UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1037

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN ARTHUR THOMPSON and
KENNETH WAYNE THOMPSON,

Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Texas
CR3 91 228 H 01 02

(March 24, 1993)

Before POLITZ, Chief Judge, GOLDBERG and JONES, Circuit Judges.

POLITZ, Chief Judge:[*]

John Arthur Thompson and Kenneth Wayne Thompson, brothers, appeal convictions for aiding and abetting (1) two bank robberies, and (2) the use of a gun in connection with one of the robberies. In addition, John Thompson appeals his conviction for conspiracy to

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

commit bank robbery. Both challenge the sufficiency of the evidence and the allowance of consideration of the role of their alleged accomplice, Lenthell Rosemond. Both also contend that the court erred by constructively amending the indictment. Finally, they contend that their attorney labored under a conflict of interest and was therefore ineffective. For the reasons assigned we find no error in the convictions of John Thompson and affirm. We likewise affirm the conviction of Kenneth Thompson for aiding and abetting the use of a firearm in connection with a violent crime but, finding the evidence insufficient to sustain his conviction for aiding and abetting in the two bank robberies, we vacate those convictions.

Background

John Thompson and Rosemond were longtime friends and crack addicts who, according to Rosemond, turned to robbing "just about anything" to feed their habits. They started with drug dealers, gas stations, fast food outlets, and convenience and liquor stores. The scenario was always the same: John Thompson would quickly survey the scene, check out the inside of the establishment, return to the car and give Rosemond a handgun borrowed from his brother Kenneth, and then wait in the vechicle while Rosemond robbed the selected victim.

The robbery spree was interrupted when Rosemond went to jail for robbing his girlfriend but resumed when he was released on parole. The stakes had increased because John Thompson had cased

a liquor store which cashed large checks for its customers. The robbery netted approximately $20,000, $5,000 of which was used to buy Kenneth Thompson a secondhand BMW. In his testimony as a witness for the prosecution Rosemond stated that he and John Thompson intended to use the BMW in subsequent robberies. About this time John Thompson suggested that they upgrade their targets to banks, the place where the real money was.

In anticipation of the first bank robbery Rosemond went to secure a handgun from Kenneth Thompson and they went to a pawn shop where Thompson purchased a .25 caliber automatic. The record contains no evidence that Rosemond told Thompson why he needed this gun. On the day of the first bank robbery Rosemond met John Thompson at his brother's house but neither told Kenneth Thompson what they planned to do as they borrowed the BMW and left to rob the First Interstate Bank in Cedar Hill, Texas.

Rosemond and John Thompson robbed that bank, using the same routine as in earlier robberies. There is no evidence that Kenneth Thompson was aware of these robbery plans or that he shared in the ill-gotten proceeds. Three days later the pair robbed the Buckner branch of First Gibraltar Bank, again using Kenneth Thompson's BMW and a handgun borrowed from him. The heist was not without a hitch. The teller placed in the bag a dye pack which exploded as Rosemond exited the bank. An effort at a local motel to wash the dye from the money was unsuccessful; they hid the stained money. There is no evidence that Kenneth Thompson knew of this robbery or shared in its proceeds.

The final bank robbery of another First Gibraltar Bank occurred a few days later using their usual routine, except this time Rosemond added a line -- he told the teller not to place a dye pack in the bag. The teller ignored this instruction and as Rosemond ran from the bank and jumped into the waiting BMW the dye pack exploded, saturating Rosemond, the money bag, and the passenger seat with red dye and chemicals. They quickly returned to Kenneth Thompson's apartment, hid the money in a truck there, returned the borrowed handgun, and bolted out of town in the BMW.

Rosemond and John Thompson were arrested later that same day by an alert deputy sheriff who responded to broadcast information about the bank robbery. Rosemond's hands were covered with red dye as was the passenger seat of the BMW.

Rosemond pleaded guilty pursuant to a plea agreement and testified against John Thompson who was tried jointly with his brother. Both were represented by the same attorney. They were charged with conspiracy to rob banks, two substantive counts of aiding and abetting in the robbery of the two First Gibraltar Banks, and for aiding and abetting the use of a firearm in relation to a crime of violence. The jury found the Thompsons guilty on all counts except for an acquittal of Kenneth Thompson on the conspiracy charge. Both timely appealed.

Analysis

The Thompsons contend that the indictment was deficient because it alleges that they aided and abetted only each other and

that there is no evidence that either was the principal. They contend that in instructing the jury to consider the aid given to Rosemond the court constructively amended the indictment. They challenge the sufficiency of the evidence on all counts and contend that their attorney labored under an unwaived conflict of interest because Rosemond had earlier asked counsel to represent him in this matter.

A. The scope of the indictment

Counts Two, Three, and Four of the indictment charged both men with bank robbery and a weapons violation "aided and abetted by each other." It is not seriously disputed that Rosemond was the one who robbed the banks. The Thompsons reason that they cannot be convicted of aiding and abetting because neither of them acted as a principal and they were only charged with aiding and abetting each other. We review the sufficiency of the indictment *de novo*,[1] considering whether by reasonable construction the wording in the indictment charges a crime.[2]

Count One of the indictment charged the Thompsons with conspiring with Rosemond to commit two bank robberies. Counts Two and Three charged the Thompsons with bank robberies in which they were "aided and abetted by each other"; there is no specification of Rosemond's role. Count Four, the gun count, adopts the

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[1] **United States v. Shelton**, 937 F.2d 140 (5th Cir.), cert. denied, 112 S.Ct. 607 (1991).

[2] **United States v. De La Rosa**, 911 F.2d 985 (5th Cir. 1990), cert. denied, 111 S.Ct. 2275 (1991).

allegations made in the first two counts and charges a violation of 18 U.S.C. § 924(c). The Thompsons insist that the language of Counts Two, Three, and Four does not permit of proof of their aiding and abetting Rosemond.

At the threshold we remind that the words "aid and abet" are not talismanic and need not appear in an indictment in order to sustain a conviction for aiding and abetting as 18 U.S.C. § 2 applies implicitly to all indictments and informations.[3] There need only be a charge of a substantive offense.[4] We also note that the aiding and abetting statute rejects the common-law distinction between principal and aider and abettor.[5] There is no requirement, for instance, that the principal be named in the indictment or prosecuted in order for an accomplice to be prosecuted for the substantive crime under 18 U.S.C. § 2.[6]

In each of the three counts John and Kenneth Thompson were charged with the substantive offenses of bank robbery and use of a weapon to commit a violent crime. The indictment charged all of the essential elements of those offenses. The issue before us is whether the inclusion of the language that they were "aided and

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[3] **United States v. Masson**, 582 F.2d 961 (5th Cir. 1978).

[4] **United States v. Cowart**, 595 F.2d 1023 (5th Cir. 1979).

[5] E.g., **Rooney v. United States**, 203 F. 928 (9th Cir. 1913).

[6] **United States v. Beebe**, 792 F.2d 1363 (5th Cir. 1986).

abetted by each other" altered or prejudiced the adequacy or validity of the indictment.

As we previously have observed, our primary concern is not whether the words "aided and abetted by" are included or omitted from the indictment because they do not in themselves "add an offense to the indictment, nor do they limit the charge."[7] Rather, we must consider whether the indictment informs the defendant of the elements of the charged offense.[8] Surplusage, such as the "aided and abetted by each other" language in the instant case, may be disregarded provided it neither broadens the indictment nor misleads the accused.[9] Obviously, the language did not broaden the indictment but it did allege facts relevant to the charged conduct.

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[7] **United States v. Pearson**, 667 F.2d 12, 14 (5th Cir. Unit B 1982). See also **United States v. Robins**, 978 F.2d 881 (5th Cir. 1992) (affirming conviction for aiding and abetting drug offense where indictment charged that accused aided only one individual despite the fact that the individual had been acquitted because, among other reasons, the evidence of the accused's role was otherwise sufficient); **United States v. Upshaw**, 685 F.2d 1202 (9th Cir. 1982) (rejecting an argument identical to that advanced here and noting that naming of principal in indictment was unnecessary and did not limit proof of another's role at trial).

[8] E.g., **United States vs. Salinas**, 654 F.2d 319 (5th Cir. 1981), where the defendants were charged with aiding and abetting the embezzling of funds from a federally insured bank. The offense required that the embezzler be an officer of the bank. The indictment alleged that the defendants aided and abetted a specific person. At trial the evidence established that they aided and abetted a different person. We determined that such a variance rendered the trial unfair. In the instant case the variance paled by comparison. Both men were informed of their charged role in the robbery, Rosemond's role was made clear, and his identity, unlike the bank officer in **Salinas**, was not an element of the offense.

[9] **United States v. Trice**, 823 F.2d 80 (5th Cir. 1987).

The indictment fairly alerted the Thompsons to the charge. The proof offered was consistent with the indictment. The allegation that Kenneth and John Thompson aided and abetted each other was mere surplusage and the trial court did not err in instructing the jury in such a manner as to allow it to consider Rosemond's activities.[10]

B. Sufficiency of the evidence

Both Thompsons challenge the sufficiency of the evidence. We review this claim *de novo*, drawing all reasonable inferences in favor of the conviction.[11] We must determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.[12] We first consider the case against John Thompson.

The jury was entitled to credit the testimony of Rosemond. It obviously did so. According to his testimony, John Thompson planned each robbery, secured the vehicle and handgun used in each, and with Rosemond made his escape with the money. All of the

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[10] **United States v. Harper**, 579 F.2d 1235 (10th Cir. 1978) (noting that failure to instruct jury that it must find the accused aided the named principle is not plain error because: "The fact that [the principal's] name was included in the indictment as a person whom [the defendant] aided and abetted does not change what the prosecution must show. Proof of everything in the indictment is not required. When the language of the indictment goes beyond alleging the elements of the offense, it is mere surplusage and such surplusage need not be proved."), cert. denied, 439 U.S. 968 (1978).

[11] **Glasser v. United States**, 315 U.S. 60 (1942).

[12] **Jackson v. Virginia**, 443 U.S. 307 (1979).

elements of the substantive counts of bank robbery and use of a firearm in relation thereto were proven as to John Thompson.

The same does not apply to Kenneth Thompson and the bank robbery charges. An essential element of aiding and abetting such a charge is the knowledge that a bank is to be robbed.[13] There is ample evidence upon which the jury could infer that Kenneth Thompson knew his BMW and his handguns were being used in nefarious activities, but the record is devoid of any proof, much less proof beyond a reasonable doubt, from which a jury could infer his knowledge that a bank was to be the subject of a robbery.[14] Such must be done to sustain these convictions.[15] They must be reversed.

The same cannot be said, however, about the conviction of Kenneth Thompson under 18 U.S.C. § 924(c)(2) for the use of a firearm in relation to a crime of violence. To convict on this charge the prosecutor need only prove that Kenneth Thompson knew that his brother and Rosemond intended to commit a crime of violence or a drug-trafficking offense with the handgun he made

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[13] **United States v. Gallishaw**, 428 F.2d 760 (2d Cir. 1970); see also **United States v. Di Stefano**, 555 F.2d 1094 (2d Cir. 1977).

[14] Cf. **United States v. Albert**, 773 F.2d 386 (1st Cir. 1985) (defendant loaned car to bank robbers but also was present during discussion of the robbery, was present in the immediate area of the robbery, and was intimately involved with the men shortly after the robbery). In the instant case the government asks that we infer from the loan of the car and allowing his brother access to his house that Kenneth Thompson knew that his brother planned to rob a bank. We decline the invitation.

[15] **United States v. Fischel**, 686 F.2d 1082 (5th Cir. 1982).

available.[16] The record contains ample proof upon which the jury could infer that Kenneth Thompson knew this.[17]

C. Conflict of counsel

The Thompsons were represented by the same lawyer at trial. During Rosemond's testimony it became apparent that counsel had discussed Rosemond's defense with him, although the lawyer ultimately declined to take Rosemond's case. The Thompsons assume that their lawyer was prevented from effectively cross-examining Rosemond by the attorney-client privilege. We cannot resolve this issue on the record presented in this direct appeal. This is a matter more appropriately addressed in a collateral proceeding during which a proper record may be developed.

The convictions and sentences of Kenneth Wayne Thompson for aiding and abetting the two bank robberies are REVERSED. His conviction of violating 18 U.S.C. § 924(c)(2) and the sentence imposed thereon, and the convictions and sentences of John Arthur Thompson are all AFFIRMED.

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[16] In **United States v. Wilson**, 884 F.2d 174 (5th Cir. 1989), we held that section 924(c) requires proof of the accused's knowledge of the facts constituting an offense. We hold that voluntarily transferring a firearm to a person whom the accused knows will employ it to commit a violent crime is sufficient to prove a violation of section 924(c) even if the accused is not certain of the details of the planned offense.

[17] **United States v. Heath**, 970 F.2d 1397 (5th Cir. 1992) (juries are free to draw on their common knowledge and experience when giving effect to the inferences that may be reasonably drawn from the evidence), petition for cert. filed, 61 U.S.L.W. 3500 (Dec. 28, 1992) (No. 92-1129).