

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLINTON E. BRACEY,

Defendant-Appellant.

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UNPUBLISHED

June 26, 1998

No. 200613

Recorder's Court

LC No. 96-004598

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL L. DAVIS,

Defendant-Appellant.

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No. 200614

Recorder's Court

LC No. 96-004598

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Defendant Bracey appeals as of right his conviction of one count of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and one count of assault with intent to rob while unarmed, MCL 750.88; MSA 28.283. Defendant Bracey was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to seven to fifteen years in prison. Defendant Davis was also convicted of one count of assault with intent to commit great bodily harm less than murder and one count of assault with intent to rob while unarmed. Defendant Davis was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to six to fifteen years in prison. We affirm.

## Defendant Bracey's Issues

### I

Defendant Bracey first argues that the prosecution presented insufficient evidence to support his conviction of assault with intent to rob while unarmed. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

The elements of an assault with the intent to rob while unarmed are (1) an assault with force and violence, (2) an intent to rob and steal, and (3) defendant being unarmed. *People v Chandler*, 201 Mich App 611, 614; 506 NW2d 882 (1993). Defendant maintains that the prosecutor did not present sufficient evidence to establish the second element. However, intent may be inferred from all the facts and circumstances of the case. *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995). Here, evidence was presented that defendants were waiting outside a store and assaulted complainant immediately after he left the store. Eyewitness James McCullough testified that one defendant shouted, "give it up," while beating complainant. McCullough also stated that defendants were stomping on complainant's right arm while complainant had his right hand in his pocket. From this testimony, a reasonable trier of fact could conclude that defendants wanted to steal whatever the complainant had, or defendants believed he had, in his right hand. Viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to support defendant Bracey's conviction of assault with intent to rob while unarmed.

### II

Defendant Bracey next argues that the trial court erred in refusing to give a jury instruction requested by defense counsel regarding conflicting evidence. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

Defendant Bracey requested that the trial court give the following instruction:

Where the testimony is directly conflicting and both versions as given could not be true, there is a reasonable doubt as to which story is true. It is your duty to accept that version which is consistent with the innocence of the defendant.

However, this instruction is not an accurate statement of the law because, while conflicting testimony may create a reasonable doubt, the jury has no duty to accept any testimony where there is a conflict.<sup>1</sup> *People v Johnson*, 127 Mich App 587, 589-590; 339 NW2d 489 (1983); accord *People v Dutra*,

155 Mich App 681, 683; 400 NW2d 619 (1986). Because the trial court's instructions, considered in their entirety, fairly presented the issues to be tried and sufficiently protected defendant's rights, we find no error requiring reversal. See *Bell, supra*.

### Defendant Davis' Issues

#### I

Defendant Davis argues that prosecutorial misconduct denied him a fair trial. However, defendant did not object at trial to the comments of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

After briefly reviewing the allegedly improper comments, we conclude that failure to consider the issue more thoroughly would not result in a miscarriage of justice. Several of the comments cited by defendant constitute proper arguments from the evidence and reasonable inferences arising from it. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor's statements regarding the complainant's credibility were not improper; the prosecutor did not imply that he had special knowledge that the complainant testified truthfully, but merely argued that complainant had no incentive to lie or to testify inaccurately about the identities of the perpetrators. See *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). The prosecutor did not appeal to the fears or prejudices of the jurors and did not encourage the jurors to suspend their own powers of judgment; accordingly, the comments did not constitute an improper civic duty argument. See *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). In the remaining comments cited by defendant, the prosecutor was merely encouraging the jurors to rely on their personal experience and their common sense.

Defendant Davis also argues that defense counsel's failure to object to the prosecutor's statements discussed above denied him the effective assistance of counsel. However, because the prosecutor's statements were not improper, defense counsel's failure to object to the statements did not constitute ineffective assistance of counsel. Defense counsel was not required to raise a meritless objection. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

#### II

Finally, defendant Davis argues that the trial court erred in refusing to instruct the jury on the lesser misdemeanor offense of aggravated assault. We disagree.

In *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982), the Supreme Court adopted a five-part test to determine whether a requested misdemeanor instruction should be given. First, the party must properly request the instruction by informing the court of exactly what lesser offenses are

being requested. Second, there must be an appropriate relationship between the charged offense and the requested misdemeanor. Third, the requested misdemeanor instruction must be supported by a rational view of the evidence. Fourth, if the prosecutor requests the instruction, the defendant must have had adequate notice. Finally, the requested instruction must not result in undue confusion or injustice. *Id.* at 261-264. A trial court retains substantial discretion as to whether the cause of justice would be served by giving the misdemeanor instruction, and an appellate court will not reverse its decision on appeal absent an abuse of that discretion. *Id.* at 265.

The trial court did not abuse its discretion in refusing to instruct the jury on aggravated assault. Aggravated assault requires a finding that the defendant did not have the intent to do great bodily harm. See MCL 750.81a(1); MSA 28.276(1). The evidence indicated that, as the complainant was exiting the store, defendant Davis hit the complainant across the bridge of the nose with an object approximately twelve to fourteen inches long. When the complainant fell to the ground, Davis continually stomped on the complainant's right arm. Both defendants kicked the complainant multiple times. Davis also repeatedly bashed the complainant's head against a concrete wall. Defendants only abandoned their attack because bystanders intervened. Based on such evidence, a jury could not reasonably find that defendant Davis did not have the intent to cause great bodily harm; accordingly, the trial court did not abuse its discretion in denying defendant's request for an instruction on aggravated assault. See *Stephens, supra* at 262-263.

Furthermore, in convicting defendant Davis of assault with intent to do great bodily harm less than murder, the jury rejected the lesser offense of felonious assault, MCL 750.82; MSA 28.277. Accordingly, even if the trial court abused its discretion in refusing the requested instruction on aggravated assault, the error was harmless. See *People v Beach*, 429 Mich 450, 453; 418 NW2d 861 (1988).

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Donald E. Holbrook, Jr.  
/s/ Mark J. Cavanagh

<sup>1</sup> We recognize that a panel of this Court recently held that the requested instruction need not be given where, as here, there is direct evidence supporting a conviction. See *People v McFall*, 224 Mich App 403, 414; 569 NW2d 828 (1997). As already stated, we believe that the instruction does not comport with Michigan law. However, because the *McFall* panel did not directly rule on the merits of the instruction, we conclude that we are not required to rule differently in this case. Even if we found *McFall* controlling, there was no error requiring reversal because the trial court fully instructed the jury on the presumption of innocence, the prosecutor's burden of proof, and the jury's duty in considering and weighing the evidence. See *id.*