STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 27, 2001
v	No. 222468 Washtenaw Circuit Court
ERWIN HARRIS, a/k/a GERRONE TAYLOR, and a/k/a TERRALD RAY HARRIS, Defendant-Appellant.	LC No. 98-011081-FC

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of armed robbery, MCL 750.529, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b.[1] The trial court sentenced him to ten to twenty years' imprisonment for the armed robbery conviction and to two concurrent, two-year prison terms for the felony-firearm convictions, to be served consecutively with the armed robbery sentence. We affirm.

This case stemmed from the robbery of two individuals in a Washtenaw County gas station store by defendant and an acquaintance, Eugene Mays. Prosecution witnesses testified that after defendant and Mays entered the store, Mays, holding a firearm toward the checkout clerk, demanded money from the cash register while defendant, unarmed, stole money from a customer's pockets.

Defendant contends that there was insufficient evidence to convict him of armed robbery with respect to the customer,[2] James Morton, because the prosecutor presented no evidence that he possessed a weapon during the offense or that Mays, who did use a gun, robbed Morton. We

[1] The jury also convicted defendant of one additional count of armed robbery, as well as one count of fleeing and eluding a police officer, MCL 750.479a(3). Defendant does not appeal these two convictions.

[2] Defendant was convicted, on an aiding and abetting theory, of armed robbery with respect to the clerk but has not appealed this conviction. See n 1, *supra*.

disagree. In evaluating a claim of insufficient evidence, we view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). We will not interfere with the jury's determination regarding the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478, amended 441 Mich 1201 (1992).

The evidence in the instant case revealed a case of two accomplices coordinating their actions closely and engaging in concerted conduct to commit armed robbery against multiple individuals. According to prosecution witnesses, defendant entered the gas station, asked customer Morton for directions, and mulled around the store, leaving it at some point. Defendant then walked back into the store, followed closely by Mays. Mays pointed the gun at clerk Christopher Parson's face and demanded money, during which Morton stood only a few feet away. Mays screamed vulgarities at and threatened to kill Parson, who would not turn over any money. Defendant angrily screamed at Mays two or three times that "he's asking for it, just pop him man, just pop him." Simultaneously, defendant pushed into Morton's back and told him to "stay cool, man, stay cool." Morton testified that he feared being shot and that he "naturally put [his] hands up" as defendant rifled through his pockets and took his driver's license, library card, cash, and ATM card. Just before leaving the store, defendant unsuccessfully attempted to open the locked cash register by hitting it and stole items off the counter.

This testimony was sufficient for a jury to conclude beyond a reasonable doubt that defendant committed armed robbery[3] with respect to Morton. Indeed, as stated in *People v Dykes*, 37 Mich App 555, 559; 195 NW2d 14 (1972), "[u]nder the accomplice statute, [MCL 767.39], one accomplice is equally liable for the actions of the other when operating in concert." In *Dykes*, *supra* at 557, the defendant was convicted of manslaughter after he and his accomplice kicked and stabbed the victim, ultimately causing the victim's death. The defendant claimed that his manslaughter conviction was improper because he had merely kicked the victim and did not wield the knife that caused the fatal stab wounds. *Id*. at 559. The Court stated that "[i]t is irrelevant as to who struck the fatal blows [because] one accomplice is equally liable for the actions of the other when operating in concert." Similarly, it does not matter here that Mays held the threatening gun while defendant rifled through Morton's pockets; each accomplice was equally liable for the actions of the other. *Id*.

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[3] The armed robbery statute states:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used of fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. . . . [MCL 750.529.]

The jury easily could have concluded that defendant and Mays, by way of their *concerted conduct*, each committed armed robbery with respect to Morton. Indeed, the evidence supported an inference that defendant intentionally used the gun held by Mays to facilitate defendant's robbery of Morton. We have no doubt that Mays' presence with a gun in the store heightened Morton's fear considerably and likely convinced him not to resist defendant. Morton saw the gun and heard Mays' threatening language. Morton heard defendant direct him to be calm and held his hands up while defendant stole items from his person. Morton heard defendant urge Mays several times to shoot Parson. Indeed, Morton was afraid that he too would be shot. This evidence clearly demonstrated that the two accomplices, *acting in concert*, committed all the elements of the crime of armed robbery such that each of them properly could be convicted of that crime. *Id*. See also *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972), in which the Court stated:

> In the context of robbery, the general rule is that:
>
> "Where more than one person is engaged in a robbery, and all are acting in concert, one of them being armed with a dangerous weapon, all are guilty of robbery armed whether any of the others were armed or not." [4 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 2226, p 2445.]

Reversal of defendant's armed robbery conviction with regard to Morton is unwarranted.

Defendant additionally contends that there was insufficient evidence to support his two felony-firearm convictions, even on an aiding and abetting theory, because the prosecutor presented no evidence that defendant assisted Mays in acquiring or retaining possession of the gun. Again, we disagree. The felony-firearm statute states that "[a] person who "carries or has in his or her possession a firearm when he or she commits . . . a felony . . . is guilty of a felony." MCL 750.227b. Here, one felony-firearm conviction was based on the armed robbery of Parson. The "felony" element of this charge was clearly established by defendant's telling Mays to "pop" Parson while demanding money. Indeed, defendant was convicted of the robbery of Parson on an aiding and abetting theory, and he has not appealed that conviction. With regard to the "possession or carrying of a firearm" element of the charge, the prosecutor had to prove that defendant "procured, counselled, aided, or abetted and so assisted in obtaining the proscribed possession, or in retaining such possession otherwise obtained." *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981). The prosecutor did this by eliciting testimony that defendant drove Mays, who was armed, to the scene. Indeed, by transporting his armed accomplice to the scene of the robbery, defendant assisted in carrying the firearm and in retaining possession of the firearm used in the armed robbery. Moreover, defendant repeatedly urged Mays to shoot Parson during the course of the robbery. This conduct "counseled" Mays in the retention of the firearm during the crime.[4] See *id*. at 54. Viewing the evidence in the light most favorable to the

[4] It might even be said that defendant's transporting his accomplice, the gun, and the robberies' fruits away from the scene assisted in the retention of the firearm during the robbery, although we do not believe these facts are necessary to affirm in this case.

prosecution, we conclude that defendant's felony-firearm conviction associated with the robbery of Parson was supported by sufficient evidence.

The prosecutor also presented sufficient evidence that defendant committed felony-firearm with respect to the robbery of Morton. As discussed earlier, the concerted actions of defendant and Mays sufficiently supported the "felony" element of this charge. Moreover, the evidence that defendant drove Mays to the scene, standing alone, supported the "possession or carrying of a firearm" element of the charge.[5] Again, by transporting Mays to the scene of the robbery, defendant assisted him in carrying the firearm and in retaining possession of the firearm used in robbing Morton. No error occurred with respect to the jury's findings in this case.

Affirmed.

/s/ Harold Hood
/s/ Patrick M. Meter

[5] We acknowledge that in *People v Eloby (After Remand)*, 215 Mich App 472, 477-478; 547 NW2d 48 (1996), this Court found that there was insufficient evidence to support the defendant's felony-firearm conviction based on a kidnapping, even though the defendant drove a vehicle containing his armed accomplice during the kidnapping. However, we do not believe that *Eloby* constitutes binding precedent for the proposition that a defendant cannot be convicted of aiding and abetting felony-firearm solely for transporting his armed accomplice before or during a crime. Indeed, *Eloby* did not squarely address this issue or even mention the driving of the vehicle during its analysis (see *Eloby, supra* at 478); the *Eloby* panel simply may have failed to consider the theory that such an action (driving a vehicle containing an armed accomplice before or during a crime) could support a felony-firearm conviction. *If Eloby* had clearly stated that "driving an armed accomplice before or during a crime cannot, in itself, support a felony-firearm conviction," then we might feel compelled to formally disagree with *Eloby* and call for a conflict panel under MCR 7.215(I)(2). However, given the wording of the *Eloby* opinion, we do not find this necessary.