STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 27, 2001
v	No. 222468 Washtenaw Circuit Court
ERWIN HARRIS, a/k/a GERRONE TAYLOR, and a/k/a TERRALD RAY HARRIS, Defendant-Appellant.	LC No. 98-011081-FC

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of armed robbery, MCL 750.529, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b.[1] The trial court sentenced him to ten to twenty years' imprisonment for the armed robbery conviction and to two concurrent, two-year prison terms for the felony-firearm convictions, to be served consecutively with the armed robbery sentence. We affirm.

This case stemmed from the robbery of two individuals in a Washtenaw County gas station store by defendant and an acquaintance, Eugene Mays. Prosecution witnesses testified that after defendant and Mays entered the store, Mays, holding a firearm toward the checkout clerk, demanded money from the cash register while defendant, unarmed, stole money from a customer's pockets.

Defendant contends that there was insufficient evidence to convict him of armed robbery with respect to the customer,[2] James Morton, because the prosecutor presented no evidence that he possessed a weapon during the offense or that Mays, who did use a gun, robbed Morton. We

[1] The jury also convicted defendant of one additional count of armed robbery, as well as one count of fleeing and eluding a police officer, MCL 750.479a(3). Defendant does not appeal these two convictions.

[2] Defendant was convicted, on an aiding and abetting theory, of armed robbery with respect to the clerk but has not appealed this conviction. See n 1, *supra*.

disagree. In evaluating a claim of insufficient evidence, we view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). We will not interfere with the jury's determination regarding the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478, amended 441 Mich 1201 (1992).

The evidence in the instant case revealed a case of two accomplices coordinating their actions closely and engaging in concerted conduct to commit armed robbery against multiple individuals. According to prosecution witnesses, defendant entered the gas station, asked customer Morton for directions, and mulled around the store, leaving it at some point. Defendant then walked back into the store, followed closely by Mays. Mays pointed the gun at clerk Christopher Parson's face and demanded money, during which Morton stood only a few feet away. Mays screamed vulgarities at and threatened to kill Parson, who would not turn over any money. Defendant angrily screamed at Mays two or three times that "he's asking for it, just pop him man, just pop him." Simultaneously, defendant pushed into Morton's back and told him to "stay cool, man, stay cool." Morton testified that he feared being shot and that he "naturally put [his] hands up" as defendant rifled through his pockets and took his driver's license, library card, cash, and ATM card. Just before leaving the store, defendant unsuccessfully attempted to open the locked cash register by hitting it and stole items off the counter.

This testimony was sufficient for a jury to conclude beyond a reasonable doubt that defendant committed armed robbery[3] with respect to Morton. Indeed, as stated in *People v Dykes*, 37 Mich App 555, 559; 195 NW2d 14 (1972), "[u]nder the accomplice statute, [MCL 767.39], one accomplice is equally liable for the actions of the other when operating in concert." In *Dykes*, *supra* at 557, the defendant was convicted of manslaughter after he and his accomplice kicked and stabbed the victim, ultimately causing the victim's death. The defendant claimed that his manslaughter conviction was improper because he had merely kicked the victim and did not wield the knife that caused the fatal stab wounds. *Id*. at 559. The Court stated that "[i]t is irrelevant as to who struck the fatal blows [because] one accomplice is equally liable for the actions of the other when operating in concert." Similarly, it does not matter here that Mays held the threatening gun while defendant rifled through Morton's pockets; each accomplice was equally liable for the actions of the other. *Id*.

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[3] The armed robbery statute states:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used of fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. . . . [MCL 750.529.]

The jury easily could have concluded that defendant and Mays, by way of their *concerted conduct*, each committed armed robbery with respect to Morton. Indeed, the evidence supported an inference that defendant intentionally used the gun held by Mays to facilitate defendant's robbery of Morton. We have no doubt that Mays' presence with a gun in the store heightened Morton's fear considerably and likely convinced him not to resist defendant. Morton saw the gun and heard Mays' threatening language. Morton heard defendant direct him to be calm and held his hands up while defendant stole items from his person. Morton heard defendant urge Mays several times to shoot Parson. Indeed, Morton was afraid that he too would be shot. This evidence clearly demonstrated that the two accomplices, *acting in concert*, committed all the elements of the crime of armed robbery such that each of them properly could be convicted of that crime. *Id*. See also *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972), in which the Court stated:

> In the context of robbery, the general rule is that:
>
> "Where more than one person is engaged in a robbery, and all are acting in concert, one of them being armed with a dangerous weapon, all are guilty of robbery armed whether any of the others were armed or not." [4 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 2226, p 2445.]

Reversal of defendant's armed robbery conviction with regard to Morton is unwarranted.

Defendant additionally contends that there was insufficient evidence to support his two felony-firearm convictions, even on an aiding and abetting theory, because the prosecutor presented no evidence that defendant assisted Mays in acquiring or retaining possession of the gun. Again, we disagree. The felony-firearm statute states that "[a] person who "carries or has in his or her possession a firearm when he or she commits . . . a felony . . . is guilty of a felony." MCL 750.227b. Here, one felony-firearm conviction was based on the armed robbery of Parson. The "felony" element of this charge was clearly established by defendant's telling Mays to "pop" Parson while demanding money. Indeed, defendant was convicted of the robbery of Parson on an aiding and abetting theory, and he has not appealed that conviction. With regard to the "possession or carrying of a firearm" element of the charge, the prosecutor had to prove that defendant "procured, counselled, aided, or abetted and so assisted in obtaining the proscribed possession, or in retaining such possession otherwise obtained." *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981). The prosecutor did this by eliciting testimony that defendant drove Mays, who was armed, to the scene. Indeed, by transporting his armed accomplice to the scene of the robbery, defendant assisted in carrying the firearm and in retaining possession of the firearm used in the armed robbery. Moreover, defendant repeatedly urged Mays to shoot Parson during the course of the robbery. This conduct "counseled" Mays in the retention of the firearm during the crime.[4] See *id*. at 54. Viewing the evidence in the light most favorable to the

[4] It might even be said that defendant's transporting his accomplice, the gun, and the robberies' fruits away from the scene assisted in the retention of the firearm during the robbery, although we do not believe these facts are necessary to affirm in this case.

prosecution, we conclude that defendant's felony-firearm conviction associated with the robbery of Parson was supported by sufficient evidence.

The prosecutor also presented sufficient evidence that defendant committed felony-firearm with respect to the robbery of Morton. As discussed earlier, the concerted actions of defendant and Mays sufficiently supported the "felony" element of this charge. Moreover, the evidence that defendant drove Mays to the scene, standing alone, supported the "possession or carrying of a firearm" element of the charge.[5] Again, by transporting Mays to the scene of the robbery, defendant assisted him in carrying the firearm and in retaining possession of the firearm used in robbing Morton. No error occurred with respect to the jury's findings in this case.

Affirmed.

/s/ Harold Hood
/s/ Patrick M. Meter

[5] We acknowledge that in *People v Eloby (After Remand)*, 215 Mich App 472, 477-478; 547 NW2d 48 (1996), this Court found that there was insufficient evidence to support the defendant's felony-firearm conviction based on a kidnapping, even though the defendant drove a vehicle containing his armed accomplice during the kidnapping. However, we do not believe that *Eloby* constitutes binding precedent for the proposition that a defendant cannot be convicted of aiding and abetting felony-firearm solely for transporting his armed accomplice before or during a crime. Indeed, *Eloby* did not squarely address this issue or even mention the driving of the vehicle during its analysis (see *Eloby, supra* at 478); the *Eloby* panel simply may have failed to consider the theory that such an action (driving a vehicle containing an armed accomplice before or during a crime) could support a felony-firearm conviction. *If Eloby* had clearly stated that "driving an armed accomplice before or during a crime cannot, in itself, support a felony-firearm conviction," then we might feel compelled to formally disagree with *Eloby* and call for a conflict panel under MCR 7.215(I)(2). However, given the wording of the *Eloby* opinion, we do not find this necessary.

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v

ERWIN HARRIS, a/k/a GERRONE TAYLOR, and a/k/a TERRALD RAY HARRIS,

Defendant-Appellant.

UNPUBLISHED
July 27, 2001

No. 222468
Washtenaw Circuit Court
LC No. 98-011081-FC

Before: Hood, P.J., and Whitbeck and Meter, JJ.

WHITBECK, J. *(concurring in part and dissenting in part).*

A jury convicted defendant Erwin Harris of two counts of possession of a firearm during the commission of a felony (felony-firearm),[1] two counts of armed robbery,[2] and fleeing and eluding a police officer,[3] all of which stemmed from his participation in a gas station convenience store robbery. I would vacate Harris' two felony-firearm convictions because I believe that the evidence does not support either conviction.

I. Basic Facts And Procedural History

On September 28, 1998, at approximately 7:00 p.m., Harris arrived at a gas station in Washtenaw County in a car he was driving with his acquaintance, Eugene Mays, as a passenger. Harris walked into the gas station store, where he approached customer James Morton to ask for directions. Seconds later, Mays entered the store with a sawed-off shotgun.[4] Mays pointed the shotgun at clerk Christopher Parson, who was standing behind the counter, and demanded money. While Harris and Morton were standing only a few feet from the counter, Harris reportedly went up to Morton and told him "to stay cool." Harris then removed Morton's wallet and other items from his pockets. During this time, Mays was screaming at Parson. According

[1] MCL 750.227b.

[2] MCL 750.529.

[3] MCL 750.479a(3).

[4] There is some debate in the record concerning whether this was a different kind of firearm, but its exact identity is not crucial to this appeal.

to Morton, when Parson refused to give any money to Mays, Harris screamed at Mays "he's asking for it, just pop him man, just pop him," referring to Parson. Parson locked the cash register, preventing Mays from opening it. Before Harris left the store, he ran to the counter, hit the cash register to try to open it, grabbed several items from the counter, and then ran out of the store.

Mays and Harris fled in their car, but the police located and pursued them. Mays, who evidently was the passenger during the flight from the convenience store, threw something out the window, which looked like a gun or pipe to the police officers. The men finally stopped their car and fled on foot before the officers caught them. The police found candy bars as well as Morton's library card in the car.

Harris had a somewhat different account of what occurred at the gas station. He said that he and Mays had been using drugs and had not slept for several days before the September 28, 1998. They went to the gas station to get directions to Harris's cousin's home in Ann Arbor, but Harris said, he did not know that Mays had a gun with him. According to Harris, he was, in fact, scared of Mays because of Mays' reputation for violence and because he had been shot on other occasions and was generally afraid of guns. Once inside the store, Harris said, he did not participate in the robbery and did not plan to take anything from Morton until Mays gave him the "evil eye." Harris said that he warned Morton that Parson was "going to get popped" for resisting Mays but that he never instructed Mays to "pop him." When Morton saw him approach the cash register, he was only doing so to get a map, not to attempt to open the cash register. He merely followed Mays' instruction to drive away from the gas station because he was scared and he did not want Mays to take the car. Though Harris noted that Mays threw the gun from the car window, he claimed that he did not run from the officers when he left the car.

On appeal, Harris now claims that the jury had insufficient evidence to convict him of robbing Morton while armed and of both felony-firearm charges. I address only the felony-firearm issue.

II. Preservation And Standard Of Review

Harris did not need to take any special steps to preserve his challenge to the sufficiency of the evidence of his conviction of felony-firearm.[5] His arguments implicate his constitutional rights to due process of law.[6] Thus, review is de novo for this constitutional issue.[7] Further, de novo review is also appropriate because the nature of our review requires us to examine the evidence itself.

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[5] See *People v Lyles*, 148 Mich App 583, 594; 385 NW2d 676 (1986).

[6] *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.

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

III. Legal Standard

In order for the jury to convict Harris properly, the prosecutor had to prove beyond a reasonable doubt that he committed every essential element of each offense.[8] In supporting this burden of proof, the prosecutor could rely on direct and circumstantial evidence,[9] as well as reasonable inferences that could be drawn from that evidence.[10] However, the prosecutor did not need to negate every theory of innocence Harris raised.[11] And, despite this relatively high burden 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.[12]

IV. Felony Firearm

In my view, the evidence introduced at trial created no factual basis for the jury to conclude that Harris was guilty of felony-firearm on a theory of aiding and abetting. Mays clearly possessed a firearm while robbing Parson and there really is no doubt from the circumstances of the offense and from Morton's testimony that Harris was involved with Mays. However, even if Mays did rob Morton while possessing a firearm, "[p]roof that defendant knowingly assisted in a felony involving a firearm is not sufficient evidence upon which to convict [him] of aiding and abetting possession of a firearm during the commission of a felony."[13] Nor would the evidence be sufficient if it merely showed that Harris "was aware that a firearm would be used, intended that it be used, and actively participated in the crime involving" the firearm.[14] Rather, as *People v Johnson*[15] 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 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.[16]

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

[9] 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).

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

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

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

[13] *People v Morneweck*, 115 Mich App 156, 158; 320 NW2d 327 (1982).

[14] *People v Bruno*, 115 Mich App 656, 661; 322 NW2d 176 (1982).

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

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

Yet, the evidence in this case does not indicate that Harris helped Mays *obtain* or *retain* the firearm. Harris' accomplice, Mays, evidently walked into the store with the firearm without any help from Harris. Mays then retained possession of the firearm during the robbery as well as during the ensuing flight from the scene. There is no proof that Harris carried or loaded the firearm for Mays,[17] that he purchased the firearm and gave it to Mays,[18] or even that he reminded Mays to bring the firearm into the store with him. If Harris did help Mays obtain or retain the firearm before he entered the store, the record is simply silent on the matter. Thus, the evidence was insufficient to sustain his convictions of felony-firearm.

The majority uses an interesting approach to reach its conclusion to affirm these two felony-firearm convictions. In essence, the majority concludes that to be convicted of felony-firearm under an aiding or abetting theory only requires proof of two elements: (1) that the defendant aided or abetted a felony, and (2) a weapon was used in that felony. Where, in the majority's analysis of the evidence on the record, is the proof of the possessory aspect of this crime? "Felony-firearm" is commonly used to refer to this crime, omitting any reference to possession. Nevertheless, this is, at its core, a possessory offense.[19] Quite clearly, to prove that a defendant aided or abetted an accomplice in possessing a firearm used during the commission of a felony, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the accomplice in *obtaining* or *retaining* the firearm as *Johnson* requires.

The logic of the conclusion that driving someone who has a firearm is assisting that person in obtaining or retaining the firearm eludes me. If this reasoning had any persuasive value, this Court would have affirmed the felony-firearm conviction associated with the kidnapping in *People v Eloby (After Remand)*.[20] In *Eloby*, from the beginning of the kidnapping until the time when the defendants and their female victim arrived at the house where the two men committed other felonies, the defendant did not have physical possession of the firearm.[21] This Court reasoned that the evidence was insufficient to sustain a felony-firearm conviction for this kidnapping aspect of the whole criminal transaction because there was no evidence that the defendant took any action with respect to the firearm at all during this drive.[22] *Eloby* makes plain

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[17] See *People v Buck*, 197 Mich App 404, 412-413; 496 NW2d 321 (1992), mod in part on other grounds sub nom *People v Holcomb*, 444 Mich 853; 508 NW2d 502 (1993).

[18] See, generally, *People v Usher*, 121 Mich App 345, 352; 328 NW2d 628 (1982).

[19] See *People v Sturgis*, 427 Mich 392, 409; 397 NW2d 783 (1986) ("The conduct made punishable under the felony-firearm statute, is not the mere possession of a firearm. Rather, it is possession of the firearm *during the commission of or attempt to commit a felony* that triggers a felony-firearm conviction."); *People v Beard*, 171 Mich App 538, 546; 431 NW2d 232 (1988) ("The elements of the felony-firearm offense are clear and unambiguous. It is possession, not use, of a firearm during the commission of a felony that satisfies the requirements of the statute.").

[20] *People v Eloby (After Remand)*, 215 Mich App 472, 477-478; 547 NW2d 48 (1996).

[21] *Id*. at 477-478.

[22] *Id*. at 478.

that, "standing alone," driving an accomplice who possesses a firearm is not enough to sustain a felony-firearm conviction.

While the majority correctly comments that the *Eloby* opinion does not explicitly state that "'driving an armed accomplice before or during a crime cannot, in itself, support a felony-firearm conviction,'" I cannot join in the conclusion that *Eloby* is irrelevant to this case. In *Eloby*, with no other evidence of aiding and abetting the possession of the firearm, this Court implicitly concluded that driving the accomplice to the scene of the crime was insufficient evidence to support a conviction. As judges of this Court, our duty is to read and interpret case law to the extent that it applies to the given facts of a case. Though it would be helpful, it is the rare occasion when case law relevant to an appeal under consideration directly states the holding the Court prefers to apply. Rather, the interrelationship between facts and law from case to case allows us to perform this duty of determining and applying precedent. The element of driving an accomplice to the scene of the crime was significant to the outcome in *Eloby*. It is, therefore, binding on this Court because of the relatively similar facts of this case involving the same crime.

Notably, I have been unable to find a published case that contradicts *Eloby* and holds that driving another person who possesses a firearm is enough to support a felony-firearm conviction for the aider or abettor. This Court reversed the defendant's felony-firearm conviction in *People v Morneweck*[23] in part because driving the "getaway" car was insufficient to demonstrate the sort of assistance or encouragement in possessing the firearm that *Johnson* requires. In *People v Beard*,[24] this Court affirmed the defendant's felony-firearm conviction because he helped conceal the accomplice's firearm following the felony, not just because the defendant drove the accomplice away from the scene of the crime. Similarly, in *People v Baker*,[25] the defendants' acts of handling the firearm and giving it to the accomplice supported a conviction of felony-firearm, not the fact that he drove his accomplice to the victim's apartment. The majority, however, does not address these other similar cases.

The majority also contends that Harris' act of encouraging Mays to "pop" Parsons constituted "counseling." Though evidence of counseling can support a conviction of felony-firearm on an aiding and abetting theory,[26] Harris evidently counseled Mays to *use* the firearm. None of his statements reflected in the record permit any inference that he was counseling Mays on how to *retain* or *obtain* the firearm. Had, for instance, Harris told Mays where to go to purchase a firearm, had Harris warned Mays that he was about to drop the firearm, or had Harris told Mays that someone was about to take the firearm away from him, then I would be quick to affirm on this issue because each of these examples would involve Harris counseling Mays on how to obtain or retain the firearm used to commit the robbery. However, as I pointed out earlier, case law unambiguously holds that evidence of the defendant's knowledge that a firearm

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[23] *Morneweck*, *supra* at 158-159.

[24] *Beard*, *supra* at 545-546.

[25] *People v Baker*, 115 Mich App 720, 721-725; 321 NW2d 385 (1982).

[26] *Johnson*, *supra* at 54.

would be used in a felony, intent that it be used, and participation in the felony itself is insufficient evidence to convict.[27] The evidence in this case amounted to no more than that.

Further, the majority contends that "[i]t might even be said that" Harris' actions following the robbery were enough to support a conviction of aiding and abetting felony-firearm, but then retracts the suggestion by saying that those facts are unnecessary to affirm in this case. Accessory after the fact can be used as an underlying felony for the purpose of a felony-firearm charge.[28] However, the prosecutor did not charge Harris as an accessory after the fact. Even if he had been charged with this crime, the evidence of Harris' conduct following the robbery is insufficient to support a conviction for felony-firearm for the same reason that the evidence he drove Mays to the gas station is insufficient. The record shows that Harris did nothing more than drive Mays away from the gas station. The evidence did not demonstrate that Harris had any effect whatsoever on Mays' possession of the firearm during this period, much less that he aided and abetted in this possession. More importantly, the underlying felony for the felony-firearm charges in this case was the robbery of two victims, which had ended by the time Harris and Mays fled in the car Harris was driving. Whatever role Harris played in helping Mays escape and dispose of the firearm *after* the robbery cannot be used as evidence that he aided and abetted Mays' possession *during the commission* of the robbery itself.[29] Thus, the majority's subtle suggestion that this evidence in the record would provide alternative grounds for affirming is not, in my view, persuasive.

V. Conclusion

The net effect of the majority's reasoning is to extinguish the possessory nature of this crime and to wipe out its fundamental identity, which is distinct from the underlying felony.[30] I simply cannot see how, on the basis of the record, the circumstances of this case can be tortured into a conclusion that, by driving Mays to the crime scene while Mays was armed, Harris aided or abetted Mays in obtaining or retaining a firearm, the primary ground on which the majority rests its decision. Nor do I find the majority's other reasoning, that Harris counseled Mays on obtaining or retaining the firearm, persuasive. Thus, while reluctant to overturn a jury's verdict, I would nevertheless vacate both of Harris' felony-firearm convictions.

/s/ William C. Whitbeck

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[27] *Bruno, supra* at 661; see also *Beard, supra* at 546.

[28] See *Beard, supra* at 546-548.

[29] See *People v Williams*, 117 Mich App 505, 515-516; 324 NW2d 70 (1982).

[30] See *Sturgis, supra* at 410; *Wayne County Prosecutor v Recorder's Court Judge*, 406 Mich 374, 391; 280 NW2d 793 (1979); see also *People v Nix*, 165 Mich App 501, 505; 419 NW2d 7 (1987).