

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD JOHNSON,

Defendant-Appellant.

UNPUBLISHED
December 3, 2009

No. 285026
Wayne Circuit Court
LC No. 07-024034-FC

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of assault with intent to rob while armed, MCL 750.89, and resisting or obstructing an officer, MCL 750.81d(1). Defendant was sentenced to 5 to 15 years in prison for the assault-with-intent-to-rob conviction, and to 1 to 2 years in prison for the resisting-or-obstructing conviction. We affirm.

Defendant first contends that the prosecutor failed to present sufficient evidence to secure a conviction of assault with intent to rob while armed. We disagree. We view the evidence in a light most favorable to the prosecution to 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 Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). In doing so, our review is de novo. *Id.*

In order to secure a conviction for assault with intent to rob while armed, the prosecution must establish that an assault with force and violence occurred, that there was intent to rob and steal, and that defendant was armed. MCL 750.89; *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). On appeal, defendant argues that the prosecution did not establish that he possessed the intent necessary to rob or steal. Thus, we address only the intent element. Defendant claims that his threats were merely intended to get attention, and were not intended as a threat of robbery or as an attempt to obtain any type of monetary gain. Defendant further contends that he lacked the specific intent to rob or steal, as evidenced by the fact that there was virtually no likelihood of successfully completing a robbery given the circumstances of this case.

Assault with intent to rob while armed is a specific intent crime, which requires evidence that defendant intended to rob or steal. *Cotton, supra* at 391. The prosecution must prove not only that the defendant did certain acts, but also that he did these acts with the intent to bring about a particular result. See *People v Taylor*, 422 Mich 554, 567; 375 NW2d 1 (1985); *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Proof of intent can be determined from

the surrounding facts. *People v Harris*, 110 Mich App 636, 641; 313 NW2d 354 (1981). Circumstantial evidence and reasonable inferences that arise from the evidence may be sufficient to prove the necessary elements of a criminal offense. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

In his brief on appeal, defendant asserts that his actions were merely intended to get the attention of the complainant and not to obtain a pecuniary gain. However, the evidence presented does not support defendant's assertion. Defendant approached the window with a bag and what appeared to be a gun, threatening the complainant and demanding money. If defendant had simply wanted attention, he likely would not have demanded money while brandishing a gun. Since defendant did in fact demand money while openly pointing a gun at the complainant, the jury could have reasonably inferred that his intention was to obtain money from the complainant. Moreover, defendant concedes that he probably put the complainant in a reasonable fear or apprehension of an immediate battery. Defendant's own admission in this regard, coupled with the evidence that he demanded money from the complainant, sufficiently established that he committed an assault with the intent to rob or steal.

In his brief on appeal, defendant argues that the "inherent impossibility" of committing the crime charged demonstrates that he lacked the requisite intent. In making this argument, defendant cites the facts that his gun was not real and that the complainant was situated behind bulletproof glass. Neither of these facts demonstrates that defendant did not possess the requisite intent. While defendant knew that the gun was a toy, the complainant did not. Furthermore, while we acknowledge that the complainant may well have been situated behind bulletproof glass, factual impossibility does not negate defendant's specific intent conduct in this case. See *People v Thousand*, 465 Mich 149, 165; 631 NW2d 694 (2001). As our Supreme Court has observed, there is "no exception for those who, possessing the requisite criminal intent to commit an offense prohibited by law and taking action toward the commission of that offense, have acted under an extrinsic misconception." *Id.* The mere fact that defendant's plan was flawed did not foreclose the jury from reasonably concluding that defendant possessed the specific intent to commit an armed robbery. Regardless of defendant's actual ability to inflict injury, the intent element was satisfied. A rational trier of fact could have concluded beyond a reasonable doubt that defendant possessed the specific intent to rob the complainant while armed.

Next, defendant contends that the prosecutor committed misconduct during her closing remarks to the jury. We disagree. We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when the plain error resulted in the conviction of an innocent defendant, or when the error significantly affected the fairness, integrity or public reputation of judicial proceedings unrelated to defendant's innocence. *Id.*

The test to determine whether prosecutorial misconduct occurred is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). This Court must examine the entire record as a whole and evaluate the prosecutor's remarks in context. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). "The propriety of the prosecutors remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). "A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *Dobek, supra* at 64.

In the prosecutor's closing argument, she stated:

Ladies and gentlemen, the issue in this case is credibility and what I mean by that is we have two completely different stories about what happened on the day of November 20th, of 2007 and it's your job as jurors to decide which version of that story is the truth.

Defendant claims that these comments by the prosecutor denied him a fair trial by shifting the burden of proof to the defendant. It is axiomatic that the prosecutor may not effectively shift the burden of proof to the defendant. See *People v Fields*, 450 Mich 94, 111-113; 538 NW2d 356 (1995). But despite defendant's assertions to the contrary, the prosecutor was not attempting to mislead the jury regarding the burden of proof in the case at bar. Rather, the prosecutor was merely commenting on the jury's role in determining the credibility of the witnesses. Such commentary was legally accurate, and was neither misleading nor improper. Jurors see and hear the witnesses, and it is the jury's function to determine the weight and credibility of their testimony. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Indeed, as this Court explained in *People v Goss*, 200 Mich App 9, 18-19; 503 NW2d 682 (1993), "the jury has the sole responsibility to decide the facts in light of the credibility of the witnesses and the weight and value of the evidence. In addition, the jury has the responsibility to find the truth and decide the ultimate question of guilt or innocence in view of the evidence presented at trial."

The prosecutor's comments at issue did not impermissibly shift the burden of proof to defendant and did not deny defendant a fair trial. The prosecutor's closing remarks contained an accurate statement of the law. Therefore, defendant can show no misconduct, and we reject his claim of error in this regard.

Defendant also argues that his trial counsel was ineffective for failing to object to the prosecutor's closing remarks. However, we have already determined that the challenged remarks were not improper and that no prosecutorial misconduct occurred. Defense counsel was not ineffective for failing to raise a futile or meritless objection. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Defendant is not entitled to relief.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald