STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL ALLEN HIGGINS,

Defendant-Appellant.

UNPUBLISHED
February 23, 1999

No. 204139
Barry Circuit Court
LC No. 97-000011 FC

Before: Whitbeck, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant Daniel Allen Higgins was charged with conspiracy to commit armed robbery, MCL 750.157a; MSA 28.354(1); conspiracy to commit home invasion, first degree, MCL 750.157a; MSA 28.354(1); armed robbery, MCL 750.529; MSA 28.797; assault with intent to rob while armed, MCL 750.89; MSA 28.284; home invasion, first degree, MCL 750.110a(2); MSA 28.305(a)(2); and possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2). A jury convicted defendant on the charges of armed robbery, assault with intent to rob while armed, home invasion, first degree, and felony-firearm. The prosecution dismissed the two conspiracy counts. The trial court sentenced defendant to the mandatory two years for the felony-firearm conviction to run consecutively to eight to twenty years in prison for each of defendant's other three convictions. These three sentences are concurrent to one another. Defendant appeals of right. We affirm.

This case arises out of an incident in which Anthony LaRoma and Elizabeth LaRoma were attacked and robbed by two men at their home. Frank McPherson pleaded guilty to this attack and robbery and indicated that the other man with him was Tim Lima. The two men robbed the LaRomas at gunpoint of approximately $9,200 in cash and beat Mr. LaRoma to the point that he required twenty or more stitches between his eyes. Defendant was tried on the theory that he aided and abetted McPherson and Lima.

Defendant's first issue on appeal is whether there was sufficient evidence to sustain each of his convictions. "In reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v*

Turner, 213 Mich App 558, 565; 540 NW2d 728 (1995). The distinction between liability of the principal and liability of one who aids and abets has been eliminated and one who aids and abets may "be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." MCL 767.39; MSA 28.979.

The prosecutor must prove three elements to show guilt based on a theory of aiding and abetting. First, the prosecutor must show that the substantive crimes were actually committed by defendant or someone else. Second, the prosecutor must show that before or during the crimes defendant did something to assist in the commission of the crimes. And finally, the prosecutor must show that defendant intended the substantive crimes be committed or knew that another person intended to commit the substantive crimes at the time of giving the assistance. *Turner, supra* at 568. We find that when the evidence presented in this case is viewed in the light most favorable to the prosecution, a reasonable trier of fact could find that the prosecution proved each of these elements beyond a reasonable doubt.

As to the first element, defendant conceded at trial that each of the underlying crimes was actually committed by Lima and McPherson.

Next, defendant argues that the prosecution did not meet its burden of proof on the second element because the state did not present direct evidence to show that defendant provided the shotgun used in the commission of the crime. It is a well-settled rule that circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of a crime. *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995); *People v Fisher*, 193 Mich App 284; 483 NW2d 452 (1992). When viewed in the light most favorable to the prosecution, we find the evidence presented was sufficient to allow a reasonable trier of fact to find beyond a reasonable doubt that defendant provided the sawed-off, double-barreled shotgun used by Lima in committing this crime.

Six witnesses gave testimony tending to show that the weapon used in the crime belonged to defendant. McPherson and Dan Meyers, a jailhouse informant, both testified to statements made by defendant to link him both to the gun and the crime. Defendant assails the motives and the credibility of these witnesses, but the determination of witness credibility is the function of the jury and not of the reviewing court. *People v McFall*, 224 Mich App 403; 569 NW2d 828 (1997).

In addition, defendant does not address the fact that evidence was presented at trial that demonstrated that defendant aided, abetted, assisted, or counseled this crime in ways beyond provision of the shotgun. McPherson testified that defendant had provided Lima and McPherson with information regarding the layout of the LaRoma home; that defendant suggested where Mr. LaRoma might hide his money; and that defendant suggested McPherson and Lima make it appear that the robbery was committed by animal rights activists inasmuch as LaRoma had a history with these activists as a big game hunter. The credibility of McPherson's testimony, as that of an accomplice, is also a question for the jury but we have held that such testimony alone can be sufficient evidence to support a conviction. *People v Sullivan*, 97 Mich App 488; 296 NW2d 81 (1980).

Finally, on the third element, defendant asserts that in *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985), our Supreme Court required a defendant to have the same requisite intent as the principal and that the evidence elicited by the people does not show any intent to steal on the part of defendant. In the wake of *Kelly*, we have already ruled that this issue is without merit. In *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995), this Court stated:

> This Court has previously held that *Kelly* did not overrule the doctrine that the intent requirement for aiding and abetting may be fulfilled if the aider and abettor only had knowledge of the principal's intent. This Court determined that *Kelly* did not address this issue. In the absence of a Supreme Court ruling clarifying the intent required of aiders and abettors, we reaffirm our consistent holding that aiders and abettors can be liable for specific intent crimes if they possess the specific intent required of the principal or if they know that the principal has that intent. [Citations omitted.]

Even if we disagreed with this holding, which we do not, we would be bound by the decision of the prior panel. MCR 7.215(H)(1).

Therefore, to prove defendant had the requisite intent necessary to convict defendant of aiding and abetting these crimes, the prosecution must convince the jury, beyond a reasonable doubt, that defendant intended the commission of the crime *or* had knowledge that Lima and McPherson intended its commission, at the time that defendant rendered assistance. In this case, testimony was elicited by the prosecution that defendant told people he wanted this crime to occur. Meyers testified that "[defendant] said Tim [Lima] and Frank McPherson were out of money and he told 'em where they could make some money. He wanted 'em to go over to the guy's house and rough him up." McPherson testified that when McPherson and Lima met with defendant the day before the robbery, defendant provided information on the LaRomas' house and instructions on injuring Mr. LaRoma. McPherson testified that on the day preceding the robbery, defendant "knew it was gonna happen that night because he had to have an alibi - - had to make sure he had a alibi because they would go to him thinkin' it was him."

Taken in a light most favorable to the prosecution, this testimony shows that defendant knew of Lima's and McPherson's intent to commit these crimes at the time defendant rendered them aid and encouragement. As such, the prosecution has presented ample evidence to support each of defendant's convictions.

Defendant's second issue on appeal is whether the trial court erred when it gave what defendant contends were erroneous jury instructions on the mens rea required to support a conviction based on a theory of aiding and abetting. Any error in the instruction of the jury was not preserved by defendant at trial because defense counsel explicitly waived any objection to the trial court's instructions. Moreover, defendant actually participated in the redrafting of the specific intent portion of the trial court's instruction to which he now objects. In *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998), we stated:

> Because the issue was resolved to the apparent satisfaction of all parties at trial, we are hesitant to upset the result of that consensus on appeal. A defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial. To do so would allow a defendant to harbor error as an appellate parachute. [Citations omitted.]

We apply the same rationale to this matter. Furthermore, defendant bases his assertion of error on the same reading of *Kelly, supra* at 278, that we have noted is inapplicable in this case. Based on this same rationale, the only possible error in the instruction required the prosecution to prove a higher, not lower, level of intent than is required by *Turner, supra*, at 568. Because any such error prejudiced the prosecution, which according to the jury met its burden, we conclude that this unpreserved error did not affect the outcome of the proceeding. "Thus, defendant failed to establish the form of prejudice necessary to preserve an issue that was not raised before the trial court." *People v Grant*, 445 Mich 535, 553-554; 520 NW2d 123 (1994).

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin