STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMIEN LAMAR TAYLOR,

Defendant-Appellant.

UNPUBLISHED
August 11, 2000

No. 210567
Muskegon Circuit Court
LC No. 97-140488-FC

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316(1)(b); MSA 28.548(1)(2), conspiracy to rob while armed, MCL 750.529; MSA 28.797, MCL 750.157a; MSA 28.354(1), two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent prison terms of life without parole for the first-degree murder conviction, twenty to seventy-five years for the conspiracy conviction, and six to ten years each for the assault convictions, to be served consecutive to three concurrent two-year terms for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant's convictions arise from an alleged unsuccessful effort to rob a crack house. The incident led to the fatal shooting of one man, Timothy Horton, a crack cocaine dealer, and permanent injuries to two other victims, Al Bailey, another crack cocaine dealer, and Shatuan Smith, who was in the house to purchase crack cocaine. Defendant allegedly participated in the robbery attempt with three others, Tyrone Williams, Dontay McMann, and Clyde Wilson. Wilson, who allegedly participated as a "getaway" driver, testified for the prosecution pursuant to a plea agreement. Two teenage girls, Selma Mardella Davis and Chandra Keenan, both of whom were allegedly involved in the planning of the robbery, also testified for the prosecution pursuant to plea agreements. Davis, Keenan, and their friend, Whonita McGruther, were all present during the attempted robbery.

On appeal, defendant argues that the evidence was insufficient to support his convictions of the various offenses. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine

whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Noble*, 238 Mich App 647, 655; 608 NW2d 123 (1999). Circumstantial evidence and reasonable inferences that arise therefrom may be sufficient to prove the elements of a crime. *Id.* Intent may be inferred from all the facts and circumstances. *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991).

Defendant first claims that the evidence was insufficient to support his conviction for conspiracy. We disagree. A conspiracy is a "partnership in criminal purposes." *People v Atley*, 392 Mich 298, 310; 220 NW2d 465 (1974), quoting *United States v Kissel*, 218 US 601, 608; 31 S Ct 125; 54 L Ed 1168 (1910). "Under such a partnership, two or more individuals must have voluntarily agreed to effectuate the commission of a criminal offense." *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997); see also *People v Blume*, 443 Mich 476, 485; 505 NW2d 843 (1993). "The gist of the offense of conspiracy lies in the unlawful agreement." *Atley, supra* at 311.

> A conspirator need not participate in all the objects of the conspiracy. In general, each conspirator is held criminally responsible for the acts of his associates committed in furtherance of the common design, and, in the eyes of the law, the acts of one or more are the acts of all the conspirators. [*People v Grant*, 455 Mich 221, 236; 565 NW2d 389 (1997). Citations and footnote omitted.]

Direct proof of a conspiracy is not essential. Proof of a conspiracy may be derived from the circumstances, acts and conduct of the parties. *Justice, supra* at 347. "Inferences may be made because such evidence sheds light on the co-conspirators' intentions." *Id.*

Initially, we find no merit to defendant's claim that the evidence was insufficient to establish a conspiracy because the principal witnesses against him testified pursuant to plea agreements and, accordingly, were not believable. The credibility of witnesses is a matter for the trier of fact to resolve. *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998). The jury was free to believe the prosecution's witnesses and disbelieve defendant.

Defendant also claims that the evidence was insufficient to show that he was part of any conspiracy because two of the co-conspirators, Davis and Wilson, testified that they did not know defendant was going to be involved, and that Williams and McMann both failed to mention defendant's name when talking about the attempted robbery. Defendant contends that he was "merely present" at the time of the offense, which is insufficient to establish a conspiracy.

The fact that Davis and Wilson were not privy to defendant's involvement prior to the event does not defeat a conviction for conspiracy, which only requires agreement with one other person. *Justice, supra* at 345. Here, evidence was presented that Williams had recruited defendant to participate in the planned robbery and that defendant conspired with Williams to participate in the crime. Moreover, a third witness testified that Davis *did* mention defendant's name in connection with the plan. Furthermore, the evidence established more than defendant's mere presence at the scene. Wilson, who drove to the crack house, testified that defendant was in the car with Williams and McMann upon arriving at the house, and that, after Williams retrieved an assault weapon from the trunk, defendant

went with Williams and McMann toward the house. As they were standing in the driveway, Timothy Horton told Davis, Keenan, and McGruther that he saw three men by the side of the house who were probably going to rob him. The girls saw a man with an assault weapon approach Horton. Other witnesses saw two men approach the front door, shoot it open and run inside, shooting. Shatuan Smith, who was shot inside the house, saw two men run past her and out the back door, shooting at and chasing Al Bailey. Witnesses saw Bailey run into a house on Apple Avenue and saw two men running after him. The two men shot into the house as Bailey ran inside. Defendant was next seen running in the street, away from the two houses where the shots were fired. Wilson, Davis, Keenan, and McGruther testified that defendant jumped into the car in which they were riding as they were fleeing the scene. Several witnesses testified that they saw defendant with a .32 revolver. Spent casings for a .32 were found in the crack house.

Viewed most favorably to the prosecution, the evidence was sufficient to enable the jury to find, as it did, that defendant was guilty of conspiring to rob the crack house.

Defendant next claims that there was insufficient evidence of malice on his part to convict him of felony murder in connection with the shooting death of Timothy Horton. We disagree.

> The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute, including armed robbery]. [*People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995).]

Further,

> [t]he facts and circumstances of the killing may give rise to an inference of malice. A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. *Id*. Malice may also be inferred from the use of a deadly weapon. [*Carines, supra*. Citations omitted.]

By engaging in an armed robbery with others, a defendant sets in motion a force likely to cause death or great bodily harm. *Id.* at 760. Even if the defendant did not personally use a deadly weapon, a jury may infer that he acted with malice if he participated in a robbery involving the use of deadly weapon and acted in wanton and wilful disregard of the possibility that death or great bodily harm would result. *Id.*

The record demonstrates that defendant participated in the attempted robbery of a crack house with others who were known by him to be violent and dangerous and with knowledge that his co-conspirators were armed with deadly weapons. The evidence, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to conclude beyond a reasonable doubt that defendant

participated in the offense with the requisite malice to support a conviction for felony murder. *Carines, supra*.

We also reject defendant's claim that there was insufficient evidence of intent to support his convictions for two counts of assault with intent to do great bodily harm less than murder. Assault with intent to commit great bodily harm less than murder is a specific intent crime, requiring that a defendant act with the specific intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). An intent to harm the victim may be inferred from the defendant's conduct. *Id.*

At trial, the prosecutor argued that defendant could be convicted of assault with intent to do great bodily harm less than murder as an aider and abettor. To prove aiding and abetting, the prosecutor must show that (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 he gave aid and encouragement. *Turner*, *supra* at 568.

Here, the evidence was sufficient to convict defendant either directly or as an aider and abettor of assault with intent to do great bodily harm less than murder. The evidence was sufficient to enable the jury to find that defendant acted in concert with others whom he knew were armed and dangerous, that defendant himself was armed with a .32 revolver, that defendant was one of the individuals who entered the crack house shooting, and that defendant chased Bailey across the neighborhood shooting at him. An intent to do great bodily harm may be inferred from defendant's conduct. *Parcha, supra* at 239.

Defendant also contends that the evidence was insufficient to convict him of three counts of felony firearm. We disagree. The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Eye-witnesses testified that they heard shots of various velocities and sounds. Witnesses also testified that the two men who charged the door of the crack house were both armed with a firearm and both fired into the house. Defendant was seen carrying a firearm as he jumped into the getaway car and was seen putting it in his pocket while standing in the driveway at Davis' house afterwards. He was also seen putting it on a stool in Davis' bedroom and taking it with him when he left with Williams to get rid of the guns. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find that the essential elements of felony-firearm were proved beyond a reasonable doubt.

Finally, defendant argues that in two respects, the trial court's instructions to the jury before and during deliberations created an impermissible coercive environment for the jury. First, defendant contends that "scheduling pressures" exerted by the court created a coercive environment. Because defendant did not object to the court's instructions at trial, appellate relief is precluded absent a showing of plain error that affected the outcome of the trial. *Carines*, *supra* at 763-764.

After carefully reviewing the court's instructions, we conclude that they did not create a coercive environment that affected the outcome of the trial. Rather, the court specifically stated when discussing the schedule that would govern during deliberations that its comments were

> not to be taken . . . as any particular directive as to the time limit you have to reach a verdict, because you may have all the time you need to deliberate. I am only telling this to you so that the attorneys and my staff can make plans.

Further, the court specifically inquired if limiting the lunch break to an hour rather than the usual hour and a half would be a hardship for any of the jurors, and they all indicated that it would not. Finally, when making its inquiry regarding whether a verdict was imminent, the court stated:

> Don't tell me how your voting is divided. I don't want to know how your voting stands, but I am asking the foreman's perception. If you feel you're very close to a verdict and another half hour might be realistic as an opportunity to reach a verdict, I am willing to stay for you so you don't have to come back Monday. But if you feel that it's unrealistic to think that a verdict could be reached even in the next 30 minutes, I will just let you go now and we will come back Monday morning.

The court never inquired into the numerical division amongst the jurors. Accordingly, no clear error is apparent from the challenged instructions. See *People v Wilson*, 390 Mich 689, 692; 213 NW2d 193 (1973); *People v Andre Alexander*, 112 Mich App 74, 78; 314 NW2d 801 (1981).

Defendant also contends that the court's instruction advising the jury that a transcript of the trial was not available contributed to a coercive environment. However, defendant affirmatively approved the court's instruction with regard to the availability of a transcript; accordingly, any error in this regard is waived. *People v Carter*, ___ Mich ___; ___ NW2d ___ (Docket No. 113817, decided June 27, 2000), slip op p 15. Moreover, any error was cured when the court subsequently instructed the jury that it could request a re-reading of any trial testimony. See *People v Howe*, 392 Mich 670, 676; 221 NW2d 350 (1974); see also MCR 6.414(H).

Affirmed.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra
/s/Jeffrey G. Collins