# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 30, 2004 |
| v | No. 249621<br>Ingham Circuit Court |
| DONJUAN LAMONT KIRK,<br><br>Defendant-Appellant. | LC No. 02-000951-FH |

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of assault with intent to rob while unarmed, MCL 750.88, and assault with intent to commit great bodily harm less than murder, MCL 750.84, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant and his brother went to complainant's home for a barbecue. The men played cards and drank beer for several hours, after which they decided to purchase more beer. Complainant agreed to contribute money to the purchase. Defendant became upset when complainant indicated he would pay his share after he returned from the store. Defendant stopped a vehicle in which complainant was riding, insisted that complainant contribute his share of the purchase price immediately, and engaged complainant in a physical altercation. When complainant arrived at the hospital he discovered that money, a wallet, and a knife were missing from his pocket. He did not know who took the items from his pocket.

Defendant first argues that the prosecutor presented insufficient evidence to support his conviction of assault with intent to rob while unarmed. We disagree. In reviewing a sufficiency of the evidence question, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. *People v Milstead*, 250 Mich App 391, 403 n 7; 648 NW2d 648 (2002). We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 404; *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). A trier of fact may make reasonable inferences from direct or circumstantial evidence in the record. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

The elements of assault with intent to rob while unarmed are: (1) an assault with force and violence; (2) an intent to rob and steal; and (3) the defendant being unarmed. See MCL 750.88. Robbery requires the intent to permanently deprive the owner of his property. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Minimal circumstantial evidence is sufficient to establish intent. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2002).

The prosecutor was not required to prove that defendant actually took property from complainant. Rather, the prosecutor was required to prove beyond a reasonable doubt that at the time of the incident defendant intended to commit robbery. See, generally, CJI2d 18.4(3). The evidence that defendant stopped a car in order to confront complainant and demand that complainant pay for his share of the purchase immediately, coupled with the evidence that complainant's money was missing when he arrived at the hospital, supported an inference that at the time of the incident, defendant intended to take money from complainant. *Ortiz, supra*; *King, supra*. The evidence, viewed in the light most favorable to the prosecution, supported defendant's conviction of assault with intent to rob while unarmed. *Wolfe, supra*.

Defendant argues that the prosecutor denied him a fair trial by improperly arguing that complainant felt a hand in his pocket during the incident, when no evidence supported that assertion. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "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), abrogated in part on other grounds by *Crawford v Washington*, ___ US ___; 124 S Ct 1354; ___ L Ed 2d ___ (2004). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Defendant did not object to the prosecutor's remark; therefore, absent plain error, he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). During cross-examination, complainant responded in the affirmative when defense counsel asked him if he put his hand in his pocket at some point during the incident. During closing argument, defense counsel noted that complainant stated that he might have felt someone's hand in his pocket during the incident. During rebuttal closing argument, the prosecutor stated that complainant felt a hand in his pocket, but that he did not know who took money from his pocket. The prosecutor did not improperly argue facts not in evidence, but responded to defense counsel's argument regarding what complainant might have perceived during the incident. The prosecutor's remark, when viewed in context, was not improper. *Noble, supra*; *Schutte, supra*. Any prejudice created by the prosecutor's remark could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). No plain error occurred. *Carines, supra*.

Affirmed.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Bill Schuette