

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID REUBEN SMITH,

Defendant-Appellant.

UNPUBLISHED

November 22, 2005

No. 254737

Wayne Circuit Court

LC No. 03-013368

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

In this case involving the robbery of an auto parts store, defendant was convicted by a jury of two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent prison terms of nine to fifteen years for each count of armed robbery and to a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant argues that there was insufficient evidence introduced at trial to support his felony-firearm conviction. “The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003), quoting *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Defendant specifically argues that the element of possession of a firearm was not established. We disagree.

Two eyewitnesses to the robbery testified that defendant was armed with “a silver gun.” Another testified that the gun defendant was carrying was a nickel-plated “.380 automatic or .32 automatic.” Further, defendant threatened to shoot one of the eyewitnesses. We note that the prosecution had no duty to present proof that the gun was operable. *People v Mason*, 96 Mich App 47, 51; 292 NW2d 480 (1980). Viewed in the appropriate light, see, e.g., *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001), the evidence was sufficient to establish that defendant was armed with a firearm. See *People v Davis*, 216 Mich App 47, 53-54; 549 NW2d 1 (1996).

Defendant also argues that the trial court gave a jury instruction that effectively reduced the prosecution’s burden of proof. The challenged instruction was part of a more complete

instruction on identification given by the court. Defendant made identification a central issue at trial, and defendant does not challenge the propriety of the identification instruction as a whole. Thus, in essence, defendant's argument is that a portion of the identification instruction is improper because, standing alone, it shifts the burden of proof.

Defendant's argument exemplifies why jury instructions must be read as a whole rather than extracted piecemeal to create error. See *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The jury in this case was properly instructed that the prosecution was required to prove each element of the charged crimes beyond a reasonable doubt. Further, the jury was properly instructed with regard to the elements of the crimes charged and with regard to the concept of reasonable doubt. Thus, defendant's claim of instructional error is without merit, and he has not established the existence of plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Patrick M. Meter