

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 25, 2013

v

DOMINICK JOHANN TRICE,

Defendant-Appellant.

No. 309314
Kent Circuit Court
LC No. 10-009849-FC

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant of two counts of armed robbery, MCL 750.529; conspiracy to commit armed robbery, MCL 750.157a; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of seven to 40 years for each of the armed robbery convictions and the conspiracy to commit armed robbery convictions, to be served consecutive to a two-year term for the felony firearm conviction. Defendant appeals as of right. We vacate defendant's felony-firearm conviction and sentence, but affirm his remaining convictions and sentences.

Defendant was charged and convicted of offenses arising from two armed robberies that occurred on the evening of August 22, 2010. On that night, defendant, Jamal Lee, and a man named "B" were expecting Amber Lucas, Whitney Kranz, and Candice McGraw to walk down an unlit sidewalk. The men concealed themselves and then simultaneously emerged from behind bushes when Lucas, Kranz, and McGraw approached. Defendant, Lee, and B confronted the women and demanded that they "give them everything." B displayed a long shotgun while defendant searched the victims and robbed them of their property. B also removed property from Kranz. After the robbery, the men left the scene together in a burgundy vehicle. Defendant was found in a nearby residence later that night and was arrested after Lucas identified him. McGraw,¹ who knew defendant, Lee, and B, later disclosed their identity to the police. The jury convicted defendant of all the charged crimes.

¹ Defendant was not charged for the armed robbery of Candice McGraw.

Defendant first argues that there was insufficient evidence to support his conviction for felony-firearm because the record does not support a finding that he possessed a firearm during the course of the robberies. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding that the essential elements of the crime were proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). “Circumstantial evidence and reasonable inferences drawn from that evidence can constitute satisfactory proof of the elements of a crime. *Id.* at 400 (quotation marks and citations omitted). “The credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in the evidence must be resolved in the prosecutor’s favor.” *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

A conviction of felony-firearm requires evidence that the defendant possessed a firearm during the commission of a felony. MCL 750.227b(1). Defendant does not dispute that he committed a felony; rather, he disputes that he possessed a firearm during the commission of the felony. A defendant may have actual or constructive possession of a firearm. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). To find constructive possession, there must be proximity to the firearm with an “indicia of control.” *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Therefore, it is enough that the firearm’s location is known to the defendant and the firearm is reasonably accessible to him. *Id.* Ownership is not required to find that the defendant possessed the weapon. *Id.* at 438-439. Moreover, possession can be joint or exclusive. *People v Johnson*, 293 Mich App 79, 83; 808 NW2d 815 (2011).

Here, there was insufficient evidence for the jury to find that the defendant possessed a firearm during the course of the robberies. The record is entirely devoid of evidence that defendant actually possessed a firearm while the robberies were committed. Therefore, we find that the evidence was legally insufficient to establish that defendant had actual possession of a firearm during the course of the robberies. With regard to constructive possession, there was sufficient evidence to support a finding that defendant knew a firearm was present and where it was located because B clearly displayed it during the course of the robbery and even threatened to shoot Kranz. However, there was insufficient evidence to support a finding that the firearm was “reasonably accessible” to defendant during the robberies. In *People v Bernard*,² 138 Mich App 408, 411; 360 NW2d 204 (1984), this Court held that “[w]here a weapon is actually in the hands of a second party, we decline to go so far as to hold that possession is also held by a first person even though the first person was acting in concert with the second person.” No subsequent case law has held otherwise.³ Here, as in *Bernard*, the record reflects that defendant

² In *Bernard*, the defendant was convicted of first-degree criminal sexual conduct while armed with a weapon. A companion held the weapon on the victim during the sexual penetration.

³ Generally, in cases such as this where there are multiple offenders but only one offender possesses the weapon, the prosecution relies on an aiding and abetting theory with regard to a felony-firearm charge. See, e.g., *People v Taylor*, unpublished opinion per curiam of the Court of Appeals, issued March 21, 2013 (Docket No. 303208); *People v Hill*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2012 (Docket No. 306764); *People v*

had proximity to the gun, but no realistic “right to control” it. *Id.* As a result, even when viewing the evidence in a light most favorable to the prosecution, the evidence was legally insufficient to support defendant’s felony-firearm conviction. In reaching our conclusion, we will not consider whether defendant’s felony-firearm conviction could be supported on an aiding and abetting theory because the prosecution did not request, and the court did not give an instruction on, that theory.

Next, defendant argues that the trial court erroneously instructed the jury concerning conspiracy and improperly responded to the jury’s instructional question concerning conspiracy. Because defendant failed to object to the conspiracy instruction, defendant did not properly preserve the issue for appeal. *People v Fletcher*, 260 Mich App 531, 557-558; 679 NW2d 127 (2004). Defendant is not entitled to relief unless he can demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A party claiming plain error must demonstrate that (1) an error occurred; (2) the error was plain; and (3) the plain error affected a substantial right of the defendant. *Id.* at 763-764.

The purpose of jury instructions is to explain the issues and legal principles that apply to the facts of the case. *People v Trammell*, 70 Mich App 351, 355; 247 NW2d 311 (1976). A trial court is not obligated to give requested instructions that are not warranted by the facts. *People v Dalton*, 155 Mich App 591, 599; 400 NW2d 689 (1986). Because the conspiracy instruction given by the trial court was warranted by the facts of the case, defendant is unable to demonstrate that plain error existed.

Here, the trial court instructed the jury that, to find defendant guilty of conspiracy to commit armed robbery, the agreement must have been formed before the armed robbery occurred. Defendant argues that the instruction was incorrect because, under Michigan law, it is possible to join an already formed conspiracy. *People v Blume*, 443 Mich 476, 483-484; 505 NW2d 843 (1993). However, no evidence was presented that defendant joined an already existing conspiracy. Therefore, the trial court’s instruction and response to the jury’s question during deliberation were warranted by the facts of the case and were not erroneous. *Dalton*, 155 Mich App at 599. Defendant has failed to establish plain error. *Carines*, 460 Mich at 763-764.

Davis, unpublished opinion per curiam of the Court of Appeals, issued May 1, 2012 (Docket No. 297743). Our research has revealed only one unpublished decision in which this Court has upheld a defendant’s conviction felony-firearm conviction where another party possessed the gun and an aiding and abetting theory was not utilized. In *People v Wilson*, unpublished per curiam opinion of the Court of Appeals, Docket No. 268417 (released March 23, 2007), this Court distinguished *Bernard* on the ground that

[T]he evidence showed when the victim did not willingly submit, defendant directed his accomplice to “show her the gun.” The accomplice obeyed, pulling out a weapon and pointing it at the victim. This evidence was sufficient to show that defendant had a right to control the use of the weapon by his accomplice.

No such evidence was presented in this case to establish that defendant had the right to control the use of the weapon by his accomplice.

In the alternative, defendant argues that his trial counsel was ineffective for failing to object to the “erroneous” conspiracy instruction. However, defense counsel does not render ineffective assistance for failing to object when the instructions are not erroneous. *People v Snider*, 239 Mich App 393, 424-425; 608 NW2d 502 (2000). As stated above, the trial court’s instruction and response to the jury’s question were warranted by the facts of the case. Further, it is well settled that it is not objectively unreasonable for counsel to fail to raise a meritless objection. *Id.* at 425.

Finally, defendant argues that the trial court erred in instructing the jury with respect to felony-firearm and that his trial counsel was ineffective for failing to object to these instructions. We need not consider these issues because they are moot in light of our conclusion that the felony-firearm conviction must be vacated. *People v Richmond*, 486 Mich 29, 34-35; 782 NW2d 187 (2010). It is well established that a court will not decide moot issues. *Id.* at 34.

Affirmed in part and vacated in part.

/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro