STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2001
v	No. 221859 Wayne Circuit Court
TRACY WEBB, Defendant-Appellant.	LC No. 98-005803

Before: Bandstra, C.J., and Whitbeck and Owens, JJ.

PER CURIAM.

Defendant Tracy Webb appeals as of right his jury convictions for possession with intent to distribute less than fifty grams of a controlled substance[1] and possession of a firearm during the commission of a felony[2] ("felony-firearm") under an aiding and abetting theory. The judgment of sentence reflects that the trial court sentenced Webb to six to twenty years in prison for the drug offense with a consecutive, two-year sentence for felony-firearm. We affirm Webb's convictions but remand for administrative correction of the sentence.

I. Basic Facts And Procedural History

On May 7, 1998, two Detroit police officers were in an area known for drug transactions when they observed Tracy Webb and Keith Farmer[3] sitting in a car parked approximately fifty to seventy feet behind their marked squad car. The officers, looking in their rear and side mirrors, saw a third person approach Farmer's car and give Farmer green paper that appeared to be money. One officer saw Farmer make a motion as if to hand something to this man who had approached Farmer's car. The other officer saw something drop from Farmer's hand into this third person's hand. The officers, concluding that they had just witnessed a drug transaction, turned their squad car and drove toward Farmer's car. At about the same time, Farmer started to

[1] MCL 333.7401(2)(a)(iv).

[2] MCL 750.227b.

[3] See *People v Farmer*, unpublished opinion per curiam of the Court of Appeals, issued August 31, 2001 (Docket No. 226303).

drive away from where he had parked the car. Farmer turned right, but failed to stop at a nearby intersection.

The officers stopped Farmer four to five blocks from where the alleged drug transaction took place and asked him for identification. When he could not produce a driver's license, the officers ordered Farmer out of the car, searched him for weapons, and arrested him. The officers also ordered Webb out of the car and searched him for weapons. One of the officers found seventeen individually wrapped packages in Webb's right front pocket. While searching Farmer's car, the officers found a handgun beneath the driver's seat where Farmer had been sitting. The handgun was placed with the handle facing toward the car gas pedal and "[i]t was," in the words of the officer who first saw it, "easily accessible for both parties," meaning both Farmer sitting in the seat directly over the gun and Webb, sitting in the adjacent seat.

Though the police never determined who owned the car Farmer was driving, the property found on and seized from Farmer included $290 in small bills, jewelry, and a pager, but no paraphernalia employed to use cocaine. Laboratory testing of two of the seventeen packages found in Webb's pocket revealed that they contained approximately .25 grams of a cocaine mixture.

II. Felony-Firearm

A. Standard Of Review

Webb first contends that there was insufficient evidence presented at trial to sustain his conviction of felony-firearm. His arguments implicate his constitutional rights to due process of law.[4] Thus, review is de novo for this constitutional issue.[5] Further, de novo review is also appropriate because the nature of our review requires us to examine the evidence itself without deferring to the jury's determination that the evidence was sufficient to convict.

B. Legal Standards

The prosecutor had to prove beyond a reasonable doubt that Webb committed every essential element of the offense.[6] "The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony."[7] However, as *People v Johnson*[8] explains:

> [t]o convict one of aiding and abetting the commission of a separately charged crime of carrying or having a firearm in one's possession during the commission

[4] *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992); see also US Const, Am XIV; Const 1963, art 1, § 17.

[5] *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

[6] See *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

[7] *People v Avant*, 235 Mich App 499, 505; 597 NW21d 864 (1999).

[8] *People v Johnson*, 411 Mich 50; 303 NW2d 442 (1981).

> of a felony, it must be established that the defendant procured, counselled, [sic] aided, or abetted and so assisted in *obtaining* the proscribed possession, or in *retaining* such possession otherwise obtained.[9]

To prove the elements of felony-firearm, whether Webb committed the offense personally or aided and abetted Farmer in committing the offense, the prosecutor was entitled to use direct and circumstantial evidence,[10] as well as reasonable inferences that could be drawn from that evidence.[11] In sustaining this burden of proof, the prosecutor did not need to negate every theory of innocence Webb raised.[12] And, despite this high burden of proof at trial, on appeal, this Court must review the evidence on the record in the light most favorable to the prosecutor to determine whether the prosecutor submitted sufficient proofs to the jury to sustain each guilty verdict it rendered.[13]

C. Aiding And Abetting

The record in this case presents something of a mystery when it comes to understanding Webb's contention that the jury actually convicted him of aiding and abetting Farmer in committing felony-firearm rather than convicting him simply of felony-firearm. The criminal information charging Webb with the felony-firearm offense made no mention of an aiding and abetting theory. Instead, the information alleged that Webb "did carry or have in his . . . possession a firearm, to-wit: handgun, at the time he . . . committed or attempted to commit a felony, to-wit: Possess with intent to deliver Cocaine; contrary to MCL 750.227b . . . ." No one at the very brief arraignment suggested that Webb was being charged on an aiding and abetting theory. The prosecutor's opening statement did refer to aiding and abetting, but only regarding the drug possession charge. With respect to the felony-firearm, the prosecutor told the jury that it would be hearing evidence that both Webb and Farmer were guilty of "possession of a firearm during the course of [the] cocaine offense." In his opening statement, Wilfred Steiner, Webb's trial counsel, did not suggest that Webb could be found guilty of aiding and abetting Farmer in committing felony-firearm. Steiner described the prosecutor's burden, saying, "Charge two is that he [Webb] had possession of a firearm during this. Now, that means he either had it, or it was available to him in the furtherance of the drug deal."

Even viewed in the light most favorable to the prosecutor,[14] we can find no evidence adduced at trial that tended to demonstrate that Webb aided and abetted Farmer in obtaining or

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[9] *Id*. at 54 (emphasis added).

[10] See *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Turner*, 213 Mich App 558, 570-571; 540 NW2d 748 (1995); see also *People v Cutchall*, 200 Mich App 396, 401; 504 NW2d 666 (1992), criticized on other grounds by *People v Edgett*, 220 Mich App 686, 691; 560 NW2d 360 (1996).

[11] *Turner*, *supra* at 570-571.

[12] See *Nowack*, *supra* at 400.

[13] *Wolfe*, *supra* at 515.

[14] *Id*.

retaining the handgun found under the car seat.[15] In fact, it appears that this was not a failure of proof; neither the defense nor the prosecution used it as a theory at trial. The aiding and abetting theory with respect to the felony-firearm charge may have arisen during the parties' jury instruction discussion with the trial court after the close of proofs. Because that discussion occurred off the record, we have no way of know who proposed this theory, what any objections to it were, or why the trial court apparently accepted the recommendation to insert the theory into the case.

The first reference to aiding and abetting felony-firearm that the jury heard was in the context of the prosecutor's closing argument. After describing the elements of the drug possession charge and the relevant evidence proving that charge, the prosecutor said:

> [Then y]ou move onto the next charge, which is felony firearm, is the short way we call it. *And that is where someone possesses, or assists another, aids and abets another in possessing a gun while they're committing a felony*. What's the felony here? Possessing cocaine, and possessing it with the intent to deliver it. Did they possess that gun together while that was going on? Of course.
>
> Now, you sort of probably got a glimpse of some of Mr. Webb's attorney's argument about that already. Well, it [the handgun] was really closer to Mr. Farmer. And you never saw Mr. Farmer with it, and so on and so forth. Well, when you think about it, who was really carrying more money out there that day? Who had the bigger reason to need the protection? The man with the $290, or the man with the $340 in cocaine? But you really don't even have to go there, because what was described to you? What your common sense tells you, that they were working together as a team. One man held the dope. One man held the money. And they kept the gun where both could get at it.
>
> Simply put, both men are guilty of possessing cocaine intending to deliver it. Simply put, both men are guilty of having a firearm while they committed that felony. This isn't a glamour case. There's no blood and guts. But simply put, it's about holding these two men, Mr. Farmer, who you saw earlier, and Mr. Webb responsible for what they did. And what they did was clear. They went out on the streets of our community, selling dope, carrying a gun, and committing the charged crimes. Simply put, guilty, guilty, guilty.[16]

Plainly, the prosecutor did not ask the jury to find that Webb aided and abetted Farmer in committing felony-firearm; the prosecutor asked the jury to find that the men both committed felony-firearm by having access to the handgun hidden, but readily accessible, under the car seat.

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[15] See *Johnson*, *supra* at 54.

[16] Emphasis added.

Though this was a joint constructive possession theory with respect to the handgun itself,[17] this was a theory of direct criminal liability for the felony-firearm offense.

Steiner's tactic in his closing argument was to challenge the officers' testimony, contending that they were not credible and had not demonstrated that Webb knew the gun was under the seat and had ready access to it. As Steiner argued to the jury:

> [T]he prosecutor wants to say that again they [Webb and Farmer] had it. He said that it was readily accessible to both. That one was the gun man. One was the drug guy. Well, let's flash back to this transaction as [the officers] say it happened. Somebody came to Mr. Farmer's Side. The driver's side. To the driver's side. There was a bam, bam transaction, money for drugs. If the gun is there for everybody's use, for everybody's protection, how in the world is it under the driver's seat? How is it readily accessible? Now can, while this is going on, Mr. Webb reach over with his left hand, under the seat, pull it out to protect the driver? You heard [one of the officers] say that he couldn't see it. He doesn't think that anybody could see it sitting in the passenger's seat. It was wedged under the seat.
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> Ladies and gentlemen, just because a gun was found in a car that Mr. Webb was in doesn't mean that he's guilt of possessing [a firearm] in the commission of a felony. I asked all of you . . . when we started this, when you're picked up by somebody and you sit in the passenger's seat, how many of you check under the driver's seat? And I'm not sure any of you said they did. It would be extremely odd to do so. They're trying to say that because it was there, and this enterprise that they said that they were running, that Mr. Webb must have known it, and must have used it, and must have been possessing it, and must have been using it to further his drug empire. Ladies and gentlemen, that doesn't make sense either. Because not only did – could you not see it from where he was sitting, it would be extremely awkward for Mr. Webb to be using it to protect himself or to protect somebody else.

Clearly, Steiner chose to attack the evidence of the elements of felony-firearm, not aiding and abetting felony-firearm. In fact, not once in his closing argument did Steiner contend that Webb had aided and abetted the felony-firearm offense. Because lack of access to a firearm at the time a felony is committed may be a defense to constructive possession of the firearm,[18] Steiner's emphasis on Webb's ability to access the handgun also suggests that he was not arguing that Webb had aided and abetted the felony-firearm, but that he was not guilty of felony-firearm itself.

In a brief rebuttal argument, the prosecutor contended once again that the handgun was found in a place that both Webb and Farmer could reach. Further, the prosecutor contended that

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[17] See *Wolfe*, *supra* at 515-516, 521.

[18] See, generally, *People v Burgenmeyer*, 461 Mich 431; 606 NW2d 645 (2000).

having a gun was vital to the individual roles Webb and Farmer played in the underlying drug offense. Farmer needed access to the weapon because he was holding cash, and Webb needed access because he was holding the drugs – a highly desired commodity.

Other than the prosecutor's initial and fleeting suggestion that felony-firearm is "where someone possesses, or assists another, aids and abets another in possessing a gun while they're committing a felony," the only other reference to an aiding and abetting theory occurred in the trial court's instructions to the jury. When reciting the counts in the criminal information to the jury, the trial court stated that "Count Two is possession of a firearm in the commission or attempted commission of a felony." In the course of defining this offense, the trial court explained:

> The defendant is also charged with the separate crime of possessing a firearm at the time he committed or attempted to commit the crimes of possession with intent to deliver less than 50 grams of a mixture containing cocaine or mere possession of less than 25 grams of cocaine.
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> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.
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> First, that the defendant committed either of those crimes, which have been defined for you.
>
> Second, that at the time he committed those crimes he know – or attempted to commit those crimes, he knowingly carried or possessed a firearm.
>
> A pistol is a firearm.
>
> Now, in this case, each defendant is charged with committing or intentionally assisting someone else in committing the crimes in Count One and the crime in Count Two.
>
> Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of that crime as an aider and abettor.
>
> To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
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> First, that the alleged crime was actually committed either by the defendant or someone else.
>
> Second, that before or during the crime, the defendant did something to assist the commission of the crime.
>
> Third, that when the defendant gave his assistance, he intended to help someone else commit the crime.

> It does not matter how much help, advice or encouragement a defendant gave. However, you must decide whether the defendant intended to help another commit the crime, and whether his help, advice or encouragement actually did help, advise, or encourage the crime.

The verdict slip did not distinguish between the direct and aiding and abetting theories with respect to either charge. The jury merely indicated on the slip that it found Webb guilty of felony-firearm. When the trial court polled the jury following its announcement of the verdict, the trial court asked the individual jurors whether they had found "Mr. Webb, guilty as to Count Two, possession of a felony firearm in the attempt or commission in the – possession of a felony firearm in the commission or attempt[ed] commission of a felony?" They each answered affirmatively.

Though the trial court's last reference to felony-firearm was slightly garbled, there can be no question from the arguments, evidence, and jury's response that the jury actually convicted Webb of felony-firearm, not aiding and abetting Farmer's commission of felony-firearm. Even though Webb correctly contends that the jury did not have sufficient evidence to convict him of the unusual elements that comprise aiding and abetting felony-firearm, as announced in *Johnson*, *supra*, he was not convicted of this offense. Moreover, he does not challenge that adequacy of the evidence that he committed felony-firearm itself.

III. Aiding And Abetting Instructions

Webb contends that the trial court erred when it failed to instruct the jury on the elements of aiding and abetting felony-firearm in a manner that comported with *Johnson*. However, his attorney expressed satisfaction with the instructions, extinguishing all error.[19]

IV. Ineffective Assistance Of Counsel

A. Standard Of Review

Webb argues that he was denied the effective assistance of counsel because Steiner failed to move to suppress the narcotics found on Webb's person and misstated the elements of aiding and abetting felony-firearm. De novo review is appropriate for this issue because it presents a constitutional question[20] and does not require us to defer to the trial court in any respect.[21]

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[19] See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

[20] See *Houstina*, *supra* at 73.

[21] See, generally, *People v Toma*, 462 Mich 281, 303-305; 613 NW2d 694 (2000) (Supreme Court directly examined the evidence on the record).

B. Legal Standards

As this Court explained in *People v Knapp*,[22]

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Because Webb did not raise this issue in the trial court, our review of is limited to the existing record.[23]

C. Analysis

We first dispense with Webb's patently meritless argument regarding defense counsel's statements concerning aiding and abetting felony-firearm. Irrespective of the abstract question whether Steiner knew the elements of aiding and abetting felony-firearm, the record makes it clear that Steiner never argued the aiding and abetting theory to jury. Rather, Steiner chose to challenge the validity of the evidence of felony-firearm generally. Had this strategy worked, Webb would have been acquitted of the second charge because the prosecutor specifically contended that Webb committed felony-firearm, not that he aided and abetted Farmer in committing this offense. That this strategy failed does not mean that Steiner was ineffective.[24] Further, there would be no strategic advantage to arguing that Webb was an aider or abettor to felony-firearm rather than the principal who committed the offense because our Legislature has abolished the distinction between principals and accessories.[25] Thus, even if Steiner's performance fell below an objective standard of reasonableness, it was not prejudicial.[26]

With respect to Webb's argument that Steiner was ineffective for failing to move to suppress the drugs seized from his pocket, we cannot agree that any such motion would have been successful. The officers lawfully stopped the car that Farmer was driving and in which

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[22] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

[23] See *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[24] See *People v Bart (On Remand)*, 220 Mich App 1, 15, n 4; 558 NW2d 449 (1996).

[25] See *People v Smielewski*, 235 Mich App 196, 202-203; 596 NW2d 636 (1999).

[26] See *Pickens*, *supra* at 303.

Webb was riding because of a traffic infraction.[27] Because the officers had witnessed the drug transaction Webb and Farmer conducted with the third person and knew that weapons are frequently used in the drug trade, the totality of the circumstances made the patdown for weapons legal with respect to Webb.[28] Though a patdown in this situation is limited in scope,[29] one of the officers had probable cause to believe that what he plainly felt in Webb's pocket was contraband, specifically narcotics.[30] The officer was under no legal obligation to ignore this contraband. Further, as the Michigan Supreme Court recently stated, "[I]t is irrelevant that the officer was secondarily looking for drugs because the principal purpose of the patdown search of defendant was to ensure that he did not have any weapons."[31] The drugs were seized lawfully. Therefore, Steiner's failure to bring this motion cannot constitute the prejudice necessary to reverse Webb's conviction and grant him a new trial.[32]

V. Sentencing

Webb claims that the judgment of sentence reflects a clerical error. We agree that the transcript unambiguously reflects that the trial court, at the sentencing hearing, confirmed that it intended to sentence within the judicial sentencing guidelines. The trial court not only stated that it would sentence Webb to the "middle" or "lower" end of the judicial sentencing guidelines because it saw his potential for rehabilitation, the trial court clearly said that it was sentencing him to 48 months to 240 months for the drug offense with the additional, consecutive, two-year sentence for felony-firearm. The trial court also confirmed that the "total" sentence was 72 months to 240 months, meaning that Webb would first serve the two-year felony-firearm sentence (24 months) and then a minimum of 48 months for the drug offense. The trial court also specifically indicated to Webb, "I'm not going to enhance your sentence, and . . . you will not serve anymore than you will on the principal offense." The judgment of sentence, however, reflects an "enhanced" sentence of 72 months to 240 months for the drug offense and an additional two years in prison for the felony-firearm conviction. Though, as the prosecutor notes, courts speak through their written orders rather than in statements from the bench,[33] we have undeniable evidence that this judgment of sentence includes a clerical error susceptible to administrative correction.[34] Correcting this problem does not require resentencing.[35] Rather the trial court, on remand, shall correct the drug offense so that it reflects a minimum prison term of

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[27] See *People v Champion*, 452 Mich 92, 99; 549 NW2d 849 (1996).

[28] *Id*.; see also *People v Custer*, 465 Mich 319, 329; 630 NW2d 870 (2001) (considering officer's experience and knowledge that drugs and weapons are frequently involved in the same situations).

[29] *Champion, supra* at 99.

[30] *Id*. at 100-101.

[31] *Custer, supra* at 330.

[32] See *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999).

[33] *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997).

[34] See, generally, *People Kaczorowski*, 190 Mich App 165, 174-175; 475 NW2d 861 (1991).

[35] See *id*. at 175; see also *People v Herndon*, 246 Mich App 371, 393; __ NW2d __ (2001).

48 months and a maximum prison term of 240 months, with a consecutive, two-year sentence for felony-firearm.

Convictions affirmed but remanded to trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Donald S. Owens