rationalize the basis of his claim. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In any case, resistance is not a component of the intent to permanently deprive and therefore, we cannot conclude that the trial court erred. See *People v Jones*, 98 Mich App 421, 426; 296 NW2d 268 (1980).

#### IV. Court-Appointed Attorney Costs

Defendant next contends that the trial court erred in ordering him to reimburse the county for court-appointed counsel without first considering his ability to pay. We agree. Because defendant did not preserve this issue, we only review for plain error affecting substantial rights. *Carines, supra* at 763-764. Indigent defendants have the right to court-appointed counsel at the public's expense, MCR 6.445(B)(2)(b), but may nonetheless "be required to reimburse the county for the cost . . ." *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004). In deciding whether to require reimbursement, the trial court must "provide some indication of consideration, such as . . . a statement that it considered the defendant's ability to pay." *Id.* at 254-255.

Our review of the record shows that the trial court failed to consider defendant's ability to pay. This was plain error. At sentencing, the trial court, indicating that it had read the presentence report, announced defendant's sentence and then stated, "[t]here's restitution of \$105, a \$60 state cost, a \$60 Crime Victim Rights assessment, \$600 for attorney fees." At a minimum, the court should have stated on the record that it considered defendant's financial ability and then should have ordered reimbursement, if any. Accordingly, we vacate the portion of the judgment of sentence ordering reimbursement of attorney fees and remand the matter to the trial court to determine reimbursement in light of considering defendant's ability to pay.

#### V. Standard 4 Brief Issues

Defendant also argues that the statutes<sup>2</sup> under which he was charged are unconstitutional because they do not have enacting clauses or titles. According to defendant, the criminal

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<sup>2</sup> Defendant was originally charged with unlawfully driving away a motor vehicle. MCL 750.413. After the preliminary examination, however, the court bound defendant over on charges of false pretenses, MCL 750.218, and larceny by conversion, MCL 750.362. Thereafter, the prosecution amended the felony information to include only the false pretences and larceny by conversion charges.

complaint and information are invalid and the trial court, therefore, did not have subject matter jurisdiction. We disagree.

Defendant correctly points out that an enacting clause is mandatory, and failure to include the clause will invalidate the act and any convictions based on the act must be reversed. *People v Dettenthaler*, 118 Mich 595, 596-597, 602-603; 77 NW 450 (1898); see also Const 1963, art 4, § 23. Defendant is also correct in his assertion that, in order to be constitutionally sound, all laws must include titles. Const 1963, art 4, § 24. However, we cannot agree with defendant's ultimate assertion—that the statute under which he was charged contained neither an enacting clause nor title. Rather, the statutes defendant lists are part of "The Michigan Penal Code," MCL 750, *et seq.*, which at the beginning of the chapter contains a title and an enacting clause conforming to the Michigan Constitution's requirements. It follows that defendant's criminal complaint was valid and defendant has failed to show plain error affecting his substantive rights.

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

/s/ Jane E. Markey

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly