

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellee/Cross- Appellant,

v

MARK FRANCIS MILES,

Defendant- Appellant/Cross- Appellee.

UNPUBLISHED

March 17, 1998

No. 196553

Oakland Circuit Court

LC No. 95-141862-FC

Before: Holbrook, Jr., P.J., and White and Fitzgerald*, JJ.

PER CURIAM.

Defendant was charged with assault with intent to murder, MCL 750.83; MSA 28.278, and malicious destruction of property over \$100, MCL 750.377a; MSA 28.609(1). Following a jury trial, defendant was convicted of assault with intent to do great bodily injury, MCL 750.84; MSA 28.279, and malicious destruction of property over \$100. The trial court sentenced defendant to five to ten years' imprisonment for the assault with intent conviction, and to two to four years' imprisonment for the malicious destruction conviction. Defendant appeals as of right. The prosecution has also cross appealed.¹ We affirm.

Defendant argues that the prosecutor improperly denigrated the defendant when she remarked in her closing argument that "[t]he defendant has filled this courtroom with so much smoke that he hopes you won't be able to see through" it. Further, defendant argues that the prosecutor made an improper civic duty argument when she compared his actions to that of a raging "tiger . . . let out of the cage," and stated that "it's up to you the jurors to put him back in." Because defendant failed to object during the prosecutor's closing remarks, appellate review is precluded unless the prejudicial effect could not have been cured by a cautionary instruction or if the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

"Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.' . . . Nevertheless, prosecutors should not resort to civic duty arguments . . . , and must refrain from denigrating a defendant with intemperate and prejudicial remarks. Such comments

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

during closing argument will be reviewed in context . . .” *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). Having reviewed the challenged remarks in context, we conclude that those remarks did not deprive defendant of a fair trial. The prosecutor’s remark that defendant had “filled this courtroom with so much smoke,” was made in the context of arguing that the evidence showed that defendant had the specific intent to commit murder. The prosecutor raised the “smoke filled courtroom” metaphor not to denigrate defendant, but instead to focus the jury’s attention on those facts that supported her theory of the case. This the prosecutor is free to do. *People v Gonzales*, 178 Mich App 526, 535; 444 NW2d 228 (1989). As for the prosecutor’s tiger metaphor, it too was raised in the context of arguing that defendant had the specific intent to commit murder. The prosecutor opened her closing argument with this metaphor, and repeatedly returned to it in order to emphasize her argument that the evidence established that defendant had the requisite specific intent. Accordingly, we see no error requiring reversal.

Finally, given the result reached on the above issue, we decline to accept the prosecution’s invitation to render an advisory opinion on the instructional issue they raise. We see no compelling reason under the circumstances to lay aside our general reluctance to offer such an opinion. See *People v Mechigian*, 168 Mich App 609, 614; 425 NW2d 199 (1988).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Helene N. White

/s/ John W. Fitzgerald

¹ The prosecution argues that the trial court erred in failing to instruct the jury that pursuant to MCL 768.21a(3); MSA 28.1044(1)(3), defendant had the burden of proving his diminished capacity defense by a preponderance of the evidence.