

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEWAINE DONALD DALE,

Defendant-Appellant.

UNPUBLISHED

December 28, 2001

No. 225780

Monroe Circuit Court

LC No. 99-029966-FC

Before: Murphy, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of bank robbery, MCL 750.531, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to a term of 172 months to 40 years' imprisonment for the bank robbery conviction, and a consecutive two-year term for the felony-firearm conviction. We affirm.

This case arises out of a bank robbery committed by defendant and an accomplice, in which the accomplice held a gun on bank employees and customers while defendant removed cash from the tellers' drawers.

On appeal, defendant claims that the prosecution failed to present sufficient evidence to support his felony-firearm conviction, either as a principal or an aider and abettor; therefore, the trial court erred in denying his motion for a directed verdict on the charge.

Where a defendant moves for a directed verdict, this Court reviews the defendant's challenge to the sufficiency of the evidence de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that each essential element of the crime was proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). This Court may not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The felony-firearm statute, MCL 750.227b, provides that "[a] person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony[.]" In order to convict a person of felony-firearm as a principal offender, the

prosecution must show that the individual charged had possession of the firearm at the time of the felony. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Possession may be actual or constructive and may be proved by circumstantial evidence. *People v Hill*, 433 Mich 464, 469-471; 446 NW2d 140 (1989). A defendant may have constructive possession of a firearm if its location is known to the him and if it is reasonably accessible to him; actual possession is not necessary. *Id.* at 470-471. “Whether actual or constructive, possession may be joint as well as exclusive.” *Id.* at 470.

Here, the record clearly indicates that during the bank robbery, defendant’s accomplice held the firearm on bank employees and customers, while defendant went to the teller stations and removed the cash. There was no testimony indicating that defendant physically possessed the gun at any time during the robbery. Therefore, the evidence was insufficient regarding the felony-firearm charge as to defendant being a principal based on actual possession. We find it unnecessary to determine whether there was sufficient evidence regarding constructive possession because the jury was never instructed on this theory, nor does the record indicate that the prosecutor argued or requested instructions concerning constructive possession.

Defendant could also be convicted of felony-firearm as an aider and abettor. *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981). The jury was instructed on aiding and abetting as to the felony-firearm charge in the present case. A conviction under an aiding and abetting theory requires proof that “the defendant procured, counselled, aided, or abetted and so assisted in obtaining the proscribed possession, or in retaining such possession otherwise obtained.” *Id.*

Here, the record indicates that defendant accompanied his accomplice to the location where the gun was procured, and that defendant was present when the gun was turned over to the accomplice by a third individual. Further, defendant drove the vehicle used in the robbery to the bank, thereby transporting the gun to the crime scene. Additionally, during the robbery, defendant held and controlled a duffel bag in which the gun was viewed by another individual shortly after the robbery, and defendant subsequently burned the duffel bag. The fact that defendant had control over the duffel bag in which the gun was subsequently placed, established that he provided the instrument by which the gun was concealed, retained, and transported during flight from the bank. Finally, defendant accompanied his accomplice in returning the gun to the individual who provided the weapon, and that individual was paid by defendant and the accomplice from the robbery proceeds for the use of the gun. When reviewing the evidence in a light most favorable to the prosecutor, a rational trier of fact could have found beyond a reasonable doubt that defendant aided and abetted in obtaining and retaining possession of the firearm.

Although the trial court erred in denying defendant’s motion for a directed verdict as to the theory that defendant was a principal in relation to the felony-firearm charge, the court did not err in denying the motion as to the theory that defendant was an aider and abettor. The jury should not have been instructed on actual possession with defendant as principal; however, any resulting error was harmless. MCL 769.26. If any juror found, however unlikely, that defendant actually possessed the gun during the robbery pursuant to the instructions, that juror would have also necessarily found that defendant was an aider and abettor because actual possession would establish that defendant assisted in the retention of the gun. See *People v Burgess*, 67 Mich App 214, 220-221; 240 NW2d 485 (1976).

Defendant next argues that he was denied due process, where the trial court failed to instruct the jury that it must unanimously agree on the underlying theory of guilt concerning the felony-firearm charge, i.e., whether defendant was guilty as a principal or aider and abettor. In light of our ruling regarding the motion for directed verdict, it is unnecessary to address this issue because, once again, the verdict was necessarily unanimous on the felony-firearm charge.

Accordingly, there was no ineffective assistance of counsel in failing to request the instruction because a trial attorney need not register a meritless objection or request to act effectively. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Affirmed.

/s/ William B. Murphy

/s/ Janet T. Neff

/s/ Joel P. Hoekstra