

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 27, 2012

V

No. 305763
Wayne Circuit Court
LC No. 10-013366-FC

THEODORE GUSTINO MILLER, a/k/a
THEODORE A. MILLER, a/k/a THEODORE G.
MILLER

Defendant-Appellant.

Before: FORT HOOD, P. J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of two counts of armed robbery, MCL 750.529, two counts of felon in possession of a firearm (felon-in-possession), MCL 750.224f, one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and one count of felonious assault, MCL 750.82. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent sentences of 14 years and 7 months to 25 years' imprisonment for each armed robbery conviction, to be served consecutive to two years' imprisonment for the felony-firearm conviction. Defendant was sentenced to time served for the remaining convictions. Because the evidence was sufficient to support defendant's felony-firearm conviction and his felon-in-possession convictions and he is not entitled to resentencing, we affirm defendant's convictions and sentences.

Defendant first argues that the prosecution presented insufficient evidence to support his felony-firearm and felon-in-possession convictions. We review de novo challenges to the sufficiency of the evidence. *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008). "When ascertaining whether sufficient evidence was presented in a bench trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact court find that the essential elements of the crime were proven beyond a reasonable doubt." *Id.* Circumstantial evidence and reasonable inferences arising therefrom may constitute sufficient proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *Kanaan*, 278 Mich App at 619.

It appears from the record that one of defendant's felon-in-possession charges was based on his constructive possession of a firearm and the other charge was based on the theory that he aided and abetted his codefendant, Kevin Ray Shelton, in possessing a firearm. Defendant argues that the evidence failed to establish beyond a reasonable doubt that (1) he possessed a firearm or (2) that he aided and abetted Shelton in possessing a firearm. We conclude that the evidence was sufficient to support defendant's felony-firearm conviction and his felon-in-possession convictions under aiding and abetting.

The aiding and abetting statute, MCL 767.39, provides:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense. [See also *People v Moore*, 470 Mich 56, 62; 679 NW2d 41 (2004).]

Generally, in order to convict a defendant of aiding and abetting an offense, a prosecutor must show that “(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.” *Id.* at 67-68 (brackets in original), quoting *Carines*, 460 Mich at 768. In *Moore*, our Supreme Court recognized that “nothing in the aiding and abetting statute suggests that it should apply differently to a possessory offense than to any other crime.” *Id.* at 67. Thus, the Court held:

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.* at 70 (quotation marks and brackets omitted).]

Like felony-firearm, felon-in-possession is a possessory offense. In order to establish felon-in-possession, the prosecution must show that: (1) the defendant possessed a firearm, (2) the defendant was previously convicted of a felony, and (3) if the defendant produces some evidence showing that his right to possess a firearm has been restored, the prosecution must prove that the right to possess a firearm has not been restored. MCL 750.224f; *People v Perkins*, 473 Mich 626, 628-629, 640; 703 NW2d 448 (2005); *People v Perkins*, 262 Mich App 267, 270-271; 686 NW2d 237 (2004). Because nothing in the aiding and abetting statute indicates that it should apply differently to possessory offenses, *Moore*, 470 Mich at 67, a defendant may be convicted of felon-in-possession on an aiding and abetting theory. Thus, to establish felon-in-possession on an aiding and abetting theory the prosecution must show that (1) either the defendant or another person violated the felon-in-possession statute, (2) the defendant performed acts or gave encouragement that assisted in the commission of felon-in-possession, and (3) the

defendant intended the commission of the offense or had knowledge that the principal intended its commission at the time that the defendant gave aid and encouragement. See *id.* at 67-68, 70.

After reviewing the record, we conclude that the prosecution presented sufficient evidence to convict defendant of two counts of felon-in-possession and one count of felony-firearm on aiding and abetting and constructive possession theories. Defendant does not argue that Shelton did not possess a firearm or challenge whether Shelton had previously been convicted of a felony and was ineligible to possess a firearm. Rather, he contends that he did not perform any acts that encouraged and assisted Shelton's possession of the firearm. To the contrary, the record shows that defendant grabbed one victim's hair and removed money from her bra while Shelton held a gun to the victim's head. Defendant also struck another victim in the head and robbed that victim of his identification, money, and prescription medication while Shelton held the gun to that victim's head. During the course of the robbery, defendant and Shelton told everyone to get down on the floor while Shelton threatened them with the firearm. Defendant also stood over the victims when Shelton chased one of the victims upstairs after stating that he was going to rape her. In addition, after removing one victim's identification from his pocket, defendant stated that he now knew the victim's name and would kill him if he went to the police. Thus, the evidence showed that defendant performed acts that assisted and encouraged Shelton's possession of a firearm and that defendant intended the commission of the offenses or had knowledge that Shelton intended their commission. Accordingly, the evidence was sufficient to support defendant's felony-firearm conviction and his felon-in-possession convictions. Not only did defendant aid and abet Shelton's possession of a firearm, but he also constructively possessed the firearm in violation of his own status as a felon in committing the charged crimes.

Defendant next argues that the trial court abused its discretion when it imposed a longer sentence in his case than it imposed in Shelton's case despite that defendant was the less culpable offender. Because defendant failed to preserve this issue for our review by raising it at sentencing below, our review is limited to plain error affecting his substantial rights. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

A defendant's recommended minimum sentence range under the legislative sentencing guidelines is calculated "by scoring offense variables, which assess the egregiousness of the crime committed, and the prior record variables, which assess a defendant's history of recidivism." *People v Horn*, 279 Mich App 31, 42; 755 NW2d 212 (2008). "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). Here, defendant's sentence was within the appropriate guidelines range and defendant does not assert an error in scoring the sentencing guidelines or argue that the trial court relied on inaccurate information. Thus, we must affirm defendant's sentences. Further, nothing supports defendant's claim that he received a lengthier sentence because he exercised his right to

a trial instead of pleading guilty. Defendant's assertion in this regard is purely speculative.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio