

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALI SCOTT BABRAK,

Defendant-Appellant.

UNPUBLISHED

July 23, 1999

No. 207421

St. Clair Circuit Court

LC No. 97-000788 FC

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA, 28.279, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 282.424(2), and carrying a weapon with unlawful intent, MCL 750.226; MSA 28.423. Defendant was sentenced to five to ten years for the assault conviction, two years for the felony-firearm conviction, and three years and four months to five years for the carrying a weapon with unlawful intent conviction. Defendant appeals as of right and we affirm.

Defendant first argues that a remark the prosecutor made during opening statement improperly commented on defendant's right to remain silent. We review questions of prosecutorial misconduct on a case by case basis by examining the pertinent portions of the trial court record and evaluating the prosecutor's comments in context to determine whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). In this case, defendant was not denied a fair trial. The prosecutor's emphasis on the fact that essentially two stories had been consistently told was a proper comment on the facts, and was subsequently supported by the testimony at trial. The prosecutor's statements and any inference that arose regarding defendant's right to remain silent "were not manifestly intended to be or were of such a character that the jury necessarily took them to be a comment of the failure of defendant to testify." *People v Guenther*, 188 Mich App 174, 179; 469 NW2d 59 (1991). Under these circumstances, reversal is not warranted.

Defendant next argues that he was denied a fair and impartial trial based on the prosecutor's improper impeachment of a witness. Defendant moved for a mistrial based on this error, which the trial court implicitly denied by instead striking the testimony and instructing the jury to disregard it. We

review the grant or denial of a mistrial for an abuse of discretion. *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (1990); *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the ability to receive a fair trial. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996).

The record reveals that the prosecutor failed to lay an adequate foundation for impeachment with a prior inconsistent statement by failing to confront the impeached witness regarding the prior statement. MRE 613; *People v Parker*, 230 Mich App 677, 683; 584 NW2d 758 (1998). However, the trial court instructed the jury that the impeaching testimony and any reference to it “will be stricken and may not serve as evidence in this case.” Accordingly, the question is whether the trial court abused its discretion in denying defendant’s motion for a mistrial.

Here, we conclude that any prejudice that resulted from the improper impeachment was cured by the trial court’s instruction to the jury. Jurors are presumed to have followed a court’s instructions until the contrary is clearly shown. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). There is nothing in the record that indicates the jury failed to follow the trial court’s instruction. Furthermore, in light of all the evidence presented, any prejudice that arose from the improper testimony was minimal and did not prejudice defendant to the extent that he was denied a fair trial. *Wolverton*, *supra* at 75.

Lastly, defendant argues that there was insufficient evidence to support his conviction of assault with intent to commit great bodily harm less than murder. The elements of this offense are: (1) an attempt or offer with force or violence to do corporeal harm to another, (2) coupled with an intent to do great bodily harm less than murder. *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), modified on other grounds 457 Mich 883 (1998). The offense is a specific intent crime, but actual physical injury is not an element. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). When determining whether sufficient evidence has been presented to sustain a conviction, the 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, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

In this case, the victim testified that while he was wrestling on the ground with defendant, defendant put a gun to his chest and shot him. The victim further testified that as he attempted to get up off the ground, defendant stepped back and shot him again. This evidence satisfied the elements of the crime, an attempt or offer with force or violence to do physical harm, coupled with the intent element. Intent may be inferred from all the facts and circumstances surrounding the event, *People v Safiedine*, 163 Mich App 25, 29; 413 NW2d 711 (1987), including the defendant’s conduct. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The testimony that defendant put a gun near the victim’s chest and fired, and that defendant shot the victim in the chest a second time as he attempted to get up indicates an intent to do great bodily harm, and thus satisfies the specific intent element of the crime. See *id.* at 239. Although defendant testified that he did not shoot the victim and there were inconsistencies in the testimony of the relevant witnesses, the credibility of witnesses is an issue for the

trier of fact, here the jury. *People v Johnson*, 397 Mich 686, 687; 246 NW2d 836 (1976). This Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514.

Therefore, viewing the evidence in a light most favorable to the prosecution, the jury could have found that both the assault and the intent elements were proven beyond a reasonable doubt.

Affirmed.

/s/ Michael J. Kelly

/s/ Kathleen Jansen

/s/ Helene N. White