

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS ANDRE DELGRECO,

Defendant-Appellant.

UNPUBLISHED

May 9, 1997

No. 174793

Macomb Circuit Court

LC No. 91-001965-FC

Before: MacKenzie, P.J., and Holbrook, Jr., and T.P. Pickard*, JJ.

PER CURIAM.

This case arises from the beating death of Alex Stachura. On September 20, 1991, defendant, then age sixteen, and Stachura engaged in a prearranged fist fight. After the fight, Stachura was surrounded by a crowd of teenagers and kicked. Defendant gave him a final kick to the forehead. Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and was sentenced as an adult to eight to twenty-five years' imprisonment. He appeals as of right. We affirm.

Defendant raises a number of claims concerning prosecutorial misconduct during closing argument. First, he contends that he is entitled to a new trial because the prosecutor referred to the evidence as uncontradicted. Although defendant moved for a mistrial on this basis after the verdict was announced, he did not object to the prosecutor's remarks at trial. Appellate review of improper remarks is generally precluded absent a timely objection by counsel unless a curative instruction could not have eliminated the prejudicial effect, or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). No miscarriage of justice would result from our refusal to consider this issue; any possible prejudice resulting from the challenged remarks could have been cured by a timely objection and curative instruction. *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995). In any event, the argument did not deny defendant a fair trial. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996).

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

Next, defendant argues that the prosecutor improperly denigrated defense counsel by referring to him as “Mr. Copperfield,” apparently alluding to magician David Copperfield. The prosecutor also characterized the defense theory of the case as a “grand illusion,” and he told the jury that “every illusion has a trick to it.” Defendant contends that the prosecutor’s remarks were intended to persuade the jury that defense counsel was engaging in deceptive practices.

It is improper for the prosecutor to engage in arguments which attack defense counsel. *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991) (concurrence by Wahls, P.J.); *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). Such arguments undermine the defendant’s presumption of innocence and impermissibly shift the jury’s focus from the evidence to defense counsel’s personality. *Moore, supra*, p 322. See also *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). When the prosecutor argues that defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. *Wise, supra*, p 102.

Although the prosecutor’s remarks were inappropriate, a new trial is not warranted on this basis. Unlike in *Wise* and *Dalessandro*, the prosecutor never explicitly stated that defense counsel was intentionally lying to the jury. Furthermore, the improper remarks were fairly isolated in relation to the case as a whole. This was a lengthy trial. The prosecutor’s closing argument was extensive. With one exception, the prosecutor stopped referring to defense counsel as “Mr. Copperfield” after a side bar which occurred well before the closing argument was half-over. In this context, it is unlikely that the improper remarks influenced the jury’s decision.

Moreover, defendant’s rights were adequately safeguarded. During his rebuttal argument, the prosecutor admitted that he should not have referred to defense counsel as “Mr. Copperfield.” He attempted to explain to the jury that the reference was intended to be a comment on the fact that defense counsel’s characterization of the evidence was contrary to the testimony admitted at trial. Later, the jury was instructed that arguments of counsel were not evidence. See *People v Mack*, 190 Mich App 7, 19; 475 NW2d 830 (1991). Under these circumstances, we conclude that defendant did not suffer prejudice as a result of the prosecutor’s improper remarks. A defendant is guaranteed a fair trial, not a perfect one. *People v Van Tassel*, 197 Mich App 653, 655; 496 NW2d 388 (1992).

Next, defendant argues that the prosecutor committed misconduct by telling the jurors that defense counsel had a duty to lie to the jury. The prosecutor neither stated nor implied that defense counsel had an obligation to lie, however. Rather, he merely commented that defense counsel had no duty to present evidence on his client’s behalf. Moreover, defendant did not raise this issue until after trial. Any possible prejudice resulting from the challenged remark could have been cured by a timely objection and cautionary instruction. *Slocum, supra*, p 241.

Nor is reversal warranted based on the fact that the prosecutor referred to trials involving other individuals charged in connection with Stachura’s death. The prosecutor did not refer to the fact that the other defendants were found guilty, nor did he argue that defendant should be convicted as a result

of the prior proceedings. Moreover, the jury was aware that there were other trials involving this incident. Accordingly, defendant did not suffer prejudice as a result of these remarks.

We have reviewed the remaining allegations of prosecutorial misconduct and find them to be similarly without merit.

Defendant also raises several related claims concerning the court's decision to sentence him as an adult. Pursuant to MCL 769.1(3); MSA 28.1072(3), a trial court is required to conduct a juvenile sentencing hearing to determine if the best interests of the juvenile and the public would be better served by placing the minor in the custody of the juvenile offender system or by sentencing the juvenile as an adult. In making this determination, the court is required to consider six factors, including the seriousness and circumstances of the offense, MCL 769.1(3)(b); MSA 28.1072(3)(b), and the best interests of the public welfare and the protection of the public security, MCL 769.1(3)(f); MSA 28.1072(3)(f).

Defendant contends that the trial court abused its discretion in giving "preemptive weight" to the seriousness of the offense. While it is true that a sentencing court may not place preemptive weight on any one factor from MCL 769.1(3); MSA 28.1072(3) when reaching its sentencing decision, *People v Spearman*, 195 Mich App 434, 448; 491 NW2d 606 (1992), overruled in part on other grounds sub nom *People v Velting*, 443 Mich 23, 43; 504 NW2d 456 (1993), a trial court may place "weight as appropriate to the circumstances" on any of the factors, as long as all of the statutory factors are carefully considered. *Id.*, pp 448-449. In light of defendant's conviction for second-degree murder and its relative severity, we are not convinced that the trial court made a mistake when it place great weight on the seriousness of defendant's offense. Moreover, it is clear from the record that the trial court carefully considered the other enumerated statutory factors in reaching its sentencing decision.

Defendant also argues that the trial court abused its discretion in failing to consider the circumstances surrounding the offense. Again, we disagree. Although the court indicated that the seriousness of the jury verdict "cannot be overstated," there is no indication that the court failed to consider the circumstances surrounding the offense. The court examined the events leading up to the fight and defendant's conduct after losing the fight to Stachura. The court believed that defendant maliciously delivered the final kick to Stachura's head while the victim was "on all fours, helplessly struggling to get off the ground."

Further, there was no reason for the trial court to have considered the fact that defendant was injured as a result of the initial fight. In convicting defendant of second-degree murder, the jury obviously determined that the injuries defendant sustained in the fist fight did not constitute sufficient provocation to mitigate the offense to voluntary manslaughter. Thus, defendant's physical and mental state was not relevant to the sentencing decision and the trial court did not abuse its discretion in failing to consider that issue in making its determination to sentence defendant as an adult.

Defendant contends that the trial court gave preemptive weight to the seriousness of the offense because MCL 769.1(3)(f); MSA 28.1072(3)(f), the other factor relied upon by the trial court in

deciding to sentence defendant as an adult, is merely a summation or combination of all the statutory factors. We disagree. Although the factors overlap each other to some extent, there is nothing in the statute which would indicate that subsection (f) is merely a summation of the other factors. See *People v Haynes*, 199 Mich App 593, 602-603; 502 NW2d 758 (1993) (analyzing subsection (f) as an independent factor).

We also reject defendant's argument that the trial court failed to make adequate factual and legal findings with regard to subsection (f), resulting in a sentencing decision based solely on the seriousness of the offense. Subsection (f) addresses the best interests of the public welfare and the protection of the public security. As to the public welfare, the trial court found that sentencing as an adult was necessary for the protection of the public's confidence in the judicial system, suggesting that the goals of punishment and retribution would not be served if defendant were to spend less than three years in juvenile detention for his crime. It is not contested that defendant was eighteen years of age when he was sentenced, that his recommended adult sentence called for a minimum of eight to twenty-five years' incarceration, or that defendant would be released from juvenile detention at age twenty-one. In light of these uncontroverted facts, we are not convinced that the trial court was mistaken in finding that sentencing defendant as an adult would best serve the public welfare. See *People v Black*, 203 Mich App 428, 430-431; 513 NW2d 152 (1994).

We also conclude that the trial court adequately considered the second element of MCL 769.1(3)(f); MSA 28.1072(3)(f), the protection of public security. While the court did not explicitly consider this factor in relation to its finding concerning the public welfare, the court stated an adult sentence was necessary to satisfy the public that the judicial system holds people accountable for their actions and protects the citizenry. In light of these considerations, we find that the trial court did not fail to consider the issue of public security in reaching its sentencing decision. We find no clear error or abuse of discretion. *People v Lyons (On Remand)*, 203 Mich App 465, 467-468; 513 NW2d 170 (1994).

Finally, defendant argues that there was insufficient evidence to sustain his conviction. In determining whether the prosecution has presented sufficient evidence, this Court is required to view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). To establish the crime of second-degree murder, MCL 750.317; MSA 28.549, the prosecutor must show that the defendant caused the death of the victim and that the killing was done with malice and without justification. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Malice is the intent to kill, the intent to do great bodily harm, or the intent to create a high risk of death or great bodily harm with knowledge that death or great bodily harm will be the probable result. Malice may be inferred from the facts and circumstances of the killing. *Id.*

Defendant contends that the trial court should have directed a verdict in his favor with regard to second-degree murder and submitted the case to the jury on a charge of voluntary manslaughter. We disagree. Although there was evidence in the record from which a reasonable trier of fact could have

concluded that defendant killed Stachura in the heat of passion, the determination of what is a reasonable provocation is a question of fact for the factfinder. *People v Pouncey*, 437 Mich 382, 390; 471 NW2d 346 (1991). Moreover, provocation or the absence of provocation is not an actual element of the crime of second-degree murder or manslaughter which the prosecution must prove beyond a reasonable doubt. *People v Van Wyck*, 402 Mich 266, 269; 262 NW2d 638 (1978). With regard to intent, the prosecutor need only prove that defendant acted with malice. *People v Hopson*, 178 Mich App 406, 410; 444 NW2d 167 (1989).

Here, several witnesses testified that defendant disliked Stachura. On his way to the prearranged fight with Stachura, defendant told others in the car, “If I lose, get him.” After Stachura won the fight with defendant, several witnesses heard defendant urge a crowd of spectators to go after him. According to Karl Von Zittwitz, defendant told the crowd to “kill” Stachura. A number of individuals then chased Stachura, tripped him, and then kicked him repeatedly for up to a minute. As the group dispersed, several witnesses saw defendant approach Stachura and forcefully kick him in the forehead. At the time, Stachura was on his hands and knees. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could conclude that defendant acted with malice, and hence possessed the requisite intent to support a second-degree murder conviction, either as a principal or as an aider and abettor. Accordingly, the trial court did not err in denying defendant’s motion for a directed verdict.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Timothy P. Pickard