

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD CORBIN-BEY, JR.,

Defendant-Appellant.

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UNPUBLISHED  
October 18, 1996

No. 167813  
LC No. 93-500006

Before: Michael J. Kelly, P.J., and Markman and J. L. Martlew,\* JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree felony murder, MCL 750.316; MSA 28.549, and possession of a firearm during the commission of a felony. MCL 750.227b; MSA 27.424(2). He was sentenced to life imprisonment without parole on the murder convictions and two years' consecutive imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

The first issue on appeal involves an evidentiary ruling. At trial, the court allowed a prosecution witness to testify that he saw defendant in possession of a .45 caliber handgun five days before the murders. This was the same type of gun used in the murders. Defendant objected to this testimony and argues that its admission was erroneous.

We find that the law of the case doctrine controls this issue. Under that doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995). If a litigant has any objection to the law stated by the appellate court, his redress is an application for rehearing to the deciding court or an appeal to a higher tribunal. *People v Russell*, 149 Mich App 110, 115; 385 NW2d 613 (1985).

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\* Circuit judge, sitting on the Court of Appeals by assignment.

The trial from which defendant appeals was not his first trial on these charges. Following an earlier conviction, defendant appealed and this Court reversed. At that trial, prosecution witnesses testified that, five days before the murders, defendant robbed them at gun point with a .45 caliber pistol. This Court ruled that evidence of defendant's possession of the gun was relevant and admissible with respect to the murder charges, but that the trial court should not have allowed the witnesses to describe the circumstances under which they saw the gun. Thus, reversal was required. This Court expressly noted, however, that testimony that the witnesses saw the gun would be admissible on retrial. *People v Corbin*, unpublished opinion per curiam of the Court of Appeals, issued June 2, 1992 (Docket No. 99444).

The law of the case doctrine applies because the facts of this appeal remain materially the same as the facts of defendant's earlier appeal. Defendant's observation that this case involves a new factual record does not change this analysis. See *People v Hatfield*, 177 Mich App 324, 326; 411 NW2d 76 (1989). Also without merit is defendant's argument that the doctrine should not apply because this Court's decision in the first appeal "demonstrate[s] little appreciation for the probative and prejudicial values of this evidence with just the direct statements of robbery armed removed." This is nothing more than an assertion that the Court should re-examine its earlier ruling, which is precisely what the law of the case doctrine is designed to foreclose.

Defendant next challenges the sufficiency of the evidence on the felony-firearm conviction, although he does not challenge the sufficiency of the evidence that he committed the murders. Specifically, defendant argues that there was no evidence that he possessed a firearm during the crime or that he assisted another person in obtaining or maintaining such possession. The case went to the jury on alternative theories that defendant was the shooter or that defendant aided and abetted the shooter. Defendant argues that the evidence was insufficient to support a finding that he possessed the gun because no one testified that defendant was seen with a gun inside the store. This fact alone, however, does not preclude a finding that defendant possessed a gun. *People v Daniel*, 207 Mich App 47, 50; 523 NW2d 830 (1994). Prosecution witnesses testified that defendant was in the store around the time of the murders, that the victims were shot with a .45 caliber gun and that defendant was in possession of the same type of gun five days before the murders. While defendant is correct that the evidence is wholly circumstantial, he does not contend that it was insufficient to support a finding that defendant participated in the murders; we believe that it was also sufficient to support a finding that he was armed when he did so.

With respect to the aiding and abetting theory, defendant argues that there was no evidence that he assisted in obtaining or retaining possession of the gun. In support, defendant cites *People v Bruno*, 115 Mich App 656; 322 NW2d 176 (1982), a case in which there was insufficient evidence to support a felony-firearm conviction on an aiding and abetting theory. That case is distinguishable because there was no evidence there that the defendant participated in the robbery. *Id.* at 660-661. Moreover, there was no evidence in *Bruno* that the defendant was in possession of the gun before the robbery. *Id.* In the present case, there is evidence both that defendant possessed the same type of gun five days before

the murders and that he was in the store around the time of the murders. From this evidence, a reasonable juror could infer that defendant assisted the killings by providing the murder weapon.

Finally, defendant argues that the trial court did not give the proper aiding and abetting instructions on the felony murder charge. At trial, defendant did not request the instruction he now claims should have been included. Thus, this Court need review the issue only to the extent that manifest injustice would otherwise result. *People v Buck*, 197 Mich App 404, 423; 496 NW2d 321 (1992). Manifest injustice results from an appellate court's refusal to review erroneous jury instructions where the instructions omit an essential element of the offense. *People v McPherson*, 323 Mich 438, 452-453; 35 NW2d 376 (1949). Manifest injustice does not result from this Court's failure to review an instruction which omits a pertinent though not legally necessary point. *People v Liggett*, 378 Mich 706, 714; 148 NW2d 784 (1976).

To support a felony-firearm conviction on an aiding and abetting theory, it is not enough for the prosecution to show that the defendant was aware that a firearm was used, that defendant intended that it be used, and that defendant actively participated in the crime involving its use. The prosecution must also show that defendant assisted in obtaining or retaining possession of the firearm. *People v Johnson*, 411 Mich 50, 54; 303 NW2d 442 (1981). In the present case, the trial court did not give the *Johnson* instruction. However, defendant did not request this instruction. Moreover, the trial court instructed the jury on both felony-firearm and aiding and abetting. While the felony-firearm instructions could have been more specific, it cannot be said that the trial court failed to instruct on an essential element of the offense. Rather, the now-requested instruction was a pertinent, but not legally necessary, because the trial court instructed the jury on felony-firearm and aiding and abetting in general. Further, the evidence supported a finding that defendant was the actual shooter and, therefore, it is not clear that the conviction was based on the aiding and abetting theory. Therefore, manifest injustice would not result if this Court declines to review this issue.

Affirmed.

/s/ Michael J. Kelly  
/s/ Stephen J. Markman  
/s/ Jeffrey L. Martlew