STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE DEMITRIUS BURRELL,

Defendant-Appellant.

UNPUBLISHED
July 18, 1997

No. 193245
Macomb Circuit Court
LC No. 95-000291-FC

Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and as an habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced to eight to twenty years' imprisonment for the assault conviction and two years' imprisonment for the felony-firearm conviction, the sentences to run consecutively. He appeals as of right. We affirm.

Defendant first argues on appeal that insufficient evidence was presented at trial from which a rational trier of fact could convict him of assault with intent to commit murder. When determining whether sufficient evidence has been presented to sustain a conviction, 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 the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

In order to establish the crime of assault with intent to commit murder, the prosecutor must prove: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Johnson*, 215 Mich App 658, 672; 547 NW2d 65 (1996). Element (1) was undisputed by defendant. Therefore, in order to sustain defendant's conviction, the prosecution had to prove beyond a reasonable doubt that defendant had the intent to kill the victim, which, if successful, would make the killing murder. The intent to kill may be proved by inference from any facts in evidence, *id.* at 672; *People v Barclay*, 208 Mich App 670; 528 NW2d 842 (1995). Because of the

difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient, *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

At trial, the prosecution showed three facts supporting a conclusion that defendant had the requisite intent to kill the victim. First, defendant began firing the gunshots within two to three feet of the victim. Second, defendant fired between five and nine gunshots. Third, defendant was shooting into the general vicinity of where the victim was seated. Viewed in a light most favorable to the prosecution, a rational juror could infer that defendant had the intent to kill the victim which, if successful, would make the killing murder.

Next, defendant argues on appeal that the trial court erred in finding that the prosecutor showed "good cause" for not producing an endorsed res gestae witness, William Fielder, and that the trial court erred by not providing an instruction which advised the jury that they may infer that the res gestae witnesses testimony would have been unfavorable to the prosecution's case. We disagree.

If the prosecution endorses a witness, it is obliged to exercise due diligence to produce the witness at trial. *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991). Due diligence is not the attempt to do everything possible to obtain the presence of a witness, rather it is the attempt to do everything reasonable. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). If the court finds a lack of due diligence when the issue is raised at trial, jury instruction CJI2d 5.12 should be given. This instruction allows the jury to infer that the missing witness' testimony would have been unfavorable to the prosecution. *People v Pearson*, 404 Mich 698, 722; 273 NW2d 856 (1979). A trial court's determination of due diligence on the part of the prosecution in the production of a res gestae witness is a factual matter and the court's finding will not be set aside unless it was clearly erroneous. *Wolford, supra* at 484.

We find that the trial court's ruling that the prosecution established due diligence was not clearly erroneous. The detective testified regarding his attempts to ensure Fielder's presence at trial. The detective went to Fielder's residence around November 9, 1995 and gave Fielder's brother the subpoena along with his phone number and a request that Fielder call the detective when he received the subpoena. When Fielder failed to call the detective, the detective went to Fielder's residence on Thanksgiving day. When a man identifying himself as Fielder opened the door, the subpoena was handed to him. Fielder stated that he would appear in court on the date indicated in the subpoena. The court ruled that the prosecutor had shown good cause in making every effort to produce Fielder at trial, and that personal service of the subpoena on Fielder by the officer on Thanksgiving day was fully adequate. Because the prosecutor exercised due diligence, defendant was not entitled to the missing res gestae witness instruction.

Defendant next objects to remarks the prosecutor made at trial. Improper prosecutorial comments are grounds for reversal where they deny the defendant a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). Claims of prosecutorial misconduct are decided on a case by case basis. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). This Court reviews

prosecutorial comments in context. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991).

Review of allegedly improper remarks is precluded if the defendant fails to timely and specifically object, unless an objection would not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

During trial, defendant objected to a statement by the prosecutor which he claimed mischaracterized his testimony concerning his intent. A prosecutor is free to relate the facts adduced at trial to his theory of the case and to argue the evidence and all reasonable inferences arising from it to the jury, *Bahoda*, *supra* at 282, but he cannot make a statement of fact to the jury which is unsupported by the evidence, *Stanaway*, *supra* at 686. We find that the prosecutor's comment that defendant admitted that he had tried to kill the victim was improper because it was not supported by the evidence. However, this improper comment does not require reversal because the trial court immediately issued a curative instructive stating that it was up to the jury to decide defendant's intent. The court also included an instruction to the jury that the lawyers' statements were not evidence. Moreover, the prosecutor stated that the jury should personally recall defendant's testimony. Therefore, we are satisfied that the court's instructions to the jury dispelled any potential prejudice with respect to the improper comment, and defendant was not denied a fair and impartial trial.

The other alleged incidences of misconduct regarding the prosecutor's disparagement of defendant and defendant's theory were not properly preserved because defense counsel failed to object. Any misconduct that may have occurred as a result of these comments was not so egregious that a prompt curative instruction could not have cured any resulting prejudicial effect. Moreover, any potentially prejudicial effects from the prosecutor's statements were cured by the court's instruction that the lawyers' statements were not evidence and that the jurors should only accept things the lawyers said which were supported by the evidence or by the jurors' own common sense and general knowledge. Therefore, a miscarriage of justice will not occur by our failure to fully review these claims. *Stanaway*, *supra* at 687.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie
/s/ William B. Murphy