

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON THOMAS TARVER,

Defendant-Appellant.

UNPUBLISHED

August 7, 2012

No. 300775

Saginaw Circuit Court

LC No. 09-033077-FC

Before: MURRAY, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to commit armed robbery, MCL 750.157a MCL 750.529, armed robbery, MCL 750.529, three counts of possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b, conspiracy to commit assault with intent to murder, MCL 750.157a MCL 750.83, assault with intent to murder, MCL 750.83, and carrying a firearm with unlawful intent, MCL 750.226. Defendant was sentenced to 210 to 480 months imprisonment for conspiracy to commit armed robbery, 210 to 480 months for armed robbery, 2 years' imprisonment for each felony firearm conviction, 225 to 480 months for conspiracy to commit assault with intent to murder, 225 to 480 months for assault with intent to murder, and 24 to 60 months for carrying a firearm with unlawful intent. Defendant was given credit for 358 days served and his sentences run concurrent to each other. For the reasons set forth in this opinion, we affirm.

I. FACTS

On July 9, 2009, the victim arrived at his aunt's house in Saginaw at about 9:30 p.m. The victim parked in the driveway and then walked up to the house and began conversing with his cousin, Alonzo Pought. The victim gave Pought his cellular telephone and asked Pought to put it on a charger. Pought agreed, and then went back in the house to fill out some job applications.

After Pought went inside, defendant and Gregory Ashworth came over from next door and started talking with the victim. Ashworth came over first and defendant followed a couple of minutes later. According to the victim, the three talked for awhile and Ashworth began rolling a marijuana cigarette. The victim testified that while they were talking, defendant got up and went next door. The victim testified that he continued to talk with Ashworth for a couple minutes and then defendant returned and pulled out a revolver. The victim stated that defendant put the revolver in his side and told him to "Give it up" and to go to the back yard. Ashworth

then began searching the victim's car. While Ashworth searched the car, the victim took money out of his pocket and gave it to defendant. Defendant then took the victim's glasses and hat.

The victim testified that while Ashworth was searching the car, Ashworth told defendant to kill him. The victim testified that when Ashworth got out of the car, defendant handed the gun to Ashworth. When asked how Ashworth got the gun, the victim stated "he handed it to him." The victim testified that he was standing at the side of his car near the front porch of his aunt's house at this point. The victim testified that Ashworth told the victim to go to the back of house, but he refused. Defendant then indicated that he wanted the victim's earrings. The victim stated that he started taking his earrings out and then grabbed defendant and tried to throw him into Ashworth. The victim then started running. The victim took a few steps and then heard five or six shots in quick succession. One bullet grazed the victim's bicep and another went through his forearm. A third bullet struck the victim in the back and lodged behind his heart. The victim fell to the ground. Defendant and Ashworth fled.

Following his convictions, defendant moved for a new trial or for resentencing and the trial court denied the motions. This appeal ensued.

II. ANALYSIS

Defendant contends that there was insufficient evidence to support his convictions of assault with intent to murder and conspiracy to commit assault with intent to murder. We review a challenge to the sufficiency of the evidence de novo. *People v Hawkins*, 245 Mich App 439, 456; 628 NW2d 105 (2001). "When reviewing a claim that the evidence presented was insufficient to support defendant's conviction, this Court must view the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find beyond a reasonable doubt that the prosecution established the essential elements of the crime." *People v Kissner*, 292 Mich App 526, 533-534; 808 NW2d 522 (2011).

The elements of assault with intent to murder are: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing a murder." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "A person who aids or abets the commission of a crime may be convicted as if he or she directly committed the crime." *People v Jackson*, 292 Mich App 583, 589; 808 NW2d 541 (2011). The elements of aiding and abetting are:

(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. [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006).]

Defendant argues the evidence showed that Ashworth fired the gun in this case and that the prosecutor failed to introduce sufficient evidence to show that he had intent to injure or kill the victim. With respect to intent, a defendant's "[i]ntent is a question of fact to be inferred from the circumstances by the trier of fact." *People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991). "An aider and abettor's knowledge of the principal's intent can be inferred from the

facts and circumstances surrounding an event.” *People v Bennett*, 290 Mich App 465, 474; 802 NW2d 627 (2010). And, “[b]ecause of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.” *McRunels*, 237 Mich App at 181.

In this case, there is sufficient evidence in the record that would allow a rational trier of fact to conclude beyond a reasonable doubt that defendant intended to assault the victim with intent to murder the victim. Here, the victim testified that defendant put the revolver in his side and told him to “Give it up” and to go to the back of the house. The victim testified that Ashworth encouraged defendant to kill him. Although defendant did not pull the trigger, the victim testified that defendant handed the revolver to Ashworth after Ashworth instructed defendant to kill him. A rational trier of fact could have concluded that defendant either intended to kill the victim or knew that Ashworth intended to kill the victim when defendant handed Ashworth the gun.

Defendant maintains that the victim’s testimony was inconsistent, stating that during the preliminary examination, the victim testified that Ashworth “grabbed” the gun from defendant. However, the victim was not impeached with the alleged inconsistent statement during trial, and the victim’s preliminary examination testimony was not otherwise introduced into evidence. Thus, defendant cannot use the victim’s preliminary examination testimony as a basis for arguing that insufficient evidence was presented during trial to support his conviction for assault with intent to commit murder.

Defendant also argues that the prosecutor failed to introduce sufficient evidence to support that he aided or encouraged Ashworth to commit the assault. However, as noted above, the victim testified that defendant handed a gun to Ashworth after Ashworth told defendant to kill the victim. This evidence would allow a rational trier of fact to conclude beyond a reasonable doubt that defendant committed an act or encouraged Ashworth in a manner that assisted Ashworth assault the victim with intent to murder. *Robinson*, 475 Mich at 6.

There was also sufficient evidence to allow a rational jury to convict defendant of conspiracy to commit assault with intent to murder. A conspiracy is a voluntary mutual agreement or understanding between two or more people to commit a criminal act. *People v Blume*, 443 Mich 476, 481, 485; 505 NW2d 843 (1993). MCL 750.157a proscribes conspiracy and provides in relevant part, “[a]ny person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy. . . .” The elements of conspiracy are: (1) the defendant intended to combine with another person; and (2) the participants intended to accomplish an illegal objective (here, murder). *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). Direct proof of a conspiracy is not required to support a conviction; rather, proof may be derived from the circumstances, acts, and conduct of the parties. *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997).

In this case, the victim testified that Ashworth and defendant approached him after Pought went back in the house. The victim testified that he knew defendant and Ashworth from jail and saw them around the neighborhood after they were released. The three talked for a bit and then defendant went next door for a couple of minutes. The victim stated that when defendant returned, defendant put a revolver in his side. Defendant and Ashworth then acted in

concert to rob the victim. Furthermore, the victim testified that defendant told him to go to the back of the house and Ashworth told defendant to kill the victim. Defendant then gave the gun to Ashworth, who also instructed the victim to go to the back of the house. The victim's testimony would allow a rational trier of fact to conclude beyond a reasonable doubt that defendant and Ashworth were acting pursuant to a coordinated common plan to rob the victim and then take him to an isolated place and kill him. Accordingly, there was sufficient evidence to convict defendant of conspiracy to commit assault with intent to murder.

Next, defendant contends that his convictions for assault with intent to murder and conspiracy to commit assault with intent to murder were against the great weight of the evidence. Defendant preserved this issue for review when he moved for a new trial on the same basis in the trial court and the trial court addressed and denied his motion. *People v Noble*, 238 Mich App 647, 659; 608 NW2d 123 (1999). We review for an abuse of discretion a trial court's ruling on a motion for a new trial based on a claim that the verdict was against the great weight of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). A verdict is against the great weight of the evidence only "if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* at 232.

In this case, evidence at trial would have allowed a rational juror to conclude that defendant and Ashworth acted in accord with a common plan to rob and murder the victim. Although defendant did not pull the trigger, he put the revolver in the victim's side and tried to force the victim into an isolated area. Additionally, defendant handed the revolver to Ashworth after Ashworth told defendant to kill the victim. Based on this record, there is no "real concern that an innocent person may have been convicted" such that "it would be a manifest injustice" to allow the guilty verdict to stand. *People v Lemmon*, 456 Mich 625, 639, 644; 576 NW2d 129 (1998). Accordingly, defendant's convictions for assault with intent to murder and conspiracy to commit assault with intent to murder were not against the great weight of the evidence, and the trial court did not abuse its discretion in denying defendant's motion for a new trial on that basis.

Next, defendant argues that he was denied the effective assistance of counsel. "Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

Defendant contends that counsel was ineffective because he failed to present a theory of defense at the appropriate time. Specifically, defendant complains that counsel reserved making an opening statement and then presented no proofs. Therefore, there was no opportunity for an opening statement. "The waiver of an opening statement involves a subjective judgment on the part of trial counsel which can rarely, if ever, be the basis for a successful claim of ineffective

assistance of counsel.” *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (quotation omitted). Defendant has failed to establish that counsel’s decision to forgo making an opening statement amounted to deficient performance on an objective standard of reasonableness. Counsel cross-examined witnesses and made a closing argument and defendant cannot show that there is a reasonable probability that, but for counsel’s decision to waive opening statement, the result of the proceeding would have been different. *Swain*, 288 Mich App at 643.

Next, defendant contends that trial counsel rendered ineffective assistance when he stipulated to dismiss several potential jurors who had prior misdemeanor convictions. Defendant contends that counsel’s conduct denied him his right to a fair and impartial jury.

Initially, we note that the record is not clear that the prospective jurors’ convictions were for misdemeanors only. See MCL 600.1307a(1)(e) (persons with prior felony convictions cannot serve as jurors). Similarly, the record is unclear as to whether the prosecutor’s office in this case prosecuted any of the potential jurors. If so, then the trial court was required to excuse the prospective jurors pursuant to MCR 2.511(D)(11). Moreover, defendant cannot show that counsel’s performance denied him his right to a fair and impartial jury. “A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community.” *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996), citing *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975).

[T]o establish a prima facie violation of the fair cross-section requirement, a defendant must show “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” [*Hubbard*, 217 Mich App at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

In this case, to the extent defendant contends that he was denied a fair and impartial jury selected from a fair cross-section of the community, defendant fails to present any case law to support the proposition that people with criminal records constitute a “distinctive group” in the community. *Duren*, 439 US at 364. Moreover, there is no evidence to support that the jurors who were selected to serve were biased or unfair in any manner. Additionally, the trial court instructed the jury that defendant was presumed innocent and that the prosecutor was required to prove all of the elements of the charged offenses beyond a reasonable doubt and jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235. As such, defendant cannot show that counsel denied him his right to a fair and impartial jury when counsel stipulated to dismiss the prospective jurors with criminal records. Accordingly, defendant cannot show that counsel’s performance in this respect fell below an objective standard of reasonableness. *Swain*, 288 Mich App at 643.

Next, defendant argues that he is entitled to resentencing because the trial court erred in scoring offense variable (OV) 6 (intent to kill or injure another), at 50 points. The trial court scored OV 6 at 50 points for both defendant’s assault with intent to commit murder (AWIM) and

conspiracy to commit AWIM convictions. We review a trial court's scoring of the sentencing guidelines to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v Lechleitner*, 291 Mich App 56, 62; 804 NW2d 345 (2010). "A scoring decision will be upheld if there is any evidence to support it." *People v Keger*, 268 Mich App 187, 190; 706 NW2d 744 (2005). To the extent we must construe or apply the statutory sentencing guidelines, such issues present questions of law that we review de novo. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

MCL 777.36(1) directs a trial court to score 50 points for OV 6 where "[t]he offender had a premeditated intent to kill. . . ." Defendant contends that there is no evidence to support that he had premeditated intent to kill. However, as noted above, the record indicates that defendant approached the victim with a revolver, put it in the victim's side, and then tried to move the victim to an isolated area. Furthermore, the victim testified that defendant gave the revolver to Ashworth after Ashworth instructed defendant to kill the victim. This evidence was sufficient to support the trial court's finding that defendant acted with a premeditated intent to kill. As such, the trial court properly scored OV 6 at 50 points.

Defendant also contends that the trial court erred when it scored OV 6 for his conspiracy to commit AWIM conviction because conspiracy is a public safety offense for purposes of the sentencing guidelines.

Conspiracy is a "public safety" offense for the purposes of the sentencing guidelines. MCL 777.18. MCL 777.22(5) lists certain offense variables that a trial court must score for crimes against public safety and OV 6 is not included in that list. However, MCL 777.22(1) directs a trial court to score OV 6 for "homicide, attempted homicide, *conspiracy* or solicitation to commit a homicide, or assault with intent to commit murder" (emphasis added). A "homicide" is defined as "any crime in which the death of a human being is an element of that crime." MCL 777.1.

In this case, the trial court properly scored OV 6 because, when defendant conspired to commit AWIM, he necessarily conspired to commit a homicide because AWIM incorporates the intent to commit murder and the death of a human being is an element of murder. Specifically, AWIM requires actual intent to commit a murder. See *McRunels*, 237 Mich App at 181 (the elements of AWIM include: "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing a murder"). The death of a human being is an element of murder. See *People v Mesik (On Reconsideration)*, 285 Mich App 535, 546; 775 NW2d 857 (2009), quoting *Random House Webster's College Dictionary*, (2001) ("murder" is "the unlawful killing of a person, esp. when done with deliberation or premeditation. . . ."). Conspiracy to commit AWIM does not involve a plan to fail to commit murder; rather, the crime is complete where a defendant has intent to commit murder. Therefore, because the death of a human being is an element of murder, and because a trial court must score OV 6 where an offender conspires to commit such an offense, MCL 777.22(1), in this case, the trial court did not err in scoring the variable for defendant's conspiracy to commit AWIM conviction.

Affirmed.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello