

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEWAYNE HERSEL CARTER,

Defendant-Appellant.

UNPUBLISHED

February 13, 2007

No. 266550

Wayne Circuit Court

LC No. 05-005310-01

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of intimidating or interfering with a witness in a criminal case for which the maximum term of imprisonment for the violation is more than ten years, or for which the violation is punishable by imprisonment for life or any term of years, MCL 750.122(7)(b). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 5 to 15 years' imprisonment for the conviction. Defendant appeals as of right. We affirm.

Defendant's sole issue on appeal is that there was insufficient evidence to find him guilty of intimidating or interfering with a witness in a criminal case punishable by more than ten years. We disagree.

This Court reviews a claim of insufficient evidence de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). Where a claim of insufficient evidence follows a bench trial, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

The witness intimidation statute, MCL 750.122, identifies and criminalizes the many ways individuals can prevent or attempt¹ to prevent a witness from appearing and providing

¹ An attempt consists of: (1) an intent to do an act or to bring about certain consequences which would in law amount to a crime, and (2) an act in furtherance of that intent which goes beyond mere preparation. Mere preparation consists of making arrangements or taking steps necessary
(continued...)

truthful information in some sort of official proceeding. *People v Greene*, 255 Mich App 426, 438; 661 NW2d 616 (2003). Under subsection six of the statute, “[a] person shall not willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify or provide information in or for a present or future official proceeding.” MCL 750.122(6); *Greene, supra* at 432.

To prove that a defendant has violated MCL § 750.122(6), . . . the prosecutor must prove that the defendant (1) committed or attempted to commit (2) an act that did not consist of bribery, threats or intimidation, or retaliation as defined in MCL § 750.122 and applicable case law, (3) but was any act or attempt that was done willfully (4) to impede, interfere with, prevent, or obstruct (5) a witness’s ability (6) to attend, testify, or provide information in or for a present or future official proceeding (7) having the knowledge or the reason to know that the person subjected to the interference² could be a witness at any official proceeding. [*Greene, supra*, pp 442-443 (footnote added).]

Although the prosecutor must prove these elements beyond a reasonable doubt, he need not negate every reasonable theory of innocence to prove his case. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). Circumstantial evidence and the reasonable inferences arising from the evidence may constitute sufficient evidence of the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Under MCL 750.122(7)(b) a defendant is guilty of a felony where a violation of MCL 750.122(6) is committed in a criminal case for which the maximum term of imprisonment for the violation is more than ten years, or for which the violation is punishable by imprisonment for life or any term of years. Abandonment is an affirmative defense to an attempted crime where the burden is on the defendant to establish, by a preponderance of the evidence, that he voluntarily and completely abandoned the criminal purpose. *People v Akins*, 259 Mich App 545, 555; 675 NW2d 863 (2003).

Defendant claims that the evidence needed to show more than defendant’s mere preparation. We agree that there was no direct evidence that defendant posted the letter or caused someone else to post it. However, circumstantial evidence and reasonable inferences are sufficient to establish the elements of a crime. *Jolly, supra* at 466. We conclude that the evidence was sufficient to establish the elements of intimidating or interfering with a witness in a criminal case.

Specifically, the evidence supported an inference by a rational trier of fact that defendant attempted to interfere with a complainant’s ability to testify in an official proceeding. The undisputed evidence established that defendant had an assault with intent to commit murder case

(...continued)

for the commission of a crime, and attempt consists of some direct movement toward commission of the crime, which would lead immediately to the completion of the crime. MCL 750.92; *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

² This Court would note that the term interference includes all types of conduct proscribed in subsection six of the statute. *Greene, supra* at 442-443.

pending against him in which he could receive life imprisonment or imprisonment for a lesser term of years. Defendant wrote a letter to his friend, Montez, advising Montez to make sure that the complainant in that case did not come to court and testify. Defendant addressed the envelope to Montez and included defendant's own return address.

Also, inmate Mohamed Ali Berry made remarks that bolstered the evidence regarding defendant's intent to have Montez interfere with the complainant's ability to testify in the case pending against defendant. Berry remarked that defendant authored a letter asking that complainant be taken care of. It was the jail policy that inmates slide their letters into the slot to have them posted and defendant had access to that slot. A rational trier of fact could infer that defendant had the opportunity and intent to mail the letter, and thus, slid it in the slot.

Defendant argues that the affirmative defense of abandonment was "an improper shifting of the burden of evidence." We disagree. In his closing remarks at trial, defendant argued that the prosecutor could not overcome the issue of abandonment. Defendant based this on two reasons. First, as there was no direct evidence that defendant had placed the letter in the slot, the prosecutor could not disprove that defendant had a change of heart after he wrote the letter. Second, Berry, rather than defendant, sealed and posted the letter as there was no other explanation for Berry knowing its contents.

The affirmative defense of abandonment requires defendant to prove that he completely and voluntarily abandoned his criminal purpose by a preponderance of the evidence. *Akins, supra* at 555. As defendant introduced no evidence that he changed his mind and decided not to post the letter, and there was no evidence that Berry had been seen near the slot on the day in question, defendant could not meet this burden. Defendant's theorizing that Berry placed the letter in the slot cannot prove abandonment. Furthermore, the evidence establishes only that Berry had general knowledge of the letter's message and not that he was aware of its details and must have therefore read it. The prosecutor proved the essential elements of her case, as she was not required to negate every reasonable theory of innocence. *Martin, supra* at 340.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio