

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEREMY AARON JOSEPH,

Defendant-Appellant.

---

UNPUBLISHED

April 1, 2008

No. 273587

Cass Circuit Court

LC No. 05-010470-FC

Before: Davis, P.J., and Murphy and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of assault with intent to do great bodily harm, MCL 750.84; two counts of felonious assault, MCL 750.82; one count of conspiracy to commit felonious assault, MCL 750.82, MCL 750.157a; and one count of carrying a weapon with unlawful intent, MCL 750.226.<sup>1</sup> Defendant was sentenced to 57 to 120 months' imprisonment for assault with intent to do great bodily harm; 2 to 5 years' imprisonment for carrying a weapon with unlawful intent; and 23 to 48 months' imprisonment for each of the two counts of felonious assault and for the count of conspiracy to commit felonious assault. We affirm.

Defendant first argues that the prosecutor did not present sufficient evidence from which a rational jury could find that there was an agreement between him and his codefendants to support a conspiracy charge. He asserts that he and his codefendants did not even know that the victim would be present, and that there was insufficient time at the scene in which to form an agreement. We disagree. We review challenges to the sufficiency of the evidence de novo and in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002). Circumstantial evidence and the reasonable inferences that arise therefrom can constitute sufficient proof of the elements of a crime beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A conspiracy is a voluntary mutual agreement or

---

<sup>1</sup> Defendant was charged with 46 counts, involving several victims and firearms charges, but was found not guilty of all counts except the five at issue.

understanding between two or more people to commit a criminal act. *People v Blume*, 443 Mich 476, 481, 485; 505 NW2d 843 (1993). The elements of conspiracy are: (1) defendant intended to combine with another person; and (2) the participants intended to accomplish an illegal objective. *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). The prosecutor was required to prove that the parties "specifically intended to further, promote, advance, or pursue an unlawful objective." *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). A conspiracy is complete upon formation of the agreement; therefore, no overt act in furtherance of the conspiracy must be shown to support a conviction. *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991). When multiple assailants coordinate an attack, it is reasonable to infer that they entered into a conspiracy. *People v Carter*, 415 Mich 558, 568; 330 NW2d 314 (1982). Proof of a conspiracy may be derived from the circumstances, acts, and conduct of the parties during the crime, and inferences are permissible. *Justice, supra* at 347. Minimal circumstantial evidence is sufficient to prove intent. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

The prosecution presented evidence from which the jury could have concluded that defendant and his codefendants went to the park together with weapons, and with the intent to use those weapons in a fight. It is not necessary that defendant and his codefendants knew the exact identity of the men they intended to assault. The crime of conspiracy only requires a defendant to agree to commit some illegal act. MCL 750.157a does not require that a defendant intend an illegal act against a specific victim. Further, the intent necessary to prove the underlying crime that formed the basis of the conspiracy charge, felonious assault, may also be established through the doctrine of transferred intent, which provides that as long as the defendant had the requisite intent as to any of the victims, such intent transfers to even an unintended victim. *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979). Thus, viewed in a light most favorable to the prosecution, there was sufficient evidence to convict defendant of conspiracy to commit felonious assault.

Defendant also challenges the sufficiency of the evidence establishing guilt of the other offenses. He argues that the witnesses were not credible, that he never admitted his guilt and always maintained that he acted in self-defense, that the physical evidence supports his version of the events, rather than the prosecution's, and that there was insufficient evidence linking him to Armstrong, the victim, and to the gun that was fired. We disagree.

In Michigan, there is no distinction between principals and accessories for purposes of establishing culpability. MCL 769.39. The requisite intent to convict a defendant as an aider and abettor is the same intent necessary to convict the principal of the underlying crime. *Mass, supra*, 464 Mich at 628; *People v Kelly*, 423 Mich 261, 278; 378 NW2d 365 (1985).

One victim testified that the two passengers of the assailants' car each possessed baseball bats when they departed from the car and began their attack. The evidence supported an inference that, regardless whether defendant was the driver or a passenger, he was aware of the codefendants' intent to assault the victims with a dangerous weapon when they left the Neon. An aider and abettor's state of mind may be inferred from all the facts and circumstances. *Carines, supra* at 757-758. There was also evidence from which the jury could have concluded that defendant yelled for one of his codefendants to get the gun.

While defendant argues that the victims presented inconsistent stories regarding the actions of the assailants during the altercation, all conflicts in the evidence must be resolved in favor of the prosecution when presented with a challenge to the sufficiency of the evidence. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Viewed in a light most favorable to the prosecution, there was sufficient evidence for the jury to reasonably conclude that defendant or one of his codefendants committed both assault with intent to do great bodily harm and two counts of felonious assault, and that defendant either committed or aided and abetted the commission of the offenses. Defendant admitted to striking one victim in the head with a baseball bat. Defendant also aided and abetted the other attacks, which involved the striking of two other victims, one victim being struck at least twice in the back of his head with a bat, causing serious injuries, which would have been critical if not properly treated.

Defendant nevertheless argues that the prosecutor did not prove beyond a reasonable doubt that he did not act in self-defense, *People v Elkhoja*, 251 Mich App 417, 443; 651 NW2d 408 (2002), vacated in part on other grounds 467 Mich 916 (2003), and thus that his convictions are improper. An assault may be excused as justified self-defense if, under the circumstances, a defendant honestly and reasonably believed that it was necessary to use the force to protect himself from harm. *People v Riddle*, 467 Mich 116, 142; 649 NW2d 30 (2002). Evidence that defendant could have safely avoided using deadly force is relevant in determining whether it was reasonably necessary for him to use force. *Id.* The amount of force used must be proportionate to the danger. *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993). In this case, the prosecutor presented evidence that, after the codefendants traveled to the park to engage in the altercation, there were several opportunities for them to depart, where they were unlikely to be harmed. Further, the victims testified that defendant and the assailants initiated the attack. A defendant may not claim self-defense where he was the initial aggressor, unless he withdraws from any further encounter with the victim and communicates the withdrawal to the victim. *Id.* at 323. While defendant asserted that the victims acted as the aggressors, the victims testified that the codefendants were the assailants, and we draw all reasonable inferences and make credibility choices in favor of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Further, even though defendant testified that he acted in self-defense, there was conflicting evidence contradicting defendant's claim, and it is the province of the jury to assess the credibility of witnesses and to assess the importance of evidence. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Defendant next argues that the prosecutor failed to present sufficient evidence that he carried a weapon with unlawful intent. The elements of carrying a weapon with unlawful intent are: (1) carrying a dangerous weapon, (2) with the intent to use the weapon against another person. *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). Possession may be either actual or constructive, and may be joint or exclusive. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748, amended 441 Mich 1201 (1992). A defendant has constructive possession of a weapon if the location of the weapon is known and the weapon is reasonably accessible to the defendant. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). The evidence of collaborative behavior on behalf of the assailants supported an inference that defendant had constructive possession of a firearm that was used during the altercation, and that he intended for it to be used against another person. Intent may be inferred from all the facts and circumstances surrounding the event. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Thus, viewed in a light most favorable to the prosecution, there was sufficient evidence

presented at trial for a rational jury to find defendant guilty beyond a reasonable doubt of carrying a weapon with unlawful intent.

Defendant next argues that the trial court committed plain error by failing to order a new jury panel after a potential juror stated to the venire that defendant's codefendants were convicted for their roles in the altercation. We disagree.

During voir dire, the prosecutor asked potential jurors whether they were exposed to any publicity about the instant action. One potential juror responded, "I've read a lot about this, and I already know that some of them have been convicted." The trial court asked that potential juror whether the information that he read would interfere with his ability to decide the case fairly, to which he responded, "yes." The trial court subsequently dismissed that potential juror without objection by either party. Other potential jurors indicated familiarity with the case, but stated that they could be fair. Defendant's attorney passed on a remaining peremptory challenge, and "accept[ed] the panel as constituted." A defendant waives his right to challenge a jury array if he indicates his satisfaction with an impaneled jury after voir dire. *People v Hubbard (After Remand)*, 217 Mich App 459, 466-467; 552 NW2d 493 (1996). Further, the jury was instructed to decide the case on the evidence. Thus, defendant failed to preserve the issue, and has established no prejudice in any event.

Defendant next argues that the trial court abused its discretion by admitting evidence that police found a cache of firearms and baseball bats on, or near, defendant's property. Defendant argues that the evidence should have been excluded because it was irrelevant and prejudicial. The evidence of the weapons found on or near defendant's property was relevant to show that defendant had access to weaponry similar to the weaponry used during the altercation, and supported that weapons were present pursuant to an agreement between defendant and his codefendants. Further, the jury was clearly able to make distinctions based on the testimony regarding defendant's involvement, without being swayed by the weapons evidence, as shown by the fact that the jury found defendant not guilty of most of the charges.

Defendant also argues that the prosecutor committed misconduct by seeking the admission of this evidence. However, prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence, and there is no basis to conclude that the prosecutor did not act in good faith. Defendant next argues that the prosecutor committed misconduct by introducing certain testimony of Detective Vandenbrink regarding the weapons cache. The prosecutor asked Detective Vandenbrink whether, in "four years of experience in law enforcement, have you ever come across an armory of guns like this in the woods before?" Detective Vandenbrink replied, "no, sir." We agree with defendant that the evidence was irrelevant. However, defendant did not object to this testimony at trial and must show that admission of the testimony resulted in a miscarriage of justice. This Court will not find a miscarriage of justice if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We again note that defendant was acquitted of most of the firearms charges brought against him, indicating that the admission of Detective Vandenbrink's challenged testimony did not affect defendant's substantial rights. Defendant next argues that the prosecutor committed misconduct by introducing evidence that the police went to defendant's residence after they talked to a codefendant, and that the police arrested the subjects involved in the incident at Lawless Park. Defendant mentions these alleged instances of

prosecutorial misconduct in one sentence, however, and does not elaborate on them. We fail to see how defendant was deprived of a fair trial by this testimony.

Defendant next argues that the trial court violated defendant's Sixth Amendment right to a jury trial when it scored defendant's sentencing guidelines based upon facts that were not proven to a jury beyond a reasonable doubt. We disagree. It is a violation of the Sixth Amendment for a trial court to increase a defendant's sentence beyond the maximum sentence permitted by law on the basis of facts found by the court rather than the jury, other than a prior conviction. US Const, Am VI; *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004); *Almendarez-Torres v United States*, 523 US 224; 118 S Ct 1219; 140 L Ed 2d 350 (1998). However, contrary to defendant's arguments on appeal, Michigan's indeterminate sentencing scheme is not affected by the ruling in *Blakely*, *supra*. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006). Therefore, "[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Drohan*, *supra* at 164. In addition, a defendant's prior record may be determined by a sentencing judge, without submitting the issue of prior convictions to a jury, without violating of the Fifth, Sixth or Fourteenth Amendments. *Almendarez-Torres*, *supra* at 230.

Next, defendant argues that the trial court was required to score the offense variables for each of the individual crimes for which he was convicted. While the trial court signed and filed a Sentencing Information Report ("SIR") for each of the conviction offenses, it was not required to do so. *People v Mack*, 265 Mich App 122, 127-129; 695 NW2d 342 (2005). Although, in *People v Johnigan*, 265 Mich App 463; 696 NW2d 724 (2005), this Court appeared to disagree with the holding in *Mack*, *Mack* controls the issue at hand because the language in *Johnigan* is dicta. Therefore, the trial court was only required to score defendant's offense variables for the highest crime class for which he was convicted, assault with intent to do great bodily harm. Assault with intent to do great bodily harm is a class D felony, MCL 777.16d, felonious assault is a class F felony, MCL 777.16d, and carrying a weapon with unlawful intent is a class E felony, MCL 777.16m.

Next, defendant challenges the scoring of 25 points on OV 1, the offense variable relating to the "aggravated use of a weapon." OV 1 is governed by MCL 777.31, which allows a trial court to score 25 points if a firearm was discharged at or toward a person. MCL 777.31(1)(a). A trial court's scoring decision will be upheld if there is any evidence in the record to support it. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005). In multiple offender cases, the statute governing OV 1 requires that, if one offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points. MCL 777.31(2)(b). The trial court noted that the codefendants received 25 points for OV 1.

Defendant next challenges the trial court's scoring of OV 2. OV 2 should be scored at 5 points where an offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon. MCL 777.32. There was evidence presented at trial supporting that defendant constructively possessed and urged the use of a shotgun.

Defendant next objects to the trial court's scoring of OV 3 at 25 points. OV 3 is to be scored at 25 points where a victim suffers life-threatening or permanent incapacitating injury MCL 777.33. At trial, the prosecutor presented evidence from the physicians who treated two of

the victims shortly after the altercation; one victim was treated for a gunshot wound to his right eyebrow, an abrasion to his lip with a laceration on the inside, and two gunshot wounds to his right arm. One shotgun pellet entered near that victim's right eyebrow, ricocheted off his nose, and lodged in his sinus. The other victim was treated for a laceration and bruising to the back of the head, bruising to his right shoulder blade, and burns on his right arm. Finally, there was evidence that a third victim sustained injuries that would have been critical if left untreated. Therefore, the trial court did not abuse its discretion by scoring defendant 25 points for OV 3.

Defendant next challenges the trial court's decision to score ten points for OV 4. Ten points are to be scored if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). In his victim impact statement, one of the victims stated that, after the incident, he was unable to sleep, due to "anxiety over possible harm that may come to me or my family from someone trying to get back at me, regarding this case." Further, that victim stated that he no longer felt safe going out in public. To score ten points for OV 4, a victim is not required to actually receive psychological treatment. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

Defendant next challenges the trial court's decision to score ten points for OV 9. Ten points are to be scored for OV 9 where there are between two to nine victims who were placed in danger of physical death or injury. MCL 777.39. Here, the medical evidence detailing the injuries suffered by three of the victims showed that they were placed in danger of physical death or injury. Defendant admitted striking one of the victims in the head with his baseball bat, and there was evidence supporting that defendant instructed his codefendants to "get the gun," or "grab the gun," after which one of the codefendants discharged a shotgun in the direction of the victims at close range.

Defendant finally objects to the trial court's decision to score OV 12 at 25 points. Twenty-five points are to be scored for OV 12 where a defendant commits three or more contemporaneous felonious acts against a person in a 24-hour period. MCL 777.42. Defendant argues that there was no evidence that he engaged in felonious behavior presented to the trial court, other than the actions that formed the basis of defendant's charges. The statute governing OV 12 specifically defines a contemporaneous felonious act as an act that occurred within 24 hours of the sentencing offenses, which will not result in a separate conviction. MCL 777.42(2)(a). However, this Court has previously held that the trial court may sentence defendant for acts that he was charged with committing, but for which he was not convicted.

Defendant finally makes a general argument that he was denied the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of defendant's trial would have been different, and (3) the resulting trial was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *Mack, supra*, 265 Mich App at 129. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant has the burden to show that counsel's performance fell below an objective standard of reasonableness and that it is reasonably probable that the result of the proceedings

would have been different but for counsel's performance. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defendant does not argue, much less demonstrate, that, but for his trial counsel's failures to object, the outcome at trial, or on appeal, would have been different.

Affirmed.

/s/ Alton T. Davis  
/s/ William B Murphy  
/s/ Helene N. White