

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUQUIL DION LOVE,

Defendant-Appellant.

UNPUBLISHED

December 18, 2007

No. 272631

Wayne Circuit Court

LC No. 06-004368-02

Before: Jansen, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to rob while armed, MCL 750.89, possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.¹ Pursuant to MCL 769.12, defendant was sentenced as a fourth habitual offender to concurrent prison terms of 20 to 35 years for the assault conviction and 5 to 35 years for the felon-in-possession conviction, and to a consecutive prison term of two years for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first argues that there was insufficient evidence to support his felon-in-possession and felony-firearm convictions. We disagree. We review de novo challenges to the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We “view the evidence in a light most favorable to the prosecution and determine whether any 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, 723; 597 NW2d 73 (1999) (citation omitted).

Defendant argues that the prosecutor did not prove beyond a reasonable doubt that either he or codefendant Bright was armed with a firearm. Defendant claims that although a witness identified Bright as possessing a black firearm, there was insufficient evidence that the object was actually a firearm. Defendant also claims that there was no evidence regarding the firearm’s caliber, the means of propulsion, or any specific characteristics of the barrel. Defendant notes

¹ Codefendant Shamarrie Bright pleaded guilty to assault with intent to rob while armed, MCL 750.89, felon-in-possession, MCL 750.224f, and felony-firearm, MCL 750.227b.

that the firearm was not fired and that the police never recovered it. Defendant also argues that even if Bright was armed with a firearm, defendant never possessed it. Finally, defendant claims that the facts do not suggest beyond a reasonable doubt that he aided and abetted Bright in the commission of the firearm-related offenses. We disagree.

The elements of felon in possession of a firearm are: (1) the defendant possessed a firearm, (2) the defendant was previously convicted of a felony, and (3) the defendant's right to possess a firearm has not yet been restored. MCL 750.224f; *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004). The elements of felony-firearm are: (1) the defendant possessed a firearm, (2) during the commission of or attempt to commit a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); see also MCL 750.227b. The central questions here are whether the prosecutor presented sufficient evidence that there was a firearm used in the assault and whether the evidence sufficiently established that defendant aided and abetted in the firearm's use or possession.

Bright testified that he used a blue steel gun to assault the victim. Both the victim and her granddaughter testified that the man who took their bag had a firearm. According to their testimony, the man told them, "If you don't want to get hurt, put your head down" Additionally, both defendant and codefendant Bright had been involved in another, separate shooting on the same day as the assault at issue in this case. We recognize that the firearm was not recovered and was not fired during the assault. Nonetheless, viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence to prove beyond a reasonable doubt that codefendant Bright possessed a firearm.

Thus, the question becomes whether defendant aided and abetted codefendant Bright in the possession of the firearm. Nothing in the aiding and abetting statute suggests that it should apply differently to a possessory offense than to any other crime. *People v Moore*, 470 Mich 56, 67; 679 NW2d 41 (2004). To convict a defendant of aiding and abetting a crime, a prosecutor must prove that: (1) the crime charged was committed by the defendant or some other person; (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 its commission at the time that the defendant gave aid and encouragement. *Id.* at 67-68. Accordingly, the test for aiding and abetting the offense of felon-in-possession is whether a defendant, who is himself ineligible to carry a firearm, has procured, counseled, aided or abetted another in the use or possession of a firearm. Similarly, the test for aiding and abetting the offense of felony-firearm is whether a defendant has procured, counseled, aided or abetted another in the use or possession of a firearm during the commission or attempted commission of a felony. *Id.* at 70. The prosecutor must "do more than demonstrate that [the defendant] aided the commission or attempted commission of the underlying" felony. Instead, the prosecutor must demonstrate that the defendant specifically aided the commission of felon-in-possession and felony-firearm. *Id.*

Turning to the facts of the present case, codefendant Bright testified that he attempted to rob the victim with a blue steel gun, thereby committing the underlying felony and the felony-firearm offense. Moreover, both Bright and defendant were previously convicted felons and were ineligible to possess a firearm.

The evidence also showed that defendant directly aided in the commission of the firearm-related offenses. Defendant transported Bright and the firearm in a white vehicle for the purpose of seeking out a potential victim. Defendant followed the victim to her home and waited at the end of her driveway while Bright assaulted her with the firearm. Defendant then again aided Bright by providing a quick getaway. Finally, the evidence showed that defendant had aided in the planning and preparation of the crimes. We conclude that a rational trier of fact could have concluded beyond a reasonable doubt that defendant aided and abetted codefendant Bright's commission of the offenses of felon-in-possession and felony-firearm.

Defendant next argues that the trial court erred when it failed to instruct the jury regarding the use of prior inconsistent statements. This issue has been waived on appeal. A claim of instructional error is waived when a defendant or his attorney affirmatively approves the jury instructions in the trial court. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). In this case, defendant's attorney submitted the instructions that the trial court used. In addition, after the jury instructions were read, the trial court asked, "Is there anything else for the record at this time, either counsel?" Defendant's attorney responded, "No, Your Honor." We conclude that defense counsel affirmatively approved the jury instructions. Because this issue has been waived on appeal, any error has been extinguished. *Id.*

Defendant also argues that he was prejudiced by the nine-month delay in the issuance of a warrant following the charged offenses. Defendant argues that he could not have known that the charges would be brought against him. He further argues that too much time had elapsed to allow him to effectively pursue an alibi defense. Finally, defendant claims that the delay was deliberately caused in an effort to prejudice him. We disagree.

Michigan applies a balancing test to determine if a prearrest delay requires reversing a defendant's conviction because the state may have an interest in delaying a prosecution that conflicts with a defendant's interest in a prompt adjudication of the case. A defendant has the burden of coming forward with evidence of prejudice resulting from the delay while the prosecutor has the burden of persuading the reviewing court that the delay was not deliberate and did not prejudice the defendant. [*People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999) (citations omitted).]

"A challenge to prearrest delay implicates constitutional due process rights." *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). A defendant must produce evidence of actual and substantial prejudice. *Id.* "To be substantial, the prejudice to the defendant must meaningfully impair his ability to defend against the charges against him in such a manner that the outcome of the proceedings will likely be affected." *Id.* A defendant must show more than just generalized allegations. *Id.* "Alleged imperfections of a witness' memory are generally insufficient to establish actual and substantial prejudice." *Id.* In *Crear*, the defendant claimed that certain witnesses had difficulty recalling certain details, but he did not identify those details. Similarly in this case, defendant merely sets forth generalized allegations. He does not identify the names of potential alibi witnesses or the details of their expected testimony. In addition, although defendant claims that the prosecutor deliberately delayed the charges, the prosecutor explained that the delay simply resulted from the natural course of an ongoing investigation. Defendant has not shown actual and substantial prejudice sufficient to warrant relief on this issue. No due process violation occurred.

Defendant lastly argues that the 180-day rule was violated because he was detained in the Wayne County jail for nine months before he was arraigned for the present offenses. The purpose of the statutory 180-day rule is to dispose of untried charges against prison inmates so that sentences may run concurrently. MCL 780.131; *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). Thus, the statute applies only to those defendants who, at the time of trial, are serving time in a state penal institution. It does not apply to individuals awaiting trial in a county jail. *Id.* Defendant is entitled to no relief under MCL 780.131 because he was detained in the Wayne County jail.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood