STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRADLEY JAMES WESTBROOK,

Defendant-Appellant.

UNPUBLISHED
November 2, 1999

No. 208935
Jackson Circuit Court
LC No. 97-081679 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM PAUL COWAN,

Defendant-Appellant.

No. 208975
Jackson Circuit Court
LC No. 97-081678 FC

Before: Talbot, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

In this consolidated appeal, defendant Bradley Westbrook was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, and was sentenced to five to twenty years' imprisonment. Defendant William Cowan was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to a prison term of two years for the felony-firearm conviction and to a consecutive prison term of three to twenty years for the armed robbery conviction. Both defendants appeal as of right. We affirm.

Defendant Westbrook contends that the trial court committed error mandating reversal when it denied his request for an instruction on the offense of assault with intent to rob while armed.

Assault with intent to rob while armed is a necessarily included lesser offense of armed robbery. *People v Kamin*, 405 Mich 482, 501; 275 NW2d 777 (1979); *People v Johnson*, 90 Mich App 415, 421; 282 NW2d 340 (1979). Because defendant requested an instruction on assault with intent to rob while armed, the trial court's refusal to instruct on this necessarily included lesser offense constitutes error. *People v Torres (On Remand)*, 222 Mich App 411, 416; 564 NW2d 149 (1997).

The issue, therefore, is whether the error was harmless. MCL 769.26; MSA 28.1096; *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992). In *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), the Court held that for preserved, nonconstitutional error the burden is on the defendant to demonstrate that "it is more probable than not that a different outcome would have resulted without the error."

The elements of the offense of armed robbery are (1) an assault, and (2) a felonious taking of property from the victim's person or presence while the defendant is armed with a weapon described in the statute. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). The elements of the offense of assault with intent to rob while armed are (1) an assault, (2) an intent to rob or steal, and (3) while armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). The offenses are distinguished only by whether a felonious taking occurred. The overwhelming evidence established that defendant and his companions stole money, cigarettes, and liquor during the robbery. Hence, we are not persuaded that a different outcome would have resulted had the court instructed on the lesser included offense.

Defendant Westbrook also argues that the evidence was insufficient to support the armed robbery conviction because there were no fingerprints or physical evidence linking him to the crime and no eyewitness positively identified him. We disagree. Viewed in a light most favorable to the prosecution, the testimony of defendant's companions regarding defendant's participation in the robbery was sufficient to allow a rational trier of fact to conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Lastly, defendant Westbrook maintains that the sentence imposed is disproportionate. We disagree. Defendant's sentence is within the guidelines range and is therefore presumptively proportionate. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993). Defendant has failed to demonstrate any unusual circumstances to overcome this presumption. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995). Contrary to defendant's suggestion, lack of criminal history is not an unusual circumstance that would overcome the presumption of proportionality. *Id.* at 533.

Defendant Cowan contends that the evidence was insufficient to support his conviction of aiding and abetting felony-firearm. We disagree.

In order to sustain a conviction of aiding and abetting felony-firearm, "it must be established that the 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). However, neither mere presence nor knowledge that the principal had the firearm in his possession at the time of the felony is enough to make a person an aider and abettor. *People v Jones*, 119 Mich App 164, 170-171; 326 NW2d 411 (1982); *People v Slate*, 117 Mich App 501, 503; 324 NW2d 68 (1982).

Here, evidence was presented that defendant Cowan carried the gun in his pocket to the store with the intent of robbing the store and that defendant gave the gun to Westbrook just before the robbery. Viewed in a light most favorable to the prosecution, this evidence was sufficient to allow a rational trier of fact to conclude that the essential elements of the crime were proven beyond a reasonable doubt. See, e.g., *People v Buck*, 197 Mich App 404; 496 NW2d 321 (1992) (the defendant carried the firearm in the car after another had acquired it and loaded and unloaded the weapon before the shooting took place); *People v Baker*, 115 Mich App 720, 724; 321 NW2d 385 (1982) (the defendant saw and handled the sawed-off shotgun before the crime, with the knowledge of the use to which it would be put).

Defendant Cowan also contends that the jury may have committed a clerical error in rendering its guilty verdict on the felony-firearm charge and that this Court should remand for an evidentiary hearing. While this appeal was pending, defendant filed a motion to remand regarding this issue. A panel of this Court denied defendant's motion because (1) the motion was not filed within the time required; and (2) defendant failed to demonstrate by affidavit or an offer of proof that a remand is necessary to develop facts outside of the record to support his claim. Because this Court has ruled upon this issue, we decline to address it again.

Defendant Cowan also contends that the three-year minimum sentence imposed by the lower court is disproportionate. We disagree. The sentence imposed, which is a downward departure from the guidelines' minimum recommended range of five to fifteen years, is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey