STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2006
v TERRY LEHAMAN HARDISON, Defendant-Appellant.	No. 264590 Wayne Circuit Court LC No. 05-003295-03

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v FERLANDO SANTINO HARRIS, Defendant-Appellant.	No. 264592 Wayne Circuit Court LC No. 05-003295-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v RASEAN DANIEL PRESTON, Defendant-Appellant.	No. 264761 Wayne Circuit Court LC No. 05-003295-01

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

In Docket No. 264590, defendant, Terry Lehaman Hardison, appeals as of right his jury trial conviction of assault with intent to rob while armed, MCL 750.89. Hardison was sentenced to 70 months' to 15 years' imprisonment for this conviction. We affirm.

In Docket No. 264592, defendant, Ferlando Santino Harris, appeals as of right his jury trial conviction of assault with intent to rob while armed, MCL 750.89. Harris was sentenced to 70 months' to 15 years' imprisonment for this conviction. We affirm.

In Docket No. 264761, defendant, Rasean Daniel Preston, appeals as of right his jury trial conviction of assault with intent to rob while armed, MCL 750.89. Preston was sentenced to 70 months' to 15 years' imprisonment for this conviction. We affirm.

On appeal, all three defendants argue that the evidence was insufficient to support their convictions. We disagree. Due process requires that evidence establish guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). The Court does not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

It is the role of the trier of fact rather than this Court to draw reasonable inferences from the evidence and accord the proper weight to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Issues of credibility and intent are also left to the trier of fact rather than this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). In addition, this Court must resolve all conflicts of evidence in favor of the prosecution, who need not negate every reasonable theory of innocence, but need only prove its case beyond a reasonable doubt despite any contradictory evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The elements of assault with intent to rob while armed are: "(1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003); MCL 750.89.

Here, Henry Smith explained that he was walking down the street while holding cash in his left hand when he felt someone wrap a belt around his neck. At this, Smith turned around and saw Hardison "recoil with whatever he hit [Smith] with." Smith explained that Preston then picked up a concrete slab and attempted to hit Smith's head with it. Smith claimed that, as Preston was raising the slab, he could see what appeared to be a gun inside Preston's pants. Then, Preston tried to go through Smith's jacket pocket while Hardison and Harris were kicking and hitting Smith. Hardison and Harris also pulled at Smith's jacket. Sometime during the attack, Preston told the other defendants, "[h]e doesn't have anything," and all three defendants left the scene. Shortly thereafter, Smith called 911. After Smith concluded the 911 call, he saw defendants carrying a pizza box and heard them yelling and laughing at him from across the street. Smith subsequently described his attackers to police, who found defendants in a near-by alley with a pizza box. Smith then identified defendants as his attackers.

It is reasonable to infer that Hardison used a belt as a weapon with which to assault Smith. Further, it is reasonable to infer that Hardison intended to rob Smith, given that he tugged on Smith's jacket while kicking and beating him, stopped assaulting Smith only after Preston indicated that Smith did not have "anything," and later taunted Smith as he walked past defendants after the attack. Given that "[c]ircumstantial evidence and reasonable inferences

drawn therefrom may be sufficient to prove the elements of the crime," *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993), the evidence was sufficient to support Hardison's conviction.[1]

Similarly, it is clear that Preston, too, assaulted Smith with a weapon, i.e., a concrete slab. Further, given that Preston attempted to go through Smith's jacket and stopped only after noting that Smith did not have "anything," it is reasonable to infer that Preston was trying to rob Smith. *Jolly*, *supra* at 466. Preston points out on appeal that nothing was stolen from Smith. However, stealing is not an element of this offense. *Akins*, *supra* at 554. In addition, although evidence was presented that Preston may have possessed a gun, but did not use it, not every theory of innocence must be refuted for the evidence to sufficiently support a conviction. *Nowack*, *supra* at 400. Therefore, sufficient evidence existed to support Preston's conviction.

Preston also claims that the jury's verdict was against the great weight of the evidence. This claim also fails. This Court reviews the unpreserved issue of whether the verdict was against the great weight of the evidence for plain error affecting a defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To determine whether the verdict is against the great weight of the evidence, this Court reviews the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998). When the evidence conflicts, the Court must leave the resolution of credibility issues to the jury, even if the testimony is impeached to a certain extent, *Lemmon*, *supra* at 642-643, "unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or [the testimony] contradicted indisputable physical facts or defied physical realities . . . ," *id*. at 645-646, quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 410, 412; 124 NW2d 255 (1963).

Here, Preston correctly points out that Smith's version of events was inconsistent over time with respect to the color of the jacket one of the attackers was wearing, whether Smith fell to the ground during the attack, whether Smith was attacked at a bus stop or in the street, and whether Smith was wearing his glasses when he saw defendants walking across the street after the attack. Despite these inconsistencies, the evidence against Preston was not impeached to the point of being incredible, nor did it "'contradict[] indisputable physical facts or def[y] physical realities.'" *Lemmon*, *supra* at 642-643, quoting *Sloan*, *supra* at 410, 412. Thus, it was the jury's role to resolve these inconsistencies. *Lemmon*, *supra* at 642-643. Therefore, the verdict was not against the great weight of the evidence.

As for the jury's verdict against Harris, we note at the outset that no evidence was presented to suggest that Harris was armed during the attack of Smith. However, sufficient evidence existed to convict Harris under an aiding and abetting theory. To convict a defendant as an aider and abetter, MCL 767.39 requires the prosecution to show that "the crime was committed by the defendant or another, that the defendant performed acts or gave encouragement that aided or assisted the commission of the crime, and that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time

[1] Given our resolution of this issue, it is unnecessary to address Hardison's argument that the evidence was insufficient to convict him under an aiding and abetting theory.

the defendant gave the aid or assistance." *People v Jones*, 201 Mich App 449, 451; 506 NW2d 542 (1993).

As noted above, the prosecutor presented sufficient evidence to establish Hardison's and Preston's intent to rob Smith. Given Harris's conduct, it is reasonable to infer that he was aware of this intent when he joined in the assault on Smith. Specifically, it was only after Harris witnessed Hardison and Preston attack Smith with a belt and concrete slab that Harris kicked Smith in the groin and began beating Smith and pulling on his jacket. Like Hardison, Harris did not stop attacking Smith until Preston said, "He doesn't have anything." Harris also walked past Smith with the other defendants and taunted Smith after the attack. Thus, there was sufficient evidence to support Harris's conviction.

Harris also claims that the trial court failed to instruct the jury on the specific intent element required to convict a defendant of aiding and abetting. This claim also fails. This Court reviews an unpreserved instructional issue for plain error. *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005). To avoid forfeiture, a defendant must show that there was plain error that affected his substantial rights, i.e., that the error was outcome determinative. *Carines*, *supra* at 763-764.

A trial court is required to clearly present a case and instruct the jury on the applicable law. *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001), aff'd 468 Mich 272 (2003). Accordingly, "[j]ury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). As previously noted, to convict a defendant as an aider and abetter, MCL 767.39 requires the prosecution to show that "the crime was committed by the defendant or another, that the defendant performed acts or gave encouragement that aided or assisted the commission of the crime, and that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave the aid or assistance." *Jones*, *supra* at 451.

Here, the trial court instructed the jury that to convict a defendant of aiding and abetting, the prosecution must show:

> First, that the alleged crime was actually committed either by the defendant or someone else. It does not matter whether anyone else has been convicted of that crime. Second, that before or during the crime the defendant did something to assist in the commission of the crime. Third, that the defendant must have intended the commission of the crime alleged *or must have known that the other person intended its commission at the time of the giving of assistance.* [Emphasis supplied.]

Therefore, the trial court properly instructed the jury on the elements of aiding and abetting.

We affirm.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra