

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL GENE ORR,

Defendant-Appellant.

UNPUBLISHED

July 13, 1999

No. 205173

Ingham Circuit Court

LC No. 97-071383 FC

Before: Fitzgerald, P.J., and Doctoroff, and White, JJ.

PER CURIAM.

Defendant was convicted by jury of intentionally discharging a firearm at a dwelling or occupied structure, MCL 750.234b; MSA 28.431(2), and possessing a firearm at the time of an attempted or completed felony, MCL 750.227b; MSA 28.424(2). He appeals as of right and we affirm.

Defendant first claims that the prosecutor committed misconduct in her closing argument by disparaging the defense and its exculpatory theory of self-defense. Defendant did not object to this instance of alleged prosecutorial misconduct at trial and this Court will not address the issue on appeal "unless failure to consider the issue would result in a miscarriage of justice." *People v Dalessandro*, 165 Mich App 569, 579; 419 NW2d 609 (1988). Defendant made self-defense a material issue through his testimony and the prosecutor was entitled to argue that defendant's defense was inconsistent with the evidence. *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995). To the extent the prosecutor's particular comments were improper, a timely objection and request for a limiting instruction would have cured any resulting prejudice. *People v Mitchell*, 223 Mich App 395, 400; 566 NW2d 312 (1997). We do not believe defendant was prejudiced by the comments and find no miscarriage of justice.

Defendant also claims that the prosecutor's "message" argument was an improper civic duty argument. Defendant preserved this issue by making a timely objection. *Dalessandro, supra* at 579. We review allegations of prosecutorial misconduct by examining the relevant portion of the record to determine if the remarks denied defendant a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270. A prosecutor commits misconduct, and thereby deprives a defendant of a fair trial, when he or she appeals to the jury to return a guilty verdict as part of its civic duty. See *People v*

Crawford, 187 Mich App 344, 354; 467 NW2d 818 (1991). “Such arguments are generally condemned because they inject issues into the trial that 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.” *Id.* Further, civic duty arguments “appeal to the fears and prejudices of jurors” *People v Schmitz*, 231 Mich App 521, 533; 586 NW2d 766 (1998).

In the instant case, the prosecutor argued that defendant had traveled to Lansing to give a message to the intended victim with his gun. However, she contended that when he "delivered" the message it was to the entire apartment building with reckless disregard for the occupants' safety. In her rebuttal argument, the prosecutor asserted that the evidence supported conviction and the jury

should give a message back, a message in return that should be loud and clear. We will not tolerate this. We will not look for ways to excuse your behavior by calling what you did self-defense. Because you cannot endanger an entire apartment building full of people when you have ways to avoid it.

We will not look the other way and ignore the evidence that you shot into this building before anyone shot at you. We will not put on blinders and refuse to ask ourselves why anyone needs to come calling on people with guns in the first place. And we will not look for a way out of holding you responsible for this by personally attacking and needlessly criticizing the person that you chose as a victim.

We conclude that the prosecutor's argument was not premised on emotion without facts, nor did it ask the jury to abandon its logic. See *Schmitz*, *supra* at 533; *Crawford*, *supra* at 354. While a different phrasing would have been preferred, the prosecutor was summarizing and interpreting the evidence presented at trial by using the image of delivering a message. And, given that the prosecutor was obliged to establish that the building was a *dwelling or occupied structure*, MCL 750.234b; MSA 28.431(2), defendant was not deprived of a fair trial by the prosecutor's references to the building residents.

Next, defendant argues that the evidence was insufficient to convict him of discharging a firearm. When reviewing the sufficiency of the evidence presented at trial, this Court looks at the evidence in the light most favorable to the prosecutor. *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995). The evidence is sufficient when a rational factfinder could determine that the prosecutor proved every element of the crimes charged beyond a reasonable doubt. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1991).

The crux of defendant's challenge to the sufficiency of the evidence is that the eyewitness account by the prosecutor's key witness was not credible. This Court has long held that “the credibility of witnesses is a matter of weight, not sufficiency. Determinations of credibility are made by the jury which heard the testimony and observed the witnesses, and this Court will not substitute its judgment on this issue.” *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). Even though this witness did not provide perfectly consistent accounts of the events, “the question is not whether there was conflicting evidence, but rather whether there was evidence that the jury, sitting as the trier of fact, could

choose to believe and, if it did so believe that evidence, that the evidence would justify convicting defendant.” *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994). Nor does it matter that the prosecutor’s case lacked physical evidence of the offense, such as a gun or a gun powder residue test that indicated defendant shot a weapon that day. “Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of a crime.” *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991). Therefore, we conclude that the evidence was sufficient beyond a reasonable doubt to convict defendant of discharging a firearm at a dwelling or occupied structure when viewed in the light most favorable to the prosecutor.

Defendant also claims that the prosecutor failed to prove a connection between him and a felony and, therefore, the jury could not properly convict him of felony-firearm. MCL 750.227b(1); MSA 28.424(2)(1). Discharging a weapon at a dwelling or structure is a felony. MCL 750.234b(1); MSA 28.431(2)(1). Although the felony-firearm statute provides exceptions for certain statutory offenses, discharging a firearm is not among them. Indeed, we have held that the felony-firearm statute applies to individuals who commit this same offense. *People v Guiles*, 199 Mich App 54, 59-60; 500 NW2d 757 (1993). By proving beyond a reasonable doubt that defendant had discharged a firearm at a dwelling or occupied structure, the prosecutor implicitly proved that defendant had possessed a firearm while committing a felony. Therefore, defendant’s felony-firearm conviction does not require reversal.

Defendant’s final argument is that the trial court did not cure the prejudice that stemmed from the clearly misstated instruction on self-defense. To the contrary, by telling the jury that it had misspoken and by re-reading the jury instruction in the correct form, the trial court provided a timely cure for its inadvertent error. See *People v Gray*, 57 Mich App 289, 297; 225 NW2d 733 (1975).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Martin M. Doctoroff

/s/ Helene N. White