STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID HOWARD THOMAS,

Defendant-Appellant.

UNPUBLISHED
August 1, 1997

No. 194983
Saginaw Circuit Court
LC No. 95-011432-FC

Before: Gribbs, P.J., and Sawyer and Young, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for breaking and entering, MCL 750.110; MSA 28.305, safe breaking, MCL 750.531; MSA 28.799, larceny over $100, MCL 750.356; MSA 28.588, possession of burglar's tools, MCL 750.116; MSA 28.311, conspiracy, MCL 750.157a; MSA 28.354(1), felonious assault, MCL 750.82; MSA 28.277, assault with intent to murder, MCL 750.83; MSA 28.278, assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, use of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and possession of a stolen firearm, MCL 750.535b;MSA 28.803(2). He later pleaded guilty to being a felon in possession of a firearm, MCL 750.224f; MSA 28.424(6), and being an habitual offender-fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to concurrent terms of five to ten years, ten to fifteen years, three to five years, five to ten years, ten to fifteen years, two and one-half to four years, twenty-five to forty years, six to ten years, two years, three to ten years, and three to five years, respectively. We affirm.

Defendant first argues there was insufficient evidence to support his conviction for assault with intent to commit murder because the prosecution failed to show the specific intent to kill. *People v Rockwell*, 188 Mich App 405, 411; 470 NW2d 673 (1991). Defendant argues that his conviction must be evaluated in light of *People v Guy Taylor*, 422 Mich 554; 375 NW2d 1 (1985). In *Taylor*, our Supreme Court listed several factors that should be considered in determining whether the defendant's actions rise to the level of actual intent to kill. These factors include: the nature of the defendant's acts constituting an assault; the temper or disposition of mind with which they were apparently performed; whether the instrument and means used were naturally adapted to produce

death; the defendant's conduct and declarations prior to, at the time, and after the assault; and any other relevant circumstances. *Id.*, 568.

In this case, the evidence established that defendant raised a gun and, aiming directly at Detective Blake Andrews who was driving a pickup truck, fired a round through the windshield. The shot came so close that Andrews "could feel it." Defendant then proceeded to fire at least three more rounds into the truck. Viewing this evidence in the light most favorable to the prosecution, *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991), the factfinder could reasonably conclude that, by firing into the windshield of an oncoming car where the driver was plainly visible, defendant intended to hit the driver. The instrumentality used, a .45 caliber semi-automatic pistol, would certainly qualify as a death-producing mechanism and the driver could have died if he had been struck by a bullet. We find sufficient evidence of an intent to kill.

Defendant next argues that the trial court erred in denying his motion for a mistrial because the prosecution impermissibly made reference to facts that were not in evidence. Specifically, defendant argues that the prosecutor made mention of defendant washing his fingerprints off the burglary tools and a gun. We find no abuse of discretion. *People v. Sowders*, 164 Mich App 36, 47; 417 NW2d 78 (1987). Contrary to defendant's assertion, the fact that he washed his tools and gun to remove any trace of fingerprints was in evidence. A police officer described these very facts when he recounted defendant's confession. It is well-established that a prosecutor may not make a statement of fact to the jury that is not supported by evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), but a prosecutor may properly argue the evidence and all reasonable inferences as they relate to his or her theory of the case. *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989), quoting *People v Cowell*, 44 Mich App 623, 627; 205 NW2d 600 (1973). We note that when making his motion for a mistrial, defense counsel conceded that these facts were in evidence. Therefore, defendant's second claim is utterly without merit, and we find no error.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Robert P. Young, Jr.