

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAFONZ LAMONT HART,

Defendant-Appellant.

UNPUBLISHED

December 29, 1998

No. 205782

Oakland Circuit Court

LC No. 96-147109 FC

Before: Doctoroff, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). The trial court sentenced defendant to three and one-half to twenty years' imprisonment for the assault conviction and to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On appeal, defendant argues that there was insufficient evidence presented at trial to support his conviction of felony-firearm. We disagree.

Viewing the evidence in the light most favorable to the prosecution, this Court must determine whether a reasonable jury could find the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 516 n 6; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). This Court should not interfere with the jury's role in determining the credibility of witnesses and weighing the evidence. *Wolfe, supra* at 514.

To support a felony-firearm conviction, the prosecution must establish that the defendant either personally possessed a firearm during the commission of a felony or that the defendant procured, counseled, aided, or abetted and so assisted another in obtaining or retaining possession of a firearm. *People v Witt*, 140 Mich App 365, 368; 364 NW2d 692 (1985). "Possession may be actual or constructive and may be proved by circumstantial evidence." *People v Williams*, 212 Mich App 607, 609; 538 NW2d 89 (1995). A defendant will be deemed to have constructively possessed a firearm if

its location was known to the defendant and if it was reasonably accessible to him during the commission of a felony. *Id.*

Furthermore, an individual may be convicted of felony-firearm as an aider and abettor, even though he or she never actually possessed a firearm. *People v Eloby (After Remand)*, 215 Mich App 472, 478; 547 NW2d 48 (1996) (citing *People v Johnson*, 411 Mich. 50, 54; 303 NW2d 442 [1981]). However, the individual must aid and abet either the acquisition or the retention of the gun. *Id.* There is no requirement that the prosecutor establish that a defendant charged with felony-firearm as an aider and abettor intended to commit the underlying felony. *People v Nix*, 165 Mich App 501, 505; 419 NW2d 7 (1987). “It is sufficient that the defendant intentionally assisted or aided the principal’s possession of a firearm under circumstances that constituted a felony-firearm offense with respect to the principal.” *Id.*

In the instant case, there was no evidence presented that defendant aided and abetted his accomplice, Solomon Richards, with either the acquisition or the retention of the firearm. Throughout the commission of the assault with the intent to rob while armed, Richards displayed a nine millimeter firearm and pointed it at one of the victims, Terrance White. According to eyewitness testimony at trial, defendant searched White’s pockets after Richards stopped him at gun point. Defendant attempted to block the apartment door to prevent White and others from fleeing the apartment. However, there was never any evidence presented that defendant used a firearm or that he aided and abetted Richards with either the acquisition or the retention of the firearm.

However, the prosecution offered testimony by police officers that defendant possessed a 380 automatic handgun. Two police witnesses testified that defendant made unsolicited statements concerning a 380 automatic handgun and stated “that’s the gun I had in my hand.” Contrary to defendant’s assertion, these statements do not appear to have been obtained in violation of *Miranda*.¹ There was no evidence that the police were interrogating defendant at the time he made the statements or that the police made any statements designed to elicit a response from defendant.

The fact that none of the witnesses testified that defendant had a gun in his hand at the time of the assault does not warrant the conclusion that defendant was not in possession of a firearm. The prosecutor was not required to establish that defendant used a firearm during the commission of the underlying felony. Instead, the prosecutor established that defendant possessed a firearm through the use of circumstantial evidence. Defendant made statements to the police about a 380 automatic and a 380 automatic was discovered across the street from where defendant had fled. Therefore, a juror could reasonably infer that defendant possessed a 380 caliber handgun during the commission of the crime. Therefore, through the use of circumstantial evidence and all the reasonable inferences drawn from it, we believe that the prosecutor produced sufficient evidence to prove the element of possession, i.e., that defendant possessed the 380 caliber handgun during the commission of the assault in the apartment. See *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997).

We note that Officer Praedel’s testimony that White had told him defendant had a 380 handgun during the assault was inadmissible hearsay, MRE 802. Given there was circumstantial evidence linking

defendant to the 380 handgun, we believe that no manifest injustice occurred by this unchallenged testimony. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

Defendant argues that his statements to police should have been excluded from evidence because he was a juvenile and the officers failed to afford him the additional protection of the presence of an adult at the time of questioning as required by statute. We note that because defendant did not object to the admission of his statements, we only review the issue for manifest injustice. *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

Whether a juvenile's confession is admissible depends upon whether the statement was voluntarily made after a review of the totality of the circumstances. *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997). Considering the totality of all the surrounding circumstances, the test of voluntariness is whether the confession was "the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *Id.* at 121; *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997).

To determine the admissibility of a juvenile's confession, the trial court must consider the following factors: "(1) whether the requirements of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), have been met and the defendant clearly understands and waives those rights, (2) the degree of police compliance with MCL 764.27; MSA 28.866 and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile defendant's personal background, (5) the accused's age, education, and intelligence level, (6) the extent of the defendant's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the accused was injured, intoxicated, in ill health, physically abused or threatened with abuse, or deprived of food, sleep or medical attention." *Givans, supra* at 121; *People v Good*, 186 Mich App 180, 189; 463 NW2d 213 (1990).

In the instant case, the statements given by defendant did not result from police questioning. Defendant offered his statements after hearing that the officers had found a gun. Police officers did not pose any questions to defendant and they did not make any statements to defendant designed to elicit a response. Because defendant was not the subject of police questioning at the time he made certain statements, there can be no *Miranda* violation. Moreover, there is no evidence on the record that defendant's statements were coerced.

Furthermore, we do not find any support for defendant's argument that he was entitled to the presence of his parent or guardian at all times during police custody or questioning. In fact, *Givans* appears to require only that a juvenile defendant must be given access to a parent or guardian upon request. Even if we were to determine that defendant was entitled to have a parent or guardian present at the time he made his statements, this would be only one factor to consider when evaluating the voluntariness of his confession under a totality of the circumstances test. Because there is no support for defendant's contention that his statements were involuntarily given, the statements made by defendant were properly admitted into evidence.

Defendant argues that the trial court erred in admitting the 380 caliber handgun into evidence. Again, we note that defendant failed to object to the admission of this evidence, and therefore this issue is not preserved. *Grant, supra*. We believe that the 380 handgun was relevant because whether defendant was armed was an element required to establish the felony-firearm charge. Defendant made a statement to police that he had a 380 handgun in his hand and described the firearm in detail, i.e., that the gun could not fire because it had no clip. Furthermore, the officers found the 380 handgun in the area in which defendant and Richards had fled. Therefore, we believe that the handgun was relevant evidence. MRE 401. Moreover, the probative value of the admission of the 380 caliber handgun was not substantially outweighed by the danger of unfair prejudice or confusion of the issue. MRE 403. Testimony was clear that a 9 millimeter handgun was used by Richards during the assault. The police testified that the bullets recovered at the crime scene were not consistent with a 380 handgun. As a result, we do not believe that manifest injustice occurred. Therefore, no error occurred in admitting the gun.

Next, defendant asserts that he was denied the effective assistance of counsel. Because defendant failed to make a motion for a new trial or a motion for an evidentiary hearing, our review is limited to any deficiencies apparent in the record itself. To establish that the right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defense counsel's performance must be evaluated against an objective standard of reasonableness without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Furthermore, effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "To establish ineffective assistance of counsel, a defendant must show a very serious error, must overcome the presumption that the challenged action might be considered sound trial strategy, and must prove prejudice." *People v Jackson*, 203 Mich App 607, 613-614; 513 NW2d 206 (1994) (citing *People v Thew*, 201 Mich App 78, 89; 506 NW2d 547 [1993]). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy or assess counsel's competency with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant argues that he was denied the effective assistance of counsel because defense counsel failed to object to the introduction of evidence at trial, such as defendant's alleged confession, testimony concerning defendant's post-arrest silence, hearsay testimony about a statement made by the victim, and the admission of a 380 caliber handgun which was not relevant to the instant case. While defendant asserts that defense counsel should have requested a *Walker*² hearing to determine the voluntariness of his alleged statements, there was no evidence on the record that the police interrogated defendant and there was no evidence that the police engaged in any misconduct. Without evidence of police interrogation, there is no question relating to a *Miranda* violation. Similarly, defendant was not denied his right under the juvenile statute to have an adult present during questioning because there is no evidence on the record that the police questioned him. Defendant made statements to the police without

any prompting. Because there was no evidence to call into question the voluntariness of defendant's statements, we believe that defense counsel's failure to request a *Walker* hearing did not deprive defendant of a fair trial.

Moreover, because we believe that the 380 handgun was properly admitted into evidence for the reasons stated above, defendant was not denied a fair trial. Finally, although defense counsel failed to raise a hearsay objection to Praedel's testimony concerning statements made to him by White, Praedel's testimony regarding White's statement was not the only "evidence" linking defendant with the possession of a handgun during the assault. Therefore, we believe that defendant was not prejudiced by his counsel's failure to raise a hearsay objection to Praedel's testimony.

Affirmed.

/s/ Martin M. Doctoroff

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).