STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2008
v LAWRENCE BAKARI WHITE, Defendant-Appellant.	No. 278835 Oakland Circuit Court LC No. 2006-211140-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v STEVEN EDWARD MONTGOMERY, Defendant-Appellant.	No. 278836 Oakland Circuit Court LC No. 2006-211141-FC

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendants were each convicted, at a joint trial before a single jury, of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant White was sentenced to a term of 27 months to 20 years' imprisonment for the robbery conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. Defendant Montgomery was sentenced to a term of 70 months to 20 years' imprisonment for the robbery conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. Both defendants appeal as of right. We affirm.

I. FACTS

Defendants' convictions arise from the robbery of a Marathon gas station. Three men were arrested in connection with the robbery—defendants White and Montgomery, and a juvenile, Damone Harris, who testified against defendants pursuant to a plea agreement.

On Wednesday, August 23, 2006, David Parker drove his truck into a Marathon gas station. While pumping his gas, he observed a car with three men inside parked facing the exit. After Parker paid and returned to his car, one of the men demanded, "Give me all your money" with a loaded revolver. Parker saw the other men, one behind his trunk and another by the driver's side of their car. After Parker said he did not have any money, the gunman grabbed his Marlboro cigarettes from his shirt pocket. When the gunman attempted to take Parker's wallet, he pulled back, ran back into the store, and called for the police. The gunman and his two partners hurried in their car and drove away. Parker and the station clerk reported that the men wore black or dark hooded sweatshirts and rode in a white or cream-colored car.

The police pulled over a white Nissan car and found the following: defendant White in the driver's seat wearing a black coat, defendant Montgomery in the rear driver's side seat wearing a black hooded sweatshirt, and 14-year-old Harris seated in the rear seat on the passenger side wearing a dark hooded sweatshirt. Police found Marlboro cigarettes, a black handgun, and marijuana in the vehicle.

Before trial, defendants moved for separate trials, arguing that a joint trial would prejudice their case. And defendant White moved to dismiss the felony-firearm charge, claiming that there was insufficient evidence to prove that he knew about the handgun or aided in its possession. The trial court denied their respective motions.

At trial, the prosecution called Harris, who testified, pursuant to a plea deal, about defendants' and his participation in the robbery. He testified that he and defendants rode around in White's car. As White drove, he and Montgomery smoked marijuana. Then Montgomery suggested that they rob someone or "get a couple of dollars." White pulled the car over, and Montgomery moved up the passenger seat revealing a gun to Harris. Harris believed that White had knowledge of this plan. They drove by one gas station, but Harris did not want to stop there, so they searched for another. White eventually pulled the car into the Marathon gas station upon Montgomery's urging. White positioned his car toward the street as to "pull straight off" when they left. White instructed Harris to be the get-away driver. Harris further testified that Montgomery robbed Parker at gun point and pulled something from his pocket, while White stood by the gas pump acting as a look out. After Montgomery robbed Parker, Harris drove them all away. But Harris and White switched places because White had a driver's license and owned the car. Defendants elected not to call any witnesses. But defendants attacked Harris's testimony, as it was inconsistent with his preliminary examination. Harris explained that he initially did not tell the truth because he was afraid.

Both counsels for Montgomery and White used their respective closing arguments to target Harris's credibility. Counsel for Montgomery reminded the jury that Harris urged defendants to buy him marijuana. And counsel argued that Harris was the stronger personality because he rejected the first gas station. White's counsel asserted that the prosecution should have been embarrassed to base its case on a liar like Harris. Defendants claimed that they lacked knowledge about any plan to commit robbery, claimed that they remained in the car during its commission, and claimed that Harris lied. Neither White nor Montgomery implicated the other in the robbery.

The jury convicted both defendants of armed robbery and felony-firearm. Defendants now appeal.

II. DOCKET NO. 278835

Defendant White argues that there was insufficient evidence to support his felony-firearm conviction under an aiding and abetting theory. We disagree.

A. Standard of Review

In reviewing a challenge to the sufficiency of the evidence, this Court reviews the evidence de novo in a light most favorable to the prosecution to 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 Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). "The standard of review is deferential: [this Court] is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

B. Analysis

The felony-firearm statute, MCL 750.227b(1), prohibits a person from carrying or possessing a firearm during the commission or attempted commission of a felony. Under the aiding and abetting statute, MCL 767.39, a person who "counsels, aids, or abets" another in the commission of an offense may be tried and convicted as if he directly committed the offense. When a defendant is charged as an aider and abettor, he must "possess the same intent as the principle, or know that the principle possesses that intent." *People v King*, 210 Mich App 425, 430; 534 NW2d 534 (1995).

In *People v Moore*, 470 Mich 56; 679 NW2d 41 (2004), our Supreme Court examined the appropriate standard for establishing a felony-firearm violation under an aiding and abetting theory. The Court overruled its previous decision in *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981), in which it held that that "[t]o convict one of aiding and abetting . . . . [felony-firearm], it must be established that the defendant procured, counseled, aided, or abetted and so assisted in obtaining the proscribed possession, or in retaining such possession otherwise obtained." The *Moore* Court stated:

> We overrule *Johnson* because the test that it created is narrower than the test set forth in the language of the aiding and abetting statute. We conclude that under the statute, the proper standard for establishing felony-firearm under an aiding and abetting theory is whether the defendant's words or deeds "procure[d], counsel[ed], aid[ed], or abet[ted]" another to carry or have in his possession a firearm during the commission or attempted commission of a felony-firearm offense. [*Moore*, *supra* at 58-59.]

Thus, to convict a defendant of aiding and abetting felony-firearm, there must be "proof that a violation of the felony-firearm statute was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation, and that the defendant intended the commission of the felony-firearm or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement." *Id.* at 70. The amount of aid given "is not material if it had the effect of inducing the commission of the offense." *Id.* at 71.

In this case, there was evidence that defendant White was driving a car in which defendant Montgomery and Harris were passengers. According to Harris, defendant Montgomery, who was sitting in the front passenger seat, suggested that they rob someone. Defendant White then pulled the car over and defendant Montgomery moved up his seat and retrieved a gun from underneath. Defendant White subsequently pulled into a gas station, where defendant White positioned the car so that it was pointing toward the street to allow for a fast exit, and then stood behind the victim while defendant Montgomery robbed him at gunpoint.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant White was aware of the gun and the plan to commit a robbery, and aided in defendant Montgomery's possession of the gun for use during the robbery, with knowledge of defendant Montgomery's intent to use the gun during the robbery. Thus, there was sufficient evidence to support defendant White's felony-firearm conviction.

III. DOCKET NO. 278836

Defendant Montgomery argues that the trial court erred in denying his motion for a separate trial or separate jury. Again, we disagree.

A. Standard of Review

We review the trial court's decision for an abuse of discretion. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).

B. Analysis

MCR 6.121 provides, in pertinent part:

> (C) Right of Severance; Related Offenses. On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.
>
> (D) Discretionary Severance. On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial.

In *Hana*, *supra* at 346-347, our Supreme Court stated:

> Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any

significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.[1]

Defendant Montgomery argues that severance was necessary to preserve his right to a fair trial because his defense and defendant White's defense were inconsistent. However, defendant Montgomery did not present a supporting affidavit below in support of his position. Further, as explained in *Hana*, inconsistent defenses do not mandate severance unless the defenses are "mutually exclusive" or "irreconcilable." *Id.* at 349. The "tension" between the two defenses must be so great that the jury can only believe the "core" of evidence offered by one defendant or that offered by the other. *Id.* In this case, neither defendant testified or called any witnesses. The prosecutor argued that both defendants were guilty as principals, or alternatively, that one aided and abetted the other. Harris's testimony, if believed, established that both defendants participated in the offense, and both defendants pursued a defense strategy of arguing that Harris was not credible. The evidence did not establish mutually exclusive or irreconcilable defenses mandating severance. The trial court did not abuse its discretion in denying defendant Montgomery's motion for a separate trial or separate jury.

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald

[1] The decision whether to order separate juries is evaluated under the same standard. *Hana*, *supra* at 351-352.