# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT LAMAR CLARK, JR.,

Defendant-Appellant.

UNPUBLISHED
December 21, 2006

No. 263322
Ottawa Circuit Court
LC No. 04-028511-FC

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

PER CURIAM.

Defendant appeals as of right his jury convictions of three counts of armed robbery, MCL 750.529, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b(1). He was sentenced as an habitual offender, second offense, MCL 769.10, to 126 to 600 months' imprisonment for each of his armed robbery convictions and 24 months' imprisonment for each of his felony-firearm convictions. Because the trial court properly instructed the jury, we affirm.

This case arises out of the defendant's involvement in the robbery of a Wendy's restaurant in Holland on August 17, 2004. During trial, defendant admitted that he was present in the restaurant with two acquaintances, Sidney Brown and Leland McGee, while those men committed armed robbery and forced four restaurant workers into a freezer. Defendant denied that he planned or participated in the robbery. Brown and McGee, however, testified that defendant initiated the robbery and possessed the firearm throughout the course of the robbery. Three of the four testifying witnesses from the restaurant also identified defendant as the gunman. One witness also identified defendant as a friend of a former Wendy's coworker. Defendant, Brown, and McGee were later apprehended in that coworker's apartment. The juror's were instructed on all of the charges and were also instructed that they could convict defendant of armed robbery and felony-firearm as a principle or under an aiding and abetting theory.

Defendant's sole issue on appeal is that the trial court erred in declining to reinstruct the jury on aiding and abetting as applied to the felony-firearm convictions after the jurors sent a question on that theory to the trial court during deliberations. We disagree.

This Court reviews claims of instructional error de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The Court examines the jury instructions as a whole to

determine whether there is error requiring reversal. *Id.* "Even if somewhat imperfect, [jury] instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). A trial court is only obligated to give a supplemental jury instruction if the standard instructions do not adequately cover an area. *Estate of Stoddard v Manufacturers Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999). Moreover, a trial court is not obligated to repeat previously given instructions so long as the "court's supplemental instruction was responsive to the jury's request and did not serve to mislead the jury in any manner." *People v Katt*, 248 Mich App 282, 311; 639 NW2d 815 (2001). "If the instructions confused the jury to the extent that the parties' theories and the applicable law were not fairly and adequately presented to the jury, then a new trial must be granted." *People v Lynn*, 229 Mich App 116, 121; 580 NW2d 472 (1998), rev'd on other grounds 459 Mich 53 (1998).

During deliberation, the jury sent a note to the trial court, asking the following question: "Felony firearm, is this charge only if he had the gun or can he be guilty for accessory?" The trial court addressed the jury's question as follows:

> Now, I interpret 'accessory' to mean aiding and abetting, and aiding and abetting refers to - - that principle of law applies to the armed robbery and to the felony firearm. That is my very short and simple answer. . . . Does that answer your question?

The juror in seat 3 specifically responded by stating, "Yes, it does."

When the trial court asked each attorney for corrections, additions, or objections to the supplemental jury instruction, defendant's counsel observed that he thought the trial court was going to read the aiding and abetting instruction again. Defense counsel had no other objection.

On appeal, defendant argues that the court's "refusal" to reinstruct on aiding and abetting in response to the jury inquiry amounted to a failure to provide the jury with an adequate explanation of the legal distinction between an accessory after the fact and the theory of aiding and abetting. However, defendant was not charged as an accessory after the fact, and the jury was not instructed on that matter. Moreover, defense counsel did not request jury instructions on either accessory after the fact or to distinguish between aiders and abettors and accessories after the fact. Nevertheless, defendant contends that the trial court erred by failing to recognize that the jury's use of the term "accessory" conveyed confusion over the theories. He bases his argument on trial testimony that defendant made out-of-court statements indicating that he was willing to plead guilty as an accessory after the fact to the armed robbery. Again, although the phrase "accessory after the fact" was mentioned at trial, it was never a theory on which the parties proceeded or on which the jury was instructed.

The trial court, without objection, instructed the jury using the general aiding and abetting instruction from CJI2d 8.1.[1] And, it was not necessary for the trial court to give separate

[1] This Court has repeatedly upheld the validity of the standard definition of aiding and abetting contained in CJI2d 8.1. See *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995), and *People v Lawton*, 196 Mich App 341, 351-352; 492 NW2d 810 (1992).

instructions on aiding and abetting for the armed robbery and the felony-firearm charges because, in the words of our Supreme Court, "aiding and abetting felony-firearm should be no different from aiding and abetting the commission of any other offense." *People v Moore*, 470 Mich 56, 67; 679 NW2d 41 (2004).

Defendant maintains on appeal that it was not sufficient that the correct aiding and abetting instructions were given once because the trial court failed to clarify the jury's apparent confusion. While we agree that, "where confusion is expressed by a juror, it is incumbent upon the court to guide the jury by providing a 'lucid statement of the relevant legal criteria,'" *People v Martin*, 392 Mich 553, 558; 221 NW2d 336 (1974), overruled in part on other grounds *People v Woods*, 416 Mich 581; 331 NW2d 707 (1982), the evidence on which defendant relies to support his argument that the jury was clearly confused is not persuasive.

In this case, the jury did not communicate that it had concluded that defendant was merely present during the commission of the crimes or merely aided after the completion of the robbery. Cf. *People v Karst*, 118 Mich App 34, 38-39; 324 NW2d 526 (1982). Its question was limited to whether defendant must have been in possession of the gun in order to be convicted of felony-firearm. The trial court's response clearly and succinctly answered that question. We hold, therefore, that the trial court did not err in responding to the jury's question by clarifying that the aiding and abetting theory could be applied to the felony-firearm charge. We note that, at no time, did the jury express confusion as to the concept of aiding and abetting itself or the instruction provided on aiding and abetting.

In reaching our conclusion, we additionally reject defendant's claim that the jury's acquittal of defendant on the charge of being a felon in possession of a firearm, under MCL 750.224f, is proof that the jurors were confused on the concept of aiding and abetting and required reinstruction. Defendant argues that the jury, by acquitting defendant on that charge, apparently rejected the allegation that defendant himself possessed the firearm. Therefore, the jury must have relied on the aiding and abetting theory to convict him of the charges. Defendant then argues that the evidence was insufficient to convict him on an aiding and abetting theory.

Our Supreme Court has repeatedly held that juries may render inconsistent verdicts. *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980); *People v Lewis*, 415 Mich 443, 450; 330 NW2d 16 (1982). "A jury in a criminal case may reach different conclusions concerning an identical element of two different offenses." *People v Goss (After Remand)*, 446 Mich 587, 597; 521 NW2d 312 (1994). Inconsistent verdicts may require reversal when there is evidence, beyond the inconsistent verdict itself, that the jury was confused or did not understand the trial court's instructions. *People v McKinley*, 168 Mich App 496, 510; 425 NW2d 460 (1988). In this case, we find that defendant has not presented sufficient evidence that confusion created his inconsistent verdict.

Here, the jury asked if there was an alternative that allowed them to convict defendant of the charge of felony-firearm without finding that he possessed the gun. The jurors mislabeled what they thought to be the alternative method "accessory." In response, the trial court clarified that the theory at issue was aiding and abetting and that it could be applied to the charge. The jury acknowledged that the trial court's response answered their question. It is speculative, at best, to argue that the inconsistent verdict was based on juror confusion.

Finally, we find that sufficient evidence existed to convict defendant as either a principal or an aider and abettor. In reviewing a sufficiency of the evidence question, this Court views the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hollis*, 140 Mich App 589, 592; 366 NW2d 29 (1985).

In order to prove a charge of felony firearm on an aiding and abetting theory, "prosecutors must do more than demonstrate that defendants aided the commission or attempted commission of the underlying crimes." *Moore*, *supra* at 70. Rather, the "prosecutor must present evidence proving that the defendant intentionally aided or abetted felony-firearm possession by specific words or deeds." *Id.* at 71 n 18.

In this case, a rational jury could find beyond a reasonable doubt that defendant aided and abetted Brown and McGee. The testimony of the victims was that all three men used the presence of the gun to intimidate them and force them into the freezer. One defendant's use of a codefendant's possession of a weapon to intimidate victims is an example given by our Supreme Court to illustrate how the aiding and abetting test might be satisfied. *Moore*, *supra* at 71. Additionally, both codefendants testified that defendant supplied the gun and that all three handled the gun while they discussed their plan to rob the Wendy's. If the jurors believed this testimony, it alone would support a finding that defendant aided and abetted the felony firearm. In addition, defendant testified to all the following facts: he changed into dark clothes just before going to the Wendy's and changed out of those clothes after returning; he went into the backrooms of the Wendy's with the Brown and McGee; he concealed his face during the robbery; and, he fled the restaurant and returned to an apartment with Brown and McGee after the robbery. From that evidence, it was reasonable for the jury to conclude that the men had planned the armed robbery together, including carrying the gun with them into the restaurant.

Finally, three of the victims and both codefendants testified that defendant was the gunman. This evidence was sufficient to convict him as a principal.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot