

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SANTANA JUNIOR CONTRERAS,

Defendant-Appellant.

UNPUBLISHED

March 7, 1997

No. 189589

Kent Circuit Court

LC No. 94-003533-FC

Before: Murphy, P.J., and Markey and A.A. Monton,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder in violation of MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony in violation of MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive prison terms of two years for the felony-firearm conviction and twenty-five to forty years on the assault with intent to murder conviction. He appeals as of right and we affirm.

Defendant first claims that there was insufficient evidence to support his assault with intent to murder conviction. When reviewing a sufficiency of the evidence claim, this Court must consider the evidence, in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the prosecution has proven the essential elements of the charged crime beyond a reasonable doubt. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). Circumstantial evidence and reasonable inferences therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

The elements of assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). Defendant specifically contends that the prosecution failed to prove elements (2) and (3) because even if there was sufficient evidence to demonstrate that defendant was the shooter,

* Circuit judge, sitting on the Court of Appeals by assignment.

the prosecution did not present evidence that defendant had an actual intent to kill or that would support a verdict of murder, if death had resulted. We disagree.

Here, the evidence showed that a shotgun wad was found embedded in the victim's coat, which indicates that the shot was fired at close range. The physician that treated the victim testified that based on the skin and soft tissue destruction he was shot at close range. A reasonable jury could infer from this evidence that defendant shot the victim from close range and therefore intended to kill him. Further, if the victim had been killed, it would have been murder because defendant had the requisite intent and no mitigating factor existed. Based on this evidence, a reasonable jury could have concluded that the prosecution had proven the essential elements of assault with intent to murder beyond a reasonable doubt.

Defendant next claims that the prosecutor improperly vouched for the credibility of a witness by stating in closing argument that the witness was telling the truth. Generally, a "prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, it is permissible for a prosecutor to argue that a witness should be believed. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). The failure of the defendant to object to the prosecutor's remarks precludes this Court from reviewing the matter unless a miscarriage of justice will result or a cautionary instruction could not cure the prejudicial effect. *People v Lee*, 212 Mich App 228, 245; 537 NW2d 233 (1994). Here, defendant failed to object to the remarks at issue. Furthermore, the prosecutor was merely arguing that based on the information provided by the witness his testimony should be believed.

Finally, defendant claims that he is entitled to resentencing because his sentence does not conform to the principles of proportionality. A sentence is presumptively proportionate if it is within the sentencing guidelines. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 457; 506 NW2d 542 (1993). To overcome the presumption of proportionality, defendant must present evidence of unusual circumstances that would overcome the presumption. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996). Defendant was sentenced to two years for the felony-firearm conviction and twenty-five to forty years for the assault with intent to murder conviction, both of which were within the sentencing guidelines range. Defendant has failed to present evidence of unusual circumstances that would overcome the presumption of proportionality.

Affirmed.

/s/ William B. Murphy

/s/ Jane E. Markey

/s/ Anthony A. Monton