

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MICHAEL SNODGRASS,

Defendant-Appellant.

---

UNPUBLISHED  
October 28, 1997

No. 194675  
St. Joseph Circuit Court  
LC No. 95-008017-FH

Before: Kelly, P.J., and Reilly and Jansen, 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). He was sentenced to consecutive terms of seven to fifteen years in prison for the assault conviction and two years for the felony-firearm conviction. Defendant appeals as of right and we affirm.

This case arises out of the shooting of defendant's brother-in-law after a dispute at the victim's house. Defendant's theory was that the gun accidentally discharged during a struggle with the victim. In contrast, the prosecution's theory was that defendant was angry about a dispute with the victim's brother and retrieved a gun to shoot the victim's brother, but instead shot the victim when the victim confronted defendant.

I

Defendant first argues that there was insufficient evidence presented at trial to sustain his convictions of assault with intent to commit murder and felony-firearm. When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that 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).

Specifically, defendant claims that there was no evidence presented of an intent to kill. However, the evidence presented at trial was that the victim testified that defendant said, “See you in hell,” pulled out a handgun, put it up to the left side of the victim’s head above his ear, and pulled the trigger. Therefore, when viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to find that the prosecution proved beyond a reasonable doubt that defendant had the specific intent to kill. Accordingly, the evidence was sufficient to sustain the jury’s convictions of assault with intent to commit murder, *People v Hoffman*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 191445, issued 8/19/97), slip op, p 4, and felony-firearm, *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

## II

Defendant next argues that several instances of alleged prosecutorial misconduct denied him a fair trial. We initially note that defendant did not object in any manner to the allegedly improper remarks of the prosecutor at trial. Appellate review of improper prosecutorial remarks is generally precluded absent an objection because the trial court is otherwise deprived of the opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Id.*

Defendant raises numerous instances of alleged prosecutorial misconduct. He claims that during opening statement, the prosecutor improperly told the jury that it would hear from the victim’s wife and that the prosecutor essentially asked the jury to sympathize with the witness. Defendant also claims that the prosecutor mislead the jury about the burden of proving the charges beyond a reasonable doubt both in the opening statement and at closing argument. Defendant contends that the prosecutor impermissibly characterized him as a liar, and denigrated defense witnesses. Finally, defendant argues that the prosecutor “testified” during closing argument by giving his opinion and conjecturing about the facts.

We have carefully reviewed the remarks made by the prosecutor in their proper context and do not find that they were improper. The statement concerning the victim’s wife was not an invitation to sympathize with her. The statements concerning reasonable doubt would not have confused the jury, and we note that the trial court’s instructions to the jury concerning the burden of proof and reasonable doubt were proper. The prosecutor’s comments characterizing defendant as a liar were not improper because a prosecutor may argue from the evidence that the defendant is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Further, we do not agree with defendant’s characterization that the prosecutor denigrated two witnesses. The prosecutor properly argued that their testimony was not worthy of belief based on the evidence. Finally, we do not agree that the prosecutor gave his own opinion at closing argument that was not supported by the evidence. Rather, the argument was based on reasonable inferences arising from the evidence presented at trial relating to the prosecutor’s theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Taken in their proper context, we do not find any of the prosecutor’s remarks to constitute error requiring reversal. *Id.*, p 283.

Moreover, we note that the trial court instructed the jury that the lawyers' statements and arguments are not evidence and were only meant to help the jury understand the evidence and the legal theories. Thus, any prejudice was cured by this instruction. *People v Mack*, 190 Mich App 7, 19; 475 NW2d 830 (1991).

### III

Next, defendant argues that the trial court abused its discretion in various evidentiary rulings. He contends that the trial court erred in not allowing the testimony of Wayne Niccum, defendant's stepfather, and that the trial court denied him a fair trial when it made comments on the record without dismissing the jury.

#### A

First, defendant made an offer of proof regarding the proposed testimony of Niccum, that the victim was physically aggressive after consuming alcohol. The trial court did not allow the testimony stating that such was not defendant's characterization of the victim. The trial court also ruled that the evidence was not admissible under MRE 405(b) because the victim's character was not an essential element of a charge, claim, or defense. We find no error because defendant did not claim self-defense. Rather, he contended that the gun discharged accidentally during a tussle with the victim. Such a defense does not implicate the victim's character trait of aggressiveness as would a self-defense claim. Moreover, any error would be harmless because a substantial right of defendant's was not affected. MRE 103(a). Defendant's mother testified that the victim was violent when he drank alcohol. Therefore, Niccum's testimony would have been merely cumulative.

#### B

Defendant also contends that the trial court abused its discretion in not permitting Niccum to testify that defendant called Niccum after the shooting and stated that the gun accidentally discharged. Defendant argues that such testimony was permissible as an excited utterance under MRE 803(2). The trial court ruled that the statement was not admissible as it was made 8-1/2 hours after the shooting and there was time for defendant to fabricate the statement. We find no abuse of discretion here. The trial court properly applied the test set forth in *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979), and concluded that defendant, an adult, had ample time to think and plan his story. The trial court also concluded that because defendant's story was coherent, it tended to show that there was opportunity to reflect.

Accordingly, the trial court did not abuse its discretion in denying defendant's proffered testimony of Wayne Niccum.

#### C

Defendant also argues that the trial court denied him due process "in making comments on the defense while taking argument of counsel without dismissing the jury." We review the record as a whole to determine whether the trial court's conduct showed bias against the defendant. *People v*

*Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Id.*

We reproduce the trial court's comments made, before the jury, because we cannot agree with defendant that the trial court's comments deprived him of a fair trial, denigrated the defense, prejudiced him, or deprived him of the presumption of innocence. The trial court stated the following at trial in response to the prosecutor's objection to the testimony of defendant's mother concerning the victim's character:

What we're fighting about here folks is whether this evidence conforms to the rules, and the philosophy behind this rule is just because somebody stole something once doesn't mean that they stole something a second time.

Now it is more likely that someone who stole something once will steal something again, but people don't steal all the time. Even if they steal once, they don't steal all the time.

So it's not logically, legally relevant. And that's the issue that we're fighting about here. Not fighting, but we're discussing here.

There is proof of other behavior, as it tends to show character, is admissible under certain circumstances and for certain purposes.

For example, let's suppose that you were trying to prove that somebody was truthful. Well you can show that the person was truthful on other occasions. But when you're specifically trying to show prior acts or wrongs to show that the person was wrong on this occasion, the rule doesn't permit it, for obvious reasons. The connection is not that strong. And it's extremely prejudicial because the danger is that you'll say well this guy was a bad guy. I don't care if the defendant shot him purposefully on this occasion, he deserved it. See, that's the danger that you'll come to that kind of a conclusion.

So this evidence is not to prove that [the victim] is a bad guy. Instead, it's intended to prove that he's aggressive. They're claiming he was aggressive on this occasion.

It doesn't make a whole lot of sense to me at this point, but we haven't heard the testimony yet. I'm assuming - because I trust [defense counsel] - I'm assuming that it will fit together later.

So that's kind of what is going on at the moment. But nevertheless, 404(b) would seem to exclude this particular offer.

Defense counsel then requested to move on to another line of questioning, and the trial court permitted counsel to make an offer of proof at a later time. A review of the record certainly indicates that the trial court did not pierce the veil of impartiality because its comments did not unduly influence the jury or in any way prejudice defendant. Defendant was not denied a fair trial in this regard.

#### IV

Defendant next argues that he should have been sentenced by the trial judge who presided over his trial. Defendant concedes that the trial judge was ill and not available for sentencing at the time that sentencing was scheduled, but argues that sentencing should have been delayed until the trial judge returned to the bench. Generally, a defendant should be sentenced by the judge who presided at trial, provided that the judge is reasonably available. *People v Pierce*, 158 Mich App 113, 115; 404 NW2d 230 (1987).

In this situation, the trial court was not reasonably available to sentence defendant. It is undisputed that the trial court was ill. As noted by the visiting judge at the time, it was not known when the trial court was to return. Moreover, pursuant to MCR 6.440(C), the visiting judge was authorized to sentence defendant, especially where the visiting judge had a presentence report and sentencing guidelines range on which to base the sentence. Accordingly, we find no abuse of discretion in the visiting judge's denial of defendant's motion for adjournment to await the original trial court's return to the bench to sentence him.

#### V

Lastly, defendant argues that his sentence of seven to fifteen years for assault with intent to commit murder violates the principle of proportionality. The sentence is at the lowest end of the guidelines range of 84 to 180 months and is, therefore, presumptively neither excessively severe nor unfairly disparate. *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). In considering the very serious nature of the crime and defendant's background, we find that defendant's sentence does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Michael J. Kelly  
/s/ Maureen Pulte Reilly  
/s/ Kathleen Jansen