STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY GREER,

Defendant-Appellant.

UNPUBLISHED
December 3, 1996

No. 181490
LC No. 94-107930-FC

Before: Neff, P.J., and Hoekstra and G.D. Lostracco,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and was sentenced to six to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the photographic showup conducted without presence of counsel denied him due process. We disagree. The fairness of an identification procedure is evaluated in the light of the totality of the circumstances. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). The right to counsel at pretrial photographic showups attaches when the accused is in custody for the crime charged, readily available, or the focus of investigation. *People v Wyngaard*, 151 Mich App 107, 112-113; 390 NW2d 694 (1986). When a photographic showup is conducted during the precustodial, pre-questioning, mere suspicion phase of an investigation, counsel's presence is not required. *People v Kurylczyk*, 443 Mich 289, 301; 505 NW2d 528 (1993). However, a defendant may be entitled to counsel's presence at precustodial photographic showups under "unusual circumstances," such as when the photographic showup is not intended to extinguish a case against an innocent bystander and the accused has already participated in two corporeal lineups with counsel present. *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994), citing *People v Cotton*, 38 Mich App 763, 769-770; 197 NW2d 90 (1972).

In this case, although defendant may have been in jail for an unrelated matter during the time he had become a suspect in the present case, he was not in jail when the photographic showup was

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

conducted. Further, defendant had no right to counsel at the photographic showup because: (1) he had not been in jail for the crime for which the photographic showup was conducted; (2) he was only a suspect, as the investigation had been placed on inactive status and only a tip from an unknown source identified defendant as a suspect; and (3) the police had not conducted previous corporeal lineups which could constitute unusual circumstances. Therefore, under these circumstances, defendant was not denied due process.

Defendant also argues that there was insufficient evidence to establish that he knew that the other person involved in the crime possessed a gun. 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 proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

Defendant acknowledges that his conviction stands or falls on an aiding and abetting theory. Aiding and abetting describes all forms of assistance rendered to the perpetrator of a crime and includes all words or deeds that might support, encourage, or incite the commission of a crime. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). To convict defendant of armed robbery, the prosecution did not have to prove that defendant knew that a gun would be used, but had to prove only that defendant knowingly aided and abetted in the commission of the robbery and that carrying or using a weapon was fairly within the scope of the robbery. *People v Young*, 114 Mich App 61, 65; 318 NW2d 606 (1982).

Here, defendant went into the convenience store twice before entering a third time to rob it. The victim testified that defendant's partner entered shortly thereafter, used the restroom, and then approached her and told her that it was a stickup. She claimed that defendant's partner had his hand in his pocket and acted as if he had a gun by pointing his coat pocket at her. Defendant stood directly across the counter from the clerk and his partner during the threats and while his partner took money from the cash register. Further, defendant told his partner to take lottery tickets and a money bag. Also, both defendant and his partner told the victim to go in the back and not return until they were gone. Viewing this evidence in a light most favorable to the prosecution, we find that a rational trier of fact could conclude that defendant knowingly aided and abetted in the robbery and that using a weapon was fairly within the scope of it.

Affirmed.

/s/ Janet T. Neff
/s/ Joel P. Hoekstra
/s/ Gerald D. Lostracco