

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 13, 2011

v

NUO NUCULOVIC,

No. 296194
Macomb Circuit Court
LC No. 2009-000059-FC

Defendant-Appellant.

Before: SAWYER, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, and conspiracy to commit assault with intent to do great bodily harm less than murder, MCL 750.157a; MCL 750.84. Defendant was sentenced, as a habitual offender, second offense, MCL 769.10, to concurrent terms of 60 to 180 months' imprisonment for both convictions. We affirm.

Defendant argues that the evidence was insufficient to show that he and codefendant, Toma Juncaj (Juncaj), formed an agreement to commit assault with intent to do great bodily harm. We disagree. When reviewing a claim of insufficient evidence, this Court reviews the record de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). In reviewing the sufficiency of the evidence, this Court "must not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault); and (2) an intent to do great bodily harm less than murder. MCL 750.84;¹ *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). The second element requires proof of specific intent. *People v*

¹ MCL 750.84 provides, "[a]ny person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars."

Parcha, 227 Mich App 236, 239; 575 NW2d 316 (1997). “An intent to harm the victim can be inferred from [the] defendant’s conduct.” *Id.*

“A conspiracy exists where two or more persons combine with the intent to accomplish an illegal objective.” *People v Martin*, 271 Mich App 280, 317; 721 NW2d 815 (2006), *aff’d* 482 Mich 851 (2008); MCL 750.157a.² Conspiracy requires proof of specific intent to both combine with at least one other person and to accomplish an illegal objective. *People v Justice (After Remand)*, 454 Mich 334, 346-347; 562 NW2d 652 (1997). The prosecution need not offer direct proof of the conspiracy. *Martin*, 271 Mich App at 317. Rather, the circumstances, acts, and conduct of the parties can be sufficient to establish an agreement in fact. *Id.* Additionally, circumstantial evidence and inferences arising from the evidence may establish the existence of the conspiracy. *Id.*

In reviewing the record in the light most favorable to the prosecution, a rational trier of fact could find that there was sufficient evidence to prove beyond a reasonable doubt that defendant and Juncaj agreed to accomplish the illegal objective of assaulting Andi Paju, the victim, with the intent to do great bodily harm. “What the conspirators actually did in furtherance of the conspiracy is evidence of what they had agreed to do.” *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002). Here, Juncaj called defendant before taking Paju to the empty condominium. At the condominium, Juncaj and Paju surveyed the layout of the condominium until defendant arrived. Once defendant, who pretended to be the owner of the condominium, arrived, he and Juncaj attempted to lead Paju into the basement. However, Paju received a phone call and decided to remain on the first floor. Once Paju ended his phone call, defendant and Paju agreed upon the lease terms, and Paju gave defendant a down payment to lease the condominium. At that point, Paju began to walk towards the front door. However, once Paju turned away from defendant, defendant grabbed Paju from behind and began to choke him. At the same time, Juncaj also began to attack Paju. During the struggle, Paju suddenly felt a burning pain in his left chest area before he lost consciousness. When Paju awoke, defendant was standing over Paju with his foot on Paju’s chest. Paju, who was having difficulty breathing, begged for his life; however, defendant told Paju that it was too late. When Paju tried to get up, Juncaj came over, pushed Paju back onto the ground, and Juncaj told Paju not to force him to stab Paju again. As Juncaj was walking away from Paju, Paju managed to stand back up, and he ran through the glass sliding door onto the backyard deck. Likewise, Janet Rentz testified that she saw two men attacking Paju on the backyard deck until all three men fell into the backyard grass and then Paju ran into the middle of the road. This evidence was sufficient for the jury to find that defendant and Juncaj conspired to assault Paju with the intent to do great bodily harm less than murder. *Roper*, 286 Mich App at 83.

We note that defendant argues that he is entitled to resentencing because his minimum sentencing guidelines range changed. However, because there is sufficient evidence to uphold

² MCL 750.157a provides, “[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....”

defendant's conspiracy to commit assault with intent do great bodily harm conviction, his minimum sentencing guidelines range has not changed, and resentencing is not required. Consequently, this issue is moot, and we need not address it further. *People v Mansour*, 206 Mich App 81, 82; 520 NW2d 646 (1994) (an issue is moot when this Court cannot fashion a remedy).

Defendant asserts that the standard reasonable doubt jury instruction, CJI2d 3.2, improperly shifts the burden of proof and lowers the standard of proof. We disagree. This Court reviews claims of instructional error de novo. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her." *Dobek*, 274 Mich App at 82. "The trial court's role is to clearly present the case to the jury and to instruct it on the applicable law." *Id.* The instructions must include all elements of the charged offenses and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

The standard reasonable doubt jury instruction, CJI2d 3.2, provides:

- (1) A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless you are satisfied beyond a reasonable doubt that [he/she] is guilty.
- (2) Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove [his/her] innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.
- (3) A reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not merely an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that—a doubt that is reasonable, after a careful and considered examination of the facts and circumstances of this case.

Defendant argues that that the word "possible" (in the third paragraph) improperly shifts the burden of proof to defendant and lowers the standard of proof needed to convict defendant. "To pass scrutiny, a reasonable doubt instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt." *People v Hubbard*, 217 Mich App 459, 487; 552 NW2d 493 (1996). This Court has held that CJI2d 3.2 adequately conveys the concepts of reasonable doubt, the presumption of innocence, and the burden of proof. *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003); *People v Werner*, 254 Mich App 528, 538; 659 NW2d 688 (2002). Furthermore, this Court also has held that CJI2d 3.2 does not shift the burden

of proof to the defendant. *Hill*, 257 Mich App at 152, citing *Hubbard*, 217 Mich App at 488. Thus, because the entire instruction from CJI2d 3.2 has been held to be adequate by this Court, defendant's argument is without merit. The trial court properly read CJI2d 3.2 to the jury. See *Hubbard*, 217 Mich App at 488 ("Taken as a whole, [including the word "possible"] the instruction given [CJI2d 3.2] conveyed to the jury that a reasonable doubt is an honest belief based upon reason.").

Affirmed.

/s/ David H. Sawyer

/s/ Kathleen Jansen

/s/ Pat M. Donofrio