

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 19, 2015

v

STEVEN BLAIR,

Defendant-Appellant.

No. 320404
Wayne Circuit Court
LC No. 13-006777-FH

Before: RIORDAN, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of assault with a dangerous weapon (felonious assault), MCL 750.82(1), and malicious destruction of property, MCL 750.377a(1). Defendant was found not guilty of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to three years of probation for felonious assault and a suspended sentence for malicious destruction of property. We affirm defendant's convictions but remand for a determination of the factual basis for the court costs imposed.

I. FACTUAL BACKGROUND

The victim was driving in Detroit, Michigan, with her 16-year-old sister and her 3-year-old niece. When she stopped at a stoplight, a large contingent of motorcycles appeared. Although the light turned green several times, the victim was unable to proceed through the intersection because the motorcyclists were stopping traffic.

The victim honked her car horn several times. In response, five men came over to the car and became angry. They threatened to kill the occupants, punched the windows and car, and reached into the car window with a handgun. The victim identified defendant as one of the five men. She testified that defendant threatened to kill her while pointing a gun at her. He also threatened to kill her sister and niece.

Eventually, the group allowed the victim to proceed through the intersection and she called the police. While waiting for them to arrive, she saw defendant outside a nearby

restaurant and recognized him. The police arrived and arrested defendant. They recovered a silver revolver from defendant's hip.¹

Defendant denied having anything to do with the assault, and testified that he was there for his brother's funeral. He testified that he was directing traffic and parking for the motorcycles. A witness testifying for the defense stated that he saw the assault, and that defendant was not involved.

The trial court found defendant guilty of aiding and abetting felonious assault and malicious destruction of property. The court found defendant not guilty of felony-firearm.² Defendant now appeals.

II. INCONSISTENT VERDICTS

A. STANDARD OF REVIEW

Defendant first contends that that the trial court's verdicts—convicting him of felonious assault but not of felony-firearm—were inconsistent, which is untenable. We review a trial court's factual findings for clear error. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). We review de novo the trial court's conclusions of law. *People v Unger*, 278 Mich App 210, 243; 749 NW2d 272 (2008).

B. ANALYSIS

“[A] trial judge sitting as the trier of fact may *not* enter an inconsistent verdict. While juries are not held to rules of logic, or required to explain their decisions, a judge sitting without a jury is not afforded the same lenience.” *People v Ellis*, 468 Mich 25, 26; 658 NW2d 142 (2003) (quotation marks and citation omitted). Furthermore, “because of double jeopardy principles, the error of the trial court in dismissing a claim and rendering an inconsistent verdict cannot be corrected on appeal.” *Id.* However, if the trial court's verdicts were based on a misapplication of the law rather than the facts, we will not set aside the convictions. *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998).

In the instant case, defendant was convicted of felonious assault, which requires proof that he assaulted “another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder[.]” MCL 750.82(1). In other words, “To perpetrate a felonious

¹ The victim had described the gun as black with a handle.

² The trial court did not pronounce its finding regarding felony-firearm at the verdict stage of the proceedings, and felony-firearm was not listed as “not guilty” on defendant's order of probation. However, felony-firearm was listed on the felony information, and at sentencing the trial court stated that defendant's behavior was “a hair's breath from Felony Firearm.”

assault, a defendant must commit (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013) (quotation marks and citation omitted).

However, defendant was convicted under an aiding abetting theory, which is “a theory of prosecution that permits the imposition of vicarious liability for accomplices.” *Robinson*, 475 Mich at 6 (quotation marks and citation omitted). The elements necessary for a conviction under an aiding and abetting theory are: (1) the defendant or some other person committed the crime; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended the commission at the time the defendant gave aid and encouragement. *Id.* See also *People v Robinson*, 475 Mich 1, 14; 715 NW2d 44 (2006) (“sharing the identical intent is not a prerequisite to the imposition of accomplice liability under the common-law principles discussed earlier.”) (Emphasis omitted).

The trial court found defendant not guilty of felony-firearm, MCL 750.227b. That charge requires proof that the defendant carried or possessed a firearm when committing or attempting to commit a felony. *People v Moore*, 470 Mich 56, 62; 679 NW2d 41 (2004). The trial court found that while defendant aided and abetted in the felonious assault by blocking traffic and helping others terrorize the victim, he may not have been the individual to actually point the gun at the victim. The court expressed doubt based on the fact that the victim described a different handgun than the one later found on defendant. However, the trial court ultimately found that the victim was credible and that a felonious assault had occurred.

On appeal, defendant repeatedly asserts that he was not the individual who held the gun during the felonious assault. Yet, the basis for his conviction was an aiding and abetting theory, not that he actually possessed the gun. Thus, whether he held the gun during the assault was not dispositive; the question was whether he aided and abetted the principal in the commission of the felonious assault. Moreover, the issue defendant raises in his questions presented is not one of sufficiency, but one of inconsistent verdicts.

Defendant asserts that the trial court’s verdicts are inconsistent because if he aided and abetted the felonious assault with the gun, he would necessarily be guilty of felony-firearm. However, even if inconsistent, vacating defendant’s conviction is not warranted because “it is clear that the court had no doubt that a weapon was used in the assault.” *Smith*, 231 Mich App at 53. The trial court clearly found that a gun was used during the assault and that defendant did not possess it. The court ruled that defendant aided and abetted the principal’s commission of the felonious assault. In other words, the court dismissed the felony-firearm count not because of a reasonable doubt that a gun had been used, but rather the decision was based on a misapplication of the law. *Smith*, 231 Mich App at 53. Therefore, “[u]nder these circumstances, where there is no factual inconsistency, we will not set aside defendant’s conviction of an offense of which he was clearly found guilty beyond a reasonable doubt.” *Id.*

III. COSTS

A. STANDARD OF REVIEW

Next, defendant contends that the trial court abused its discretion when imposing court costs pursuant to MCL 769.1k. “Because defendant failed to object when the trial court ordered [him] to pay costs and attorney fees, we review [his] challenge to the trial court’s imposition of court costs for plain error.” *People v Konopka*, __ Mich App __; __ NW2d __ (Docket No. 319913, issued March 3, 2015); slip op at 6. To demonstrate such error, the defendant must show that (1) an error occurred, (2) the error was clear or obvious, and (3) “the plain error affected substantial rights,” which “generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. LEGAL BACKGROUND

At the time defendant committed the crimes and at his sentencing, MCL 769.1k provided that the court may impose “[a]ny cost in addition to the minimum state cost set forth in subdivision (a).” MCL 769.1k(1)(b)(ii). In interpreting this language, the Michigan Supreme Court in *People v Cunningham*, 496 Mich 145, 154; 852 NW2d 118 (2014), held that the statute “does not provide courts with the independent authority to impose ‘any cost.’” *Id.* Rather, the Court found that trial courts are authorized “to impose only those costs that the Legislature has separately authorized by statute.” *Id.*

Nevertheless, the Legislature subsequently passed 2014 PA 352, which amended the language of the statute. The amendment was given immediate effect as of October 17, 2014, which occurred during the pendency of this appeal. The statute now provides that the court may impose “any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case[.]” MCL 769.1k(1)(b)(iii). Further, Enacting Section 1 of the amendment provides, “This amendatory act applies to all fines, costs, and assessments ordered or assessed under section 1k of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.1k, before June 18, 2014, and after the effective date of this amendatory act.” Enacting Section 2 provides, “This amendatory act is a curative measure that addresses the authority of courts to impose costs under section 1k of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.1k, before the issuance of the supreme court opinion in *People v Cunningham*, 496 Mich 145 (2014).”

In *Konopka*, we addressed the impact of the amendments in the context of *Cunningham*, and most notably the added language in MCL 769.1k(1)(b)(iii). We concluded that the amended statute applies in cases pending on appeal when the amendment was adopted, and when the costs and assessments were incurred before June 18, 2014. *Konopka*, __ Mich App at __; slip op at 6. We also recognized that “[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.” *Id.*; slip op at 6 (quotation marks and citations omitted).³

³ We also found that the amendments did not violate the separation of powers, equal protections, substantive due process, or the ex post factor clauses. *Id.* at __; slip op at 8-16.

Ultimately, we concluded that “[t]he amended version of MCL 769.1k(1)(b)(iii) provides for an award of certain costs that are *not* independently authorized by the statute for the sentencing offense[.]” *Konopka*, __ Mich App at __; slip op at 6 (emphasis in original). In other words, we found that the MCL 769.1k(1)(b)(iii) authorizes trial courts to impose costs independent of the statute for the sentencing offense. *Id.* at __; slip op at 7.

However, we also found that the trial court in *Konopka* “did not establish a factual basis” for the fee imposed in that case. *Id.* at __; slip op at 8. Thus, we were unable to “determine whether the costs imposed were reasonably related to the actual costs, as required by MCL 769.1k(1)(b)(iii).” *Id.* at __; slip op at 7-8. We explained that even though the trial court need not separately calculate the costs involved in a particular case, “defendant should be given the opportunity to challenge the reasonableness of the costs below” and the trial court should “establish a factual basis” for the costs imposed. *Id.* at __; slip op at 2, 8. Because the trial court failed to do that, we remanded for the trial court to establish a factual basis for the costs imposed in that case. *Id.* at __; slip op at 8.

C. APPLICATION IN THIS CASE

In light of *Konopka, supra*, we find that the trial court had the authority to impose costs in this case. However, like *Konopka*, defendant challenges the trial court’s failure to articulate its reasons for imposing costs in this case. Defendant is correct that the trial court failed to divulge its reasoning on the record. Thus, as in *Konopka*, we are unable to “determine whether the costs imposed were reasonably related to the actual costs, as required by MCL 769.1k(b)(iii).” __ Mich App at __; slip op at 8. Further, defendant “should be given the opportunity to challenge the reasonableness of the costs below.” *Id.* at __; slip op at 8, citing *People v Sanders*, 296 Mich App 710, 715; 825 NW2d 87 (2012).

Accordingly, we remand this case “to the trial court for further proceedings to establish a factual basis for the . . . costs imposed, under MCL 769.1k(1)(b)(iii), or to alter [the amount imposed], if appropriate.” *Konopka*, __ Mich App at __; slip op at 8.

IV. CONCLUSION

Vacating defendant’s convictions is not warranted because any inconsistency in the verdicts is not based on a factual incoherency. However, consistent with *Konopka, supra*, we remand this case for further proceedings to establish the factual basis for the amount of court costs imposed. MCL 769.1k(1)(b)(iii). We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood