STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHAD MICHAEL CHINGWA,

Defendant-Appellant.

UNPUBLISHED
June 12, 1998

No. 199128
Mackinac Circuit Court
LC No. 96-002265

Before: Sawyer, P.J., and Kelly and Smolenski, JJ.

PER CURIAM.

Defendant was charged and convicted by a jury of felonious assault, MCL 750.82; MSA 28.277, and was sentenced by the court to one to four years' imprisonment for his offense. Defendant appeals his conviction and sentence as of right. We affirm.

I.

Defendant first claims on appeal that there was insufficient evidence upon which the jury could find him guilty of felonious assault. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). The elements of felonious assault are: (1) assault, (2) with a dangerous weapon, and (3) with intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993). Specifically, defendant argues that the prosecutor failed to adequately prove the intent element of the offense. Felonious assault is a specific intent crime. *People v Davis*, 126 Mich App 66, 69; 337 NW2d 315 (1983). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Intent can be inferred from all of the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), and 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).

The victim, Kelly Lynn Johnson, testified that while she and defendant were having a heated argument at her mother's home, defendant "ran at [her] with a butcher knife." As defendant came at

her, the victim crouched down on the floor because she was afraid. According to the victim, defendant threw the knife down when he got within about two feet of her, and then said, "he could have killed [her] but he was a nice guy." Both Joshua Johnson, the victim's brother, and Ashley Gallagher, a friend of defendant's family, testified that they saw defendant grab a knife from the kitchen counter, run toward the victim with it in his right hand, and then throw it down behind him. Johnson and Gallagher stated that the victim "rolled up in ball" as defendant came at her. Johnson further testified that he could tell that the victim was afraid immediately after the incident because she was nervous, shaking, and crying. Defendant admitted that he and the victim were arguing and shoving each other just before the alleged incident. Defendant stated that he was "real upset" and wanted to sweep everything off the kitchen counter so that he could vent his anger. Defendant further admitted that he picked up a knife from the counter, but threw it down immediately. According to defendant, he may have taken one step toward the victim while he had the knife in his hand; however, he denied swinging the knife at her.

Viewing the above evidence in a light most favorable to the prosecution, there was sufficient evidence upon which the jury could find that defendant intended to injure the victim or intended to place the victim in reasonable fear of an immediate battery. It was for the jurors to evaluate the credibly of the witnesses and to decide who they believed. *Wolfe, supra* at 514-515. Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony. *Id*., quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974).

Defendant also claims that there was insufficient evidence of defendant's identity. Although identity was not at issue in this case, defense counsel moved for directed verdict at the close of the prosecutor's case-in-chief on the ground that no one had identified defendant as Chad Chingwa. The trial court denied defendant's motion and allowed the prosecution to reopen its case for the purposes of identifying defendant. The victim took the stand for a second time and specifically identified defendant as Chad Chingwa, the person who swung the knife at her. Therefore, there was sufficient evidence that defendant was the individual who committed the instant crime.

II.

Next, defendant claims that he was denied a fair trial as the result of five instances of prosecutorial misconduct that occurred during the prosecutor's closing argument. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v LaGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). Generally, prosecutors are given broad latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutors are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Id*.

Defendant claims that he was denied a fair trial when the prosecutor attacked defense counsel and characterized the defense as "smoke." Placing the complained-of remarks in context, the prosecutor was rebutting defendant's theory that if the events happened as described by the witnesses

for the prosecution, the knife could not have come to rest by the kitchen table as it did. The prosecutor stated:

> So in effect, the table as Attorney Spencer [defense counsel] would have you think was not blocked by some kind of a wall because there is none here. It's just straight. And so when he did take the knife and swing them [sic] at her when she was just a couple feet away from her [sic] and swung it behind him, it wouldn't be any problem with the knife going there. It's just smoke. That's all it is for his defense.

It is improper for the prosecutor to attack defense counsel and suggest to the jury that defense counsel is intentionally trying to mislead the jury. *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991). However, the prosecutor's statements in this case certainly do not reach the same level of impropriety as those in *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). In *Dalessandro*, this Court reversed the defendant's conviction in part due to the prosecutor's improper closing remarks in which he repeatedly and explicitly described the defense in terms such as "sham," "a bunch of lies," "damnable lies," demonstrative lies," and "fabrications of evidence." The same is true for *People v Kent*, 157 Mich App 780, 794; 404 NW2d 668 (1987), also cited by defendant. In *Kent*, this Court disapproved of the prosecutor's suggestions that defense counsel was trying to mislead the jury with "fairly tales," "total misstatements of fact," "misleading statements," and "changing white to black." Although the prosecutor's statement in this case may have been somewhat improper, defendant was not denied a fair trial on that basis.

Defendant claims that the prosecutor also made an improper civic duty argument when he stated:

> Now, where does it end? Where does it end? I think that I have done my job as a prosecutor. The Court, Judge is doing his. You have a duty as jurors to come back with a verdict. Do you allow it to continue? Do you allow him to continue doing what his pattern of behavior is?

A prosecutor may not urge the jurors to convict the defendant as part of their civic duty. *Bahoda*, supra at 282. Such arguments are condemned because they inject issues into the trial which are broader than a defendant's guilt or innocence of the charges and because they encourage the jurors to suspend their own powers of judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). The above statements by the prosecutor may possibly be construed as a civic duty argument; however, we find that they are fairly innocuous for a civic duty argument and that it did not deny defendant a fair trial. Compare *People v Biondo*, 76 Mich App 155, 158-160; 256 NW2d 60 (1977).

Defendant further claims that the prosecutor's reference to the victim as a "little girlfriend" improperly invoked sympathy for the victim. A prosecutor may not appeal to the jury to sympathize with the victim. *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988). Defendant relies upon *Dalessandro, supra* at 581, in which this Court found that the prosecutor's repeated references to the ten-month-old victim as a "little innocent baby" constituted an improper appeal to the jury to sympathize with the victim and, combined with other errors in the case, required reversal. However, we

do not believe that the prosecutor's single reference to the victim as a "little girlfriend" would have reasonably invoked the same level of sympathy from the jurors, or would have denied defendant a fair trial.

Next, defendant claims that the prosecutor made an improper religious duty argument when he told the jury, "You know, it doesn't take Solomon to come up with a verdict in this case. You have seen the knife. You have heard the testimony of three people. It doesn't take Solomon. It just takes plain, old common sense." Read in its proper context, it is clear the prosecutor's reference to Solomon was intended to convey the idea of a very wise person, not to appeal to the jurors' sense of religious duty. Compare *People v Rohn*, 98 Mich App 593, 596-598; 296 NW2d 315 (1980).

Defendant claims on appeal that "the Prosecutor's statement that a felonious assault is simply scaring somebody without adding the element of specific intent is misleading and improper." It is not clear from defendant's brief or from the record, which specific prosecutorial remarks defendant is referring to in this portion of his claim. Nor did defense counsel ever object at trial to the prosecutor's explanation of felonious assault; therefore, appellate review is precluded absent a miscarriage of justice. *People v Rivera,* 216 Mich App 648, 651; 550 NW2d 593 (1996). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's conduct could have been cured by a timely curative instruction. *Id*. at 651-652. Even if the prosecutor omitted the intent element in his explanation of the crime, the trial court instructed the jury on each element of felonious assault, including the requisite intent element. The court further informed the jury that "felonious assault requires proof of specific intent," which meant that the prosecutor had to show that "the defendant intended either to injure Kelly Lynn Johnson or to make Kelly Lynn Johnson reasonably fear an immediate battery." Consequently, there was no miscarriage of justice.

Finally, defendant claims that defendant was denied a fair trial by the cumulative effect of all of the above instances of prosecutorial misconduct. See *People v Malone*, 180 Mich App 347, 362; 447 NW2d 157 (1989). Some of the prosecutor's remarks during the closing argument were not entirely appropriate; however, we do not find that those remarks, taken individually or together, were so prejudicial as to deny defendant a fair trial.

III.

Finally, defendant claims that the trial court abused its discretion by sentencing defendant to a minimum term of imprisonment in excess of the sentencing guidelines. Because defendant has already served his minimum sentence, it is impossible for this Court to fashion a remedy. This issue is, therefore, moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Michael R. Smolenski