STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 29, 2009
v	No. 285960 Gogebic Circuit Court
JAMES CLINTON WOODS, Defendant-Appellant.	LC No. 07-000366-FC

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for instigating a prison riot, MCL 752.542a, and assaulting a prison employee, MCL 750.197c. Defendant was sentenced as a third habitual offender, MCL 769.11, to serve consecutive to his current sentence[1] 114 months to 20 years for instigating a prison riot and 48 months to 8 years for assaulting a prison employee. We affirm.

I. Background

This case arises out of a prison riot occurring April 9, 2006, at the Ojibway Correctional Facility in Marenisco, Michigan during which several corrections officers were seriously injured. For some time before the riot, tension was growing among the Ojibway prisoners over a rumor that a dividing fence would be constructed at the prison. Some prisoners even discussed protesting the fence's construction. It was in this tense atmosphere that around 6:30 p.m. on the date in question, a white prisoner named Ralph Martin assaulted a black prisoner named Shawn Lundy while in the prison yard with a homemade prison weapon known as a sticker. Believing the officers allowed the attack to occur, many prisoners became unruly and told the officers that the officers would die and "go out in body bags." Defendant in particular was upset and told the officers: "You started it. You mother [expletives] are going to die. You're going to get yours."

[1] In 2000, defendant was convicted of carjacking, MCL 750.529a, armed robbery, MCL 750.529, felony-firearm, MCL 750.227b, and possession of less than 25 grams of a controlled substance, MCL 333.7403(2)(a)(v).

In an effort to quell the tension, the officers led the prisoners back inside the facility and permitted a prisoner–Ray X, known as a leader within the Alpha Unit of the prison–to visit Lundy, who was in the infirmary. Lieutenant Albert Basso, who was in charge of Ojibway that day, assured Ray X that appropriate measures would be taken to investigate the attack on Lundy and the officers' response. Ray responded that if the officers went into the prison area at that time, they were "going to die." Shortly thereafter, a confrontation ensued between a prisoner and an officer in the Alpha Unit prison area. Other prisoners were observed with their jackets inside out to hide their prisoner numbers, and when another officer asked defendant what was going on, defendant replied: "You'll see." At this point, a prisoner named Fultz gave a salute, and prisoners rushed out of the "T.V." room and card room and brutally attacked several officers. Among those attacked was Basso. The riot eventually dispersed when the prison's Emergency Response Team arrived, firing pepper balls into the fray and subduing the prisoners with flex cuffs.

Notably, officers reviewing surveillance video of the riot observed defendant "nudge" another prisoner, codefendant Jerry Johnson, on the back and appear to hand Johnson an item believed to be a sticker. Seconds later, Johnson approached Basso and made punching, kicking and stabbing motions. The officers also observed that the video showed defendant walking around the melee and giving what appeared to be directions throughout the attack on Basso. Basso, who was seriously injured, claimed to see a knife coming at him during the attack and sustained an injury to his neck consistent with a stab wound.

Defendant was subsequently charged with assault with intent to murder Basso, MCL 750.83, instigation of a prison riot, MCL 752.542a, assault of a prison employee (Basso), MCL 750.197c, and felonious assault (against Basso), MCL 750.82. After a jury trial, defendant was convicted of assault of a prison employee and instigation of a prison riot, but acquitted of the other charges. The instant appeal ensued.

II. Analysis

A. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support both of his convictions. We disagree. Due process requires the evidence to show 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).

i. Assault of a Prison Employee, MCL 750.197c

Defendant asserts the prosecution failed to prove that defendant had any contact with Johnson, let alone that he aided and abetted Johnson's assault of Basso. To establish the crime of assault of a prison employee, the prosecution must show that: (1) defendant was lawfully

imprisoned or confined, (2) in a jail or other lawful place, (3) through the use of violence, threats of violence, or dangerous weapons, (4) assaults an employee of the place he is confined, (5) knowing that the person was an employee of the place of confinement. MCL 750.197c. To convict a defendant as an aider and abetter, MCL 767.39 requires the prosecution to show that "[1] the crime was committed by the defendant or another, [2] that the defendant performed acts or gave encouragement that aided or assisted the commission of the crime, and [3] 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." *People v Jones*, 201 Mich App 449, 451; 506 NW2d 542 (1993). Regarding intent,

> [a] defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense. [*People v Robinson*, 475 Mich 1, 15; 715 NW2d 44 (2006).]

In challenging this conviction, defendant concedes that Johnson assaulted Basso and only contests that the evidence established that he encouraged the assault and that he shared Johnson's intent. Neither argument withstands scrutiny.

Specifically, several of the corrections officers present during the riot observed that the video showed defendant "nudge" or tap Johnson on the back and apparently hand Johnson a small item just prior to Johnson's attack on Basso, which consisted of punching, kicking, and stabbing motions. Further, officer Stephen Peterson explained that defendant was a high-ranking member of a prison religious organization, who by his actions on the video, appeared to be giving directions throughout the attack on Basso. In particular, defendant circled the melee and gave hand directions during the assault, and even Basso noticed that defendant was standing right behind him just before the riot began. Also damaging to defendant are his comments before the assault. Shortly after the fight between Mason and Lundy concluded, defendant accused the guards of permitting Lundy to be stabbed on purpose and stated, "You mother [expletives] are going to die," and "You're going to get yours." Similarly, in the hectic moments before the riot, an officer asked defendant what was going on and defendant merely replied, "You'll see."

When this evidence is considered in light of the fact that Basso sustained a puncture wound consistent with being stabbed, a reasonable juror could conclude that defendant handed Johnson an item that Johnson used to stab Basso, or at the very least that defendant encouraged and directed Johnson's admitted punching and kicking of Basso during the riot and in fact, intended these attacks.[2] Indeed, given the difficulty in establishing an actor's state of mind,

[2] Johnson admitted during his post-riot interview that he kicked and punched Basso.

minimal circumstantial evidence is sufficient to demonstrate the disputed elements of the crime. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998); *People v Terry*, 217 Mich App 660, 663; 553 NW2d 23 (1996). That threshold was met in this case.

Defendant contends that because the jury acquitted him of felonious assault, it necessarily found that evidence of his handing a weapon to Johnson was lacking. Therefore, defendant concludes, the evidence cannot support his conviction of assault of a prison employee under an aiding and abetting theory. However, this argument ignores that fact that assault of a prison employee requires only proof of a simple assault, which does not require the use of a dangerous weapon.[3] *Terry*, *supra* at 662. And as we have explained, the evidence minimally creates the inference that defendant encouraged and intended Johnson's punching and kicking Basso. In any event, juries are permitted to render inconsistent or lenient verdicts. *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). Consequently, defendant's argument is without merit.

ii. Instigation of a Riot at a State Correctional Facility, MCL 752.542a

Next, defendant claims that the prosecution failed to prove the causation element of instigation of a prison riot.[4] We disagree. To the extent this claim raises issues of statutory construction our review is de novo. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003).

Under MCL 752.542a,

> A person shall not willfully instigate, cause, attempt to cause, assist in causing, or conspire to cause a riot at a state correctional facility. As used in this section, "riot at a state correctional facility" means 3 or more persons, acting in concert, who intentionally or recklessly engage in violent conduct within a state correctional facility that threatens the security of the state correctional facility or threatens the safety or authority of persons responsible for maintaining the security of the state correctional facility.

As a preliminary matter, defendant contends that because the term "cause" has acquired a unique and technical meaning in criminal law, his conviction must be reversed because the prosecution failed to establish both factual and proximate causation. Initially, we note that defendant is correct that the term "cause" has acquired a technical meaning in criminal law and, as such, should be construed "'according to [its] peculiar and appropriate meaning'" as MCL 8.3a directs. *People v Schaefer*, 473 Mich 418, 435; 703 NW2d 774 (2005), overruled in part on other grounds by *People v Derror*, 475 Mich 316, 334; 715 NW2d 822 (2006).

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[3] "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (quotation marks and citation omitted).

[4] Defendant does not challenge the sufficiency of the evidence with respect to the other elements of this crime.

In criminal jurisprudence, the peculiar and appropriate legal meaning of causation is broken into two components: factual and proximate cause. *Schaefer*, *supra* at 435. Factual cause, also known as "but for" causation, requires that a result would not have occurred absent a defendant's action whereas proximate cause requires a result to be the "direct and natural result" of a defendant's action. *Id*. at 435-437.

Here, it is at least arguable that but for defendant's actions, a prison riot would not have occurred. Indeed, it was another prisoner, Fultz, who gave the signal to commence the riot, and no evidence was presented that defendant had contact with or directed Fultz before the riot. Thus, were the issue of causation the end of the inquiry it would be at least arguable that the evidence failed to support the inference that, but for defendant's conduct, the riot would not have occurred.

Notwithstanding this, the plain language of MCL 752.542a does not constrain the prosecution to show only willful causation to satisfy that element of the crime. *People v Rutledge*, 250 Mich App 1, 5; 645 NW2d 333 (2002) ("Statutory construction begins by examining the plain language of the statute to discern and give effect to the Legislature's intent."). Rather, the prosecution need only establish that a defendant did "willfully instigate, cause, attempt to cause, assist in causing, or conspire to cause a riot in a state correctional facility." MCL 752.542a. "The disjunctive term 'or' refers to a choice or alternative between two or more things." *Yankee Springs Twp v Fox*, 264 Mich App 604, 608; 692 NW2d 728 (2004). Accordingly, applying basic rules of grammar, establishing that a defendant willfully instigated rather than caused or took part in causing a riot is sufficient to prove this element of the crime. *Id*.

Regarding the term instigate, it is undisputed that this term has not acquired a unique, technical meaning under the law. Thus, resort to a lay dictionary to ascertain the term's meaning is appropriate. *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007). *The Random House College Dictionary* (rev ed, 1988) defines "instigate" as "to provoke or incite to some action or course" or "to bring about by incitement; foment." Applying this definition, a view of the evidence in the light most favorable to the prosecution creates the reasonable inference that, beyond a reasonable doubt, defendant instigated a prison riot.

Shortly before the riot began, several corrections officers observed defendant meandering throughout the T.V. and card rooms as well as other prisoners' cells. During this time, the number of prisoners inside the T.V. room increased from 35 or 40 to around 50. Notably, many of the prisoners involved in the riot came from that room. Moreover, defendant's conduct, i.e., wandering "all over" and into prisoners' cells was not permitted. One of the corrections officers observed that just after the fight between Mason and Lundy, defendant was "getting the other prisoners excited" and "creating a disturbance," and that while in the T.V. room before the fight, defendant was pacing, appeared "extremely agitated," and "[t]he other prisoners in the T.V. room were feeding off his energy." Evidence was also presented that defendant walked around during the riot and appeared to give three or four different prisoners directions regarding whom to attack. When this evidence is considered in conjunction with defendant's comments already noted, a reasonable juror could conclude that defendant provoked or incited the other prisoners to act in concert and intentionally engage in violent conduct that threatened the security of Ojibway and Ojibway's officers. In other words, the evidence was sufficient to establish defendant's willful instigation of a prison riot.

According to defendant, the term "instigate" is synonymous with the term "cause," and therefore, because the evidence failed to establish that defendant caused (or assisted, attempted, or conspired to cause) a prison riot, reversal of that conviction is warranted. In making this argument, defendant resorts to a website, which defines instigate as "to cause by incitement; foment" or "to urge, provoke, or incite to some action or course."[5] We decline to adopt defendant's interpretation of this definition. Indeed, to construe "instigate" as synonymous with "cause" disregards the Legislature's use of the disjunctive term "or" by which the Legislature specified separate ways of committing this crime. To hold otherwise would violate "the fundamental rule of [statutory] construction that every word should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible." *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 714; 664 NW2d 193 (2003) (quotation marks and citation omitted). Sufficient evidence was presented to support defendant's conviction on this score.

B. Pre-Arrest Delay

This brings us to defendant's final claim that the delay of 14 months between the prison riot and his trial rendered him unable to contact two potential witnesses and consequently violated his due process rights. We disagree. "A challenge to a prearrest delay implicates constitutional due process rights, which this Court reviews de novo." *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999).

Both the United States Constitution and the Michigan Constitution guarantee the right to a speedy trial, and a prearrest delay may violate a defendant's due process rights. US Const, Am VI; Const 1963, art 1, § 20; *People v Tanner*, 255 Mich App 369, 414; 660 NW2d 746, rev'd and remanded on other grounds 469 Mich 437 (2003). The Court applies a balancing test to determine whether a prearrest delay implicates due process. *Cain*, *supra* at 108. Under this test, the defendant bears the initial burden to show prejudice and then the burden shifts to the prosecution to justify the delay. *Tanner*, *supra* at 414. Regarding the defendant's burden,

> a defendant must demonstrate both actual and substantial prejudice that impairs the defendant's right to a fair trial. Substantial prejudice is prejudice of a kind or sort that the defendant's ability to defend against the charges was so impaired that it likely affected the outcome of the trial. *Actual prejudice is not established by general allegations or speculative claims of faded memories, missing witnesses, or other lost evidence*. Furthermore, a defendant must show that the prosecution intended to gain a tactical advantage by delaying formal charges. [*Id*. at 414-415 (citations omitted, emphasis supplied).]

In the instant case, the prison riot occurred on April 9, 2006. Defendant, who was already in prison, was not arraigned until June 15, 2007. According to defendant, due to an administrative law judge's finding that he was not involved in any assault during the prison riot, he did not take measures to secure two witnesses on his behalf, who either have been released

[5] See <http:dictionary.reference.com/browse/instigate> (last accessed September 29, 2009).

from prison or murdered, and was therefore prejudiced by the delay. Such a claim that prejudice resulted is pure speculation.

Indeed, defendant not only fails to name either witness, but defendant does not even indicate how the substance of either witness's testimony would impact his defense other than to corroborate his own testimony and that of five other prisoners whom defendant called at trial to testify that defendant acted as a sort of peacekeeper and was not involved in the riot. Such general and speculative claims are insufficient to establish prejudice. *People v Adams*, 232 Mich App 128, 137; 591 NW2d 44 (1998). At any rate, any testimony of these two witnesses would have been needlessly cumulative under MRE 403. *People v Fletcher*, 260 Mich App 531, 553, 679 NW2d 127 (2004). Thus, defendant has failed to meet his burden.

Notwithstanding, we note that the prosecution explained that this case involved a complex investigation. Many prisoners were dispersed throughout the upper peninsula following the riot, and the process of interviewing these and other witnesses–as well as prioritizing the warrant and charging decisions and locating enough defense attorneys in such a small county–was time consuming. "[T]o prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *United States v Lovasco*, 431 US 783, 796; 97 S Ct 2044; 52 L Ed 2d 752 (1977). In short, there was no error.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello