

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK BURKS,

Defendant-Appellant.

UNPUBLISHED

April 19, 2002

No. 229700

Wayne Circuit Court

LC No. 00-001218

Before: Zahra, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for three counts of second-degree home invasion, MCL 750.110a(3), two counts of felonious assault, MCL 750.82, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to six to fifteen years in prison for his second-degree home invasion convictions, two to four years in prison for his felonious assault convictions, and two years in prison for his felony-firearm conviction, to be served consecutively to the home invasion and the felonious assault convictions. We affirm.

On appeal, defendant argues that there was insufficient evidence for the jury to convict him of two counts of felonious assault. Due process requires that the prosecution introduce sufficient evidence that could justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). Therefore, by arguing that the evidence was insufficient to sustain his conviction for felonious assault, defendant invokes his constitutional right to due process of law. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Review of this constitutional issue is de novo. *Id.*

When reviewing a claim of insufficient evidence, this 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 Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 478, amended 441 Mich 1201 (1992). The prosecution need not negate every reasonable theory consistent with innocence, but need only convince the jury of the defendant's guilt in the face of whatever contradictory evidence the defendant may provide. *Nowack, supra* at 400. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The Michigan felonious assault statute provides:

[A] person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony
[MCL 750.82(1).]

“The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). An automobile may be used as a “dangerous weapon” for purposes of the felonious assault statute. *People v Sheets*, 138 Mich App 794, 799; 360 NW2d 301 (1984).

Defendant was convicted of one count of felonious assault for driving his car at Officer Dailey. Defendant argues that the evidence showed that he did not intentionally drive the car at Officer Dailey because Officer Solomon was holding on to his arm while he was driving. We disagree. Evidence showed that, as defendant got into the car, Officer Solomon grabbed him and tried to pull him out of the car. Officer Solomon was holding on to defendant’s shirt or jacket and pulling on his arm as defendant was driving away. Officer Dailey testified that defendant pressed the accelerator all the way down, and defendant turned the wheel of the car, driving at him. Officer Dailey testified that, even after Officer Solomon let go of defendant and fell off the car, defendant continued to drive the car at him. A rational trier of fact could conclude that defendant intended to drive the car at Officer Dailey. Therefore, there was sufficient evidence for the jury to convict defendant of the first count of felonious assault.

Defendant was convicted of a second count of felonious assault for pointing his gun at Officer Solomon. Defendant argues that there was insufficient evidence to support a conviction of this count because Officer Solomon’s testimony, that defendant pointed a gun at him, was incredible. Again, we disagree. Officer Solomon testified that he saw defendant attempting to climb through the side window of the house to get out. He testified that defendant had a gun and was pointing it at him. Defendant argues that this testimony was incredible because defendant would have been looking at the ground if he was climbing out a window, and there was no showing of the required intent. We disagree. On these facts, whether defendant pointed a gun at Officer Solomon was a matter for the jury. This Court should not interfere with the jury’s role of determining the weight of the evidence or deciding the credibility of the witnesses. *Wolf, supra* at 514-515. The evidence was sufficient for the jury to convict defendant of the second count of felonious assault.

Next, defendant argues that the trial court erred by failing to instruct the jury that felonious assault is a specific intent crime. We find no error.

Defendant stated that he had no objection to the jury instructions. After the trial court gave a supplemental jury instruction on felonious assault, including further instruction on the required intent, defendant again stated that he had no objection. A defense attorney’s express approval of jury instructions, as opposed to his mere failure to object, constitutes a waiver that extinguishes any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). When the trial court asks a party if it has an objection for the record after it has read the jury instructions and the party responds in the negative, that party has waived the jury instruction

issue. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).¹ We find that defendant waived this instructional issue for appeal.

Even were we to conclude that defendant did not waive this issue, we would find no error. The trial court properly instructed the jury concerning the required intent. When giving the supplemental instruction, the trial court stated that specific intent is required for a felonious assault conviction.

Finally, defendant argues that the prosecutor made comments during her closing argument that were unsupported by the evidence, and therefore, denied him a fair trial. Defendant failed to object to the prosecutor's comments. Appellate review of an unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting defendant's substantial rights. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Prosecutorial misconduct issues are decided case by case and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000) (citations omitted).]

"No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.* The trial court's instruction to the jury that it is to decide the case on the evidence alone and that the arguments of attorneys are not evidence may dispel any prejudice from the mischaracterization of testimony by the prosecutor. *People v Green*, 228 Mich App 684, 692-693; 580 NW2d 444 (1998).

The allegedly improper comments made by the prosecutor all concerned facts that were not essential to the prosecution's case against defendant or were reasonable inferences that arose from the evidence submitted at trial. Defendant has failed to show that he was prejudiced by these comments. Even if the prosecutor's comments were improper, we find that any prejudice that may have occurred was eliminated by the trial court's instruction that the attorneys' closing arguments were not evidence. See *id.* Therefore, defendant has not established that the prosecutor's comments during closing argument were outcome-determinative plain error. *Watson, supra*.

¹ In *Tate, supra* at 559, this Court stated: "Pursuant to *Carter, supra*, we conclude that any error in [] the instruction ... was extinguished by counsel's repeated waiver, either in the form of express approval or (which amounts to the same thing) by responding 'No' when specifically queried by the court whether there was anything further for the record."

Affirmed.

/s/ Brian K. Zahra

/s/ Janet T. Neff

/s/ Henry William Saad