STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2011
v KENNEDY LEE NIX, Defendant-Appellant.	No. 293677 Wayne Circuit Court LC No. 09-008458-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ALLEN MITCHELL BLAIR, Defendant-Appellant.	No. 293734 Wayne Circuit Court LC No. 09-008458-FH

Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

Defendants Kennedy Nix and Allen Blair were tried jointly, before a single jury. They were each convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault, MCL 750.82. Defendant Nix was sentenced to concurrent prison terms of four to ten years for the assault with intent to do great bodily harm conviction and two to four years for the felonious assault conviction. Defendant Blair was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 8 to 20 years for the assault with intent to do great bodily harm conviction and two to four years for the felonious assault conviction. Defendant Nix appeals as of right in Docket No. 293677, and defendant Blair appeals as of right in Docket No. 293734. In Docket No. 293677, we remand for proceedings consistent with this opinion. In Docket No. 293734, we affirm.

I. BASIC FACTS

Defendants were convicted of assaulting Charles Baker, the boyfriend of defendant Nix's mother, Kecia Nix. According to Kecia, defendant Nix entered Kecia's bedroom, where Baker was lying on a bed, and accused Baker of taking Kecia's money. Kecia asked defendant Nix to leave the room, but he refused. Baker and Kecia both testified that defendant Nix subsequently hit Baker in the jaw or cheek. Baker hit defendant Nix back. Kecia tried to break up the fight and called the police. According to both Baker and Kecia, defendant Nix called for defendant Blair, who was already in the house, to help him "get Baker." Baker claimed that both defendants thereafter assaulted him over a period of approximately an hour. Baker stated that he was knocked down to the floor, where he was kicked, hit, and stomped, and that he was struck with bottles, chairs, a coffee table, and the wooden handle of a snow shovel. Baker testified that both defendants participated in the assault, during which defendant Nix attempted to ram the handle of a shovel into Baker's rectum and also scraped Baker's face with a steak knife while telling him that he was going to leave in a "body bag." Baker and Kecia both received serious injuries that required treatment at a hospital.

Defendant Nix testified at trial that it was Baker who first assaulted him. Defendant Nix claimed that he only used his fists to defend himself from Baker, and that he never used any weapon. Defendant Blair denied participating in any assault on Baker and claimed that his involvement was limited to attempting to break up the fight between defendant Nix and Baker.

I. DOCKET NO. 293677

A. INSTRUCTION ON SELF-DEFENSE

Defendant Nix argues that a new trial is required because, although the trial court instructed the jury on his claim of self-defense, it erroneously instructed that, to be entitled to claim self-defense, it was necessary for the jury to find that at the time defendant Nix acted, he "must have been . . . engaged in commission of a crime." Defendant Nix did not object to the trial court's self-defense instruction at trial, and the issue is unpreserved.

The lower court record reflects that the trial court instructed the jury that, for defendant Nix to be entitled to self-defense, he "must have been . . . engaged in commission of a crime" at the time he acted. However, a correct instruction would have indicated that defendant "must *not* have been engaged in the commission of a crime" to lawfully claim self-defense. CJI2d 7.22(3) (emphasis added); see also MCL 780.972(2). We note that the trial court later accurately instructed the jury that "the person claiming self-defense must not have acted wrongfully and brought on the assault." We also note that the jury did not request clarification of the trial court's seemingly conflicting instructions. On appeal, the parties acknowledge that the court indicated to the jury that it would be provided a written copy of the jury instructions, but the lower court record does not contain any verification that this was done.

On appeal, the prosecution requests "a hearing to determine whether the transcript contains a typographical error," and suggests that this Court query whether any record evidence exists to determine whether the jury was provided with a correct written copy of the jury instruction on self defense. We agree with this course of action. MCR 7.216(A) provides that "[t]he Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just," including "(4) permit . . . corrections, or additions to the transcript or

record" and to " (5) remand the case to allow additional evidence to be taken." Accordingly, in Docket No. 293677, we remand to the trial court for proceedings consistent with this opinion.

II. DOCKET NO. 293734

A. SUFFICIENCY OF THE EVIDENCE

Defendant Blair argues that the evidence was insufficient to support his convictions for assault with intent to do great bodily harm less than murder and felonious assault. We disagree. An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be reviewed in a light most favorable to the prosecution. *Id*. at 514-515. All conflicts in the evidence must be resolved in favor of the prosecution. *People v John T Williams, Jr*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

The testimony of Baker and Kecia indicated that defendant Blair participated in the assault of Baker by hitting Baker in the head with several bottles, by stomping or kicking Baker's neck, chest, head, back, and legs while Baker was lying on the ground, and by throwing a coffee table that bounced off the wall and struck Baker in the head. This testimony was sufficient to enable the jury to find each of the elements of assault with intent to do great bodily harm less than murder and felonious assault beyond a reasonable doubt. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996); *People v John Davis, Jr*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Although defendant Blair argues that Baker and Kecia were not credible, the credibility of their testimony was for the jury to resolve and this Court will not resolve it anew. *People v Thomas Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

B. SENTENCING

Defendant Blair also argues that his sentence of 8 to 20 years' imprisonment for assault with intent to do great bodily harm less than murder is unconstitutionally cruel and/or unusual, contrary to US Const, Am VIII and Const 1963, art 1, § 16. We disagree.

A sentence that is grossly disproportionate to the offense constitutes cruel or unusual punishment. *People v Bullock*, 440 Mich 15, 30, 32-40; 485 NW2d 866 (1992). Here, defendant Blair was sentenced within the sentencing guidelines range of 34 to 100 months. A sentence within the guidelines range is presumptively proportionate, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Powell*, 278 Mich App 318, 323-324; 750 NW2d 607 (2008), and a sentence that is proportionate is not cruel or unusual punishment, *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997). There is nothing unusual about defendant Blair's age or background, or the circumstances of this case, to overcome the presumptive proportionality of defendant Blair's sentence, especially considering that his conviction arises from his participation in an extremely assaultive offense, that he has prior convictions for receiving or concealing stolen property and possession of cocaine, and that he committed this offense while on probation. Thus, defendant Blair's sentence is not cruel or unusual.

In Docket No. 293734, we affirm. In Docket No. 293677, we remand for proceedings consistent with this opinion. We do not retain jurisdiction, defendant having a right to appeal the final order issued by the trial court on remand. MCR 7.202(6)(b)(iv).

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood