

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON PAUL PLOTNICK,

Defendant-Appellant.

UNPUBLISHED

October 31, 2006

No. 262207

Ingham Circuit Court

LC No. 04-000897-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DUANE WHITE,

Defendant-Appellant.

No. 262208

Ingham Circuit Court

LC No. 04-001214-FC

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

Following a consolidated trial, a jury convicted defendants Jason Plotnick and Michael White of two counts of armed robbery,¹ one count of possession of a firearm during the commission of a felony (felony-firearm),² and one count of conspiracy to commit armed robbery.³ The trial court sentenced Plotnick to concurrent terms of 200 to 360 months in prison for armed robbery and conspiracy, and to a consecutive two-year term, with 275 days' credit, for felony-firearm. The trial court sentenced White to concurrent terms of 240 to 480 months in prison for armed robbery and conspiracy, and to a consecutive two-year term, with 199 days' credit, for felony-firearm. In this consolidated appeal, both Plotnick and White appeal as of right. We affirm in each case. We decide these appeals without oral argument.⁴

¹ MCL 750.529.

² MCL 750.227b.

³ MCL 750.529; MCL 750.157a.

⁴ MCR 7.214(E).

I. Basic Facts And Procedural History

White and Jerri Villarreal would routinely gather with Plotnick, their mutual friend, to use drugs. White and Plotnick usually supplied the drugs. On April 21, 2004, after noticing that they had exhausted their drug supply, Villarreal, White, and Plotnick decided to rob a pharmacy. The trio decided that Villarreal would enter the store and carry out the robbery while White and Plotnick would remain in the car. White supplied a hooded shirt for Villarreal to wear, and Plotnick supplied red sunglasses. Once Villarreal was dressed, the three left White's apartment in Plotnick's vehicle en route to Brown's Pharmacy. Villarreal rode in the back seat, Plotnick drove, and White rode in the passenger seat. After they arrived at Brown's Pharmacy, White handed Villarreal a gun, a walkie-talkie, and a satchel. Villarreal entered the store, but she returned moments later, explaining that the pharmacy was too crowded to carry out the robbery. They abandoned the idea and began to drive back to White's apartment.

But while on the way back to the apartment, White recalled that his former girlfriend had once robbed another pharmacy, the Medicine Shoppe. The trio then decided that they too would attempt to rob the Medicine Shoppe. They drove there and parked outside the Colonial Bar, a neighboring establishment, where the Medicine Shoppe staff could not see them.

Villarreal entered the Medicine Shoppe and waved the gun at the two attending pharmacists. She demanded money and Schedule 2 narcotics (potent pain relieving medication), specifically requesting Oxycontin. After her satchel was full of the drugs and she had taken \$75 from the register, she left the store and fled back to Plotnick's car. As the three began to drive away, White and Plotnick told Villarreal to lie down in the backseat.

While waiting at an adjacent stop light, Daniel Washburn, a truck driver who was making a delivery to the Colonial Bar, saw Plotnick's car parked by a nearby dumpster. As Washburn was pulling into the parking lot, Plotnick's car rapidly pulled out of the lot in front of him, nearly causing a collision. Washburn noted the license plate number and observed the driver and a passenger.

After fleeing the scene, Villarreal handed the drugs and the gun to White. Both White and Plotnick attempted unsuccessfully to disengage the weapon; White eventually discharged the gun out of the passenger window. Villarreal removed the hooded shirt she had been wearing, and Plotnick threw it out the window. The three then returned to White's apartment, where they planned to sell and use the stolen drugs. Plotnick removed the identifying labels from the pharmacy bottles and flushed them down the toilet. People were in and out of the apartment most of that day to buy the stolen drugs.

The same day, police ran the license plate number provided by Washburn and determined that the car used in the robbery belonged to Plotnick. They began surveillance of Plotnick's apartment and later observed his girlfriend, Rachel Thomas, leaving the apartment. Because she fit the description of the female robber, the police arrested Thomas and took her to the Lansing city jail. Thomas made several telephone calls from jail, including at least one to White's apartment. White instructed Villarreal to go to the jail and post Thomas' bond. Villarreal drove Plotnick's vehicle (the one used in the robbery), was stopped by the police, and arrested.

In light of Thomas' phone call to White, the police sent units to White's apartment shortly after Villarreal's arrest. White answered the door, stated that he was there alone with his nine-year-old son, and that he did not know Plotnick's whereabouts. However, while the officers

were speaking with White, they heard a crash in one of the bedrooms; Plotnick caused the noise while attempting to hide. The police arrested Plotnick, and then took both him and White to the police station, where White consented to a search of his apartment. In White's bedroom, police found seven empty pharmacy pill bottles with no labels. The police then released White.

Four days later, Thomas contacted the police to have them investigate the sale of drugs occurring at White's apartment. Police arrived at the apartment to find White, Thomas, and a third individual, Benjamin Ballard. Ballard initially gave the police a false name. After finally determining Ballard's true identity, the deputy learned that there was an outstanding warrant for his arrest. He arrested Ballard and took him to a patrol car. On reentering the apartment, the deputy found a baggie lying in a laundry basket by the front door. The baggie contained 19 Oxycontin pills, the same drug that was stolen from the Medicine Shoppe. Ballard confirmed that he had purchased the pills from White and had thrown them in the laundry basket to evade police detection. Ballard claimed he frequently bought drugs from White and that White had never had Oxycontin to sell prior to the robbery of the Medicine Shoppe. Police also later found marijuana and various syringes at White's apartment. The police arrested White pursuant to a warrant unrelated to the Medicine Shoppe robbery.

II. Plotnick's Appeal – Sufficiency Of The Evidence

A. Standard Of Review

Plotnick argues that the prosecution presented insufficient evidence at trial to support his conviction of felony-firearm on an aiding and abetting basis. In reviewing a challenge to the sufficiency of the evidence, we view the evidence *de novo*, in a light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.⁵ However, we “will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses.”⁶

B. Aiding And Abetting A Felony-Firearm Offense

(1) Legal Standards

One who “procures, counsels, aids or abets in [the] commission” of an offense may be convicted and “punished as if he directly committed such offense.”⁷ “Aiding and abetting” describes all forms of assistance rendered to the perpetrator of a crime, and includes “words or deeds that are intended to encourage, support, or incite the commission of [a] crime.”⁸ “[T]he proper standard for establishing felony-firearm under an aiding and abetting theory is whether the defendant's words or deeds ‘procured, counseled, aided, or abetted’ another to carry or have in his possession a firearm during the commission or attempted commission of a felony-firearm

⁵ *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

⁶ *People v Wolfe*, 440 Mich 508, 514-15; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

⁷ MCL 767.39; *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006).

⁸ *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004).

offense.”⁹ But “[t]he prosecutors must do more than demonstrate that defendants aided the commission or attempted commission of the underlying crimes Rather, the prosecutors must demonstrate that defendants specifically aided the commission of felony-firearm.”¹⁰ To support a finding that a defendant aided and abetted a felony-firearm offense, the prosecutor must show: (1) the defendant or some other person committed a violation of the felony-firearm statute; (2) “that the defendant performed acts or gave encouragement that assisted in the commission of the felony-firearm violation”; and (3) “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.”¹¹

“An aider and abettor’s state of mind may be inferred from all the facts and circumstances.”¹² “Factors that may be considered include a close association between the defendant and the principal, the defendant’s participation in planning or executing the crime, and evidence of flight after the crime.”¹³ Once the defendant’s conduct had the effect of inducing the crime, the amount of advice, aid, or encouragement given is immaterial.¹⁴

(2) Applying The Law

Here, the prosecution unequivocally established the first element necessary to support a finding that Plotnick aided and abetted a felony-firearm offense. It is undisputed that Villarreal robbed the Medicine Shoppe pharmacy at gunpoint, thus committing a felony-firearm offense.

With respect to the second element, Plotnick argues that his mere involvement of driving the car was insufficient to prove that he performed acts that aided in the commission of the felony-firearm violation. We disagree. Plotnick helped plan the robbery and drove Villarreal to the pharmacy. White handed the gun to Villarreal while en route to the first pharmacy. When the trio opted against that target, Plotnick drove Villarreal to the Medicine Shoppe where she completed the trio’s plan. It was reasonable for the jury to infer that Plotnick knew Villarreal possessed a firearm while he was transporting her to the site of the felony. Thus, we conclude that there was sufficient evidence to support a finding that, by his act of knowingly driving a vehicle that carried Villarreal and the gun to the site of the robbery, Plotnick assisted in and supported the commission of the felony-firearm offense.

Plotnick also attempts to dispute the third element by stating that nothing in the record indicated that he had anything to do with the use of the gun during the robbery; in fact, he argues, nothing in the record indicated that he knew the gun was real at the time of the robbery. Again, we disagree. Viewing the evidence in the prosecution’s favor and inferring Plotnick’s state of mind from the surrounding facts and circumstances, we conclude that sufficient evidence

⁹ *Id.* at 58-59, 70, quoting MCL 767.39.

¹⁰ *Id.* at 70.

¹¹ *Id.* at 70-71; see *People v Cairnes*, 460 Mich 750, 768; 597 NW2d 130 (1999).

¹² *Carines*, *supra* at 757, quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

¹³ *Id.* at 757-758, quoting *Turner*, *supra* at 569.

¹⁴ *Moore*, *supra* at 71.

existed to convince the jury that Plotnick had knowledge that Villarreal intended to use the gun in the robbery while he drove her to the Medicine Shoppe. As drug partners, Plotnick had a close association with Villarreal. He participated in the planning and execution of the crime and there is strong evidence of his rapid flight from the scene of the crime. Further, the fact that Plotnick did not handle or carry the gun is wholly immaterial.¹⁵ There was no need for him to touch the gun in order to encourage Villarreal in its use while robbing the pharmacy. Therefore, we conclude that the prosecution presented sufficient evidence to convict Plotnick of felony-firearm insofar as he knowingly aided and abetted the commission of the crime by the principal.

III. White's Appeal – Improper Admission Of “Bad Acts” Evidence

A. Standard Of Review

White argues that the trial court abused its discretion by admitting “other acts” evidence regarding his arrest for delivery of drugs stemming from the discovery of the 19 Oxycontin pills and Ballard's related testimony. The admissibility of bad acts evidence is within the trial court's discretion, and we will reverse on appeal only when there has been a clear abuse of discretion.¹⁶ Further, because this issue is unpreserved, White must demonstrate plain error that affected his substantial rights.¹⁷

B. Admission Of “Bad Acts” Evidence

(1) Legal Standards

MRE 404(b)(1) governs the admission of evidence of bad acts.¹⁸ Bad acts evidence must generally satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice.¹⁹ The proffered evidence would be unfairly prejudicial if it presents a danger that the jury will give marginally probative evidence undue or preemptive weight.²⁰

¹⁵ *Moore, supra* at 73-74.

¹⁶ *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005).

¹⁷ *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

¹⁸ MRE 404(b)(1) states as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

¹⁹ MRE 404(b)(1); *Knox, supra* at 511.

²⁰ *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

(2) Applying The Law

White argues that the probative value of the drug evidence was cumulative at best and that emphasizing his drug-related crimes unfairly prejudiced him in front of the jury. He asserts that the drug charge related to the finding of the Oxycontin pills in his apartment was irrelevant to the robbery charges. According to White, the evidence made him look like a “bad person” in the eyes of the jury. We disagree.

In ruling on White’s motion in limine regarding the admissibility of other evidence, the trial court stated that the Oxycontin was not “other acts” evidence; rather, it was direct evidence relating to the Medicine Shoppe robbery. We find no error in this ruling. As they directly relate to the robbery in question, the Oxycontin pills did not raise a question regarding the admissibility of other bad acts and were properly admitted. Similarly, Ballard’s testimony regarding the Oxycontin pills constitutes a direct reference to the drugs stolen in the Medicine Shoppe robbery and was properly admitted.

Ballard also testified regarding White’s reputation as a drug dealer. But we need not decide whether admission of this testimony was appropriate. No additional prejudice was cast on White by the admission of this evidence. The jury had already heard testimony regarding White’s drug use and dealing. This evidence merely supported the conclusion that he was engaged in illicit activities and had the motive to participate in the robbery of the Medicine Shoppe in order to obtain more drugs for sale and personal use. Therefore, the evidence was relevant to the crime charged and not overly inflammatory to the jury.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette