STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2015
v	No. 323662 Washtenaw Circuit Court
BENJAMIN COLEMAN, Defendant-Appellant.	LC No. 13-001512-FC

Before: SAWYER, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by right his convictions, following a jury trial, of armed robbery, MCL 750.529, and possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to a prison term of 135 months to 20 years for armed robbery, and to a consecutive term of two years for felony-firearm. On appeal, defendant challenges only his felony-firearm conviction. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant and another man approached the victim, Xavier Ruffin, in his van and robbed him of his cell phone and wallet. The robbery occurred in the parking lot of an apartment complex called Armstrong Court. Ruffin testified that he was flagged down by defendant as he was driving his van, and that defendant approached the driver-side window, leaned in, and asked Ruffin if he was there to purchase marijuana. As Ruffin and defendant were talking, an unidentified man approached the passenger side of the van and tried to open the door. Ruffin testified that only the driver-side door could be opened from the outside. The victim explained that he heard the man say "oops" and saw him back away. Thinking that the man had mistaken him for someone else, Ruffin turned back to defendant. When he turned back around, the unidentified man was waving a gun in the victim's face through the open passenger-side window. Ruffin testified that the robber told him to "drop everything" and to "give me everything." Ruffin testified that defendant said, "don't make it no worse than it already is," and then took the victim's cell phone and wallet out of his pockets.

Defendant contended that he, along with Ruffin, was a victim of robbery. He testified that he had previously been shot during a robbery and knew that hesitation could result in someone being shot. Thus, defendant claimed that, to avoid being shot, he took Ruffin's wallet

and cell phone and gave them to the gunman, along with his own money and wallet. However, Ruffin testified that he never saw defendant pass any items to the gunman.

Defendant was convicted as described. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE – FELONY-FIREARM

Defendant was convicted of felony-firearm on an aiding and abetting theory. On appeal, defendant argues that the evidence was insufficient to convict him as an aider and abettor. We disagree. "In reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

"The correct test for aiding and abetting felony-firearm in Michigan is whether the defendant procures, counsels, aids, or abets in another carrying or having possession of a firearm during the commission or attempted commission of a felony." *People v Moore*, 470 Mich 56, 70; 679 NW2d 41 (2004) (internal quotation marks and citations omitted).

> Establishing that a defendant has aided and abetted a felony-firearm offense requires proof that a violation of the felony-firearm statute was committed by the defendant or some other person, that the defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation, and that the defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. [*Id*.]

It is not enough to show that the defendant "merely knew that his codefendant possessed a gun during the crime," *People v McGuffey*, 251 Mich App 155, 158; 649 NW2d 801 (2002), or that the defendant incidentally benefitted from the principal's possession of a firearm during the commission of the felony, *Moore*, 470 Mich at 70 n 18. "[T]o convict a defendant of felony-firearm under an aiding and abetting theory, the prosecutor must present evidence proving that the defendant intentionally aided or abetted felony-firearm possession by specific words or deeds." *Id*.

We conclude that, viewed in the light most favorable to the prosecution, the evidence was sufficient to support defendant's conviction of felony-firearm on an aiding and abetting theory. Defendant made the initial contact with Ruffin, after which the gunman attempted to enter the van through the passenger door. When that effort failed, the gunman pointed a gun at Ruffin through the open passenger-side window, and demanded Ruffin's money and valuables. Defendant then told Ruffin not to make it "worse than it already is," and physically removed Ruffin's valuables from his pockets. Ruffin denied seeing defendant give either his valuables or defendant's own valuables to the gunman. In *Moore*, 470 Mich at 72-73, our Supreme Court found sufficient evidence that the defendant had aided and abetted felony-firearm where the defendant "used his confederate's possession of [a] firearm to intimidate and rob a store customer" and also encouraged his confederate to "pop" the store clerk when the store clerk refused to hand over any money. Similarly here, defendant relied on the gunman's possession of

a firearm to facilitate his robbery of Ruffin, and made statements to him indicating that things would get "worse" if he did not comply. Although defendant did not expressly refer to the gun when making this statement, the implied threat to Ruffin (who, in light of the gun being pointed at him, could hardly have thought that defendant was referring to a consequence apart from being shot), combined with defendant's removal of his wallet and phone, were sufficient to support his conviction for felony-firearm.

III. INSTRUCTIONAL ERROR/INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that the trial court erred in instructing the jury on the elements of aiding and abetting felony-firearm by issuing unclear initial instructions and erroneously responding to a jury question by informing the jury that defendant did not have to know before commission of the crime that a gun would be used during the crime, or alternatively that his trial counsel was ineffective for failure to object to the initial jury instructions. We disagree.

Defendant failed to object to the initial aiding and abetting instruction given to the jury. Thus, we review this issue for plain error. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004). A criminal defendant may obtain relief under this standard if the alleged defect constituted plain error that "resulted in the conviction of an actually innocent defendant," or "seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *People v Jones*, 468 Mich 345, 345-355; 662 NW2d 376 (2003). Defense counsel did object to the trial court's answer to the jury's question. We review de novo whether the trial court erred in instructing the jury in response to its question. *People v Martin*, 271 Mich App 280, 337; 721 NW2d 815 (2006).

"The determination of whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). We review the trial court's findings of fact for clear error, and its rulings on questions of constitutional law de novo. *Id*. Because defendant did not move for a new trial or a *Ginther*[1] hearing, our review is limited to errors apparent on the record. *Id*.

Here, the trial court instructed the jury as follows regarding felony-firearm:

> The defendant is also charged with the separate crime of possessing a firearm at the time he committed the crime of armed robbery or aided and abetted in this commission. To prove this charge the prosecutor must prove each of the following beyond a reasonable doubt.
>
> First, that the defendant committed or aided and abetted in the commission of an armed robbery which has been defined for you. It is not necessary, however, that the defendant be convicted of that crime.

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

> Second, that at the time the defendant committed or aided and abetted in the commission of that crime he knowingly carried or someone else—knowingly carried or possessed a firearm which he was aiding and abetting.
>
> Firearm includes a weapon from which a dangerous object can be shot or propelled by the use of explosives, gas or air. A pistol is a firearm. A firearm does not include smooth bore rifles or handguns designed and manufactured exclusively—excuse me, for shooting BB's not exceeding .177 caliber.
>
> In this case, the defendant is charged with committing armed robbery and felony firearm or intentionally assisting someone else in committing it. 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 abetter [sic]. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the alleged crime was actually committed either by the defendant or someone else. It does not matter whether anyone else has been convicted of that crime.
>
> Second, that before or during the crime the defendant does something to assist in the commission of that crime.
>
> Third, that the defendant must have intended the commission of the alleged crime or must have known that the other person intended its commission or that the crime alleged was a natural and probable consequence of the commission of the crime intended.
>
> Even if the defendant knew that the alleged crime was planned or was being committed the mere fact that he was present when it was committed is not enough to prove that he assisted in committing it.

The instructions in this case, taken as a whole, correctly presented the elements necessary to establish aiding and abetting felony-firearm. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009). Further, the initial instructions accurately stated the law. The jury was instructed on both the elements of aiding and abetting and the elements of felony-firearm. Although defendant argues that the trial court should have inserted the phrase "felony-firearm" in place of the word "crime," we find no plain error in the trial court's use of the standard aiding and abetting instruction, which we note is approved of in Michigan's Model Criminal Jury Instructions. See Notes, M Crim JI 11.35 and 11.36.

Further, defense counsel was not ineffective for failing to object to these instructions. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). In order for ineffective assistance of counsel to justify 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, 303; 521 NW2d 797 (1994). Here, because the initial instructions accurately stated the law, defense counsel was not ineffective for failing to raise a meritless or futile objection. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

Finally, with regard to the trial court's answer to the jury's question, the trial court correctly clarified for the jury that defendant did not have to know before the crime was committed that the principal intended to use a firearm. *Moore* requires only that "defendant intended the commission of the felony-firearm violation or had knowledge that the principal intended its commission *at the time that the defendant gave aid and encouragement*." *Moore*, 470 Mich at 70-71 (emphasis added).

Affirmed.

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Mark T. Boonstra