

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE LEVEURN ANDREWS,

Defendant-Appellant.

UNPUBLISHED

November 24, 1998

No. 203700

Recorder's Court

LC No. 96-007152

Before: Smolenski, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to consecutive sentences of two years' imprisonment for the felony-firearm conviction and fifteen to thirty years' imprisonment for the assault with intent to commit murder conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the evidence presented by the prosecution was not sufficient to sustain the jury's finding that defendant was guilty beyond a reasonable doubt of assault with intent to commit murder. We disagree. When reviewing a claim of insufficient evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *Hutner, supra*, 209 Mich App 282.

To establish assault with intent to commit murder, the prosecution must prove beyond a reasonable doubt (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Defendant first argues that the prosecution failed to present sufficient evidence that defendant acted with the intent to kill. Specifically, defendant argues that the fact that complainant was shot only in the leg indicates that the shooter did not have the intent to kill. However, the jury may infer an intent to kill from any facts in

evidence, including the manner of use of a dangerous weapon. *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997)(Riley, J); *Hoffman, supra*, 225 Mich App 111. Here, the jury could reasonably infer from the evidence that a dangerous weapon was used and that complainant was shot five times that defendant had the intent to kill. *People v Turner*, 62 Mich App 467, 470; 233 NW2d 617 (1975). Defendant also argues that the evidence was not sufficient to support a finding that the intent to kill, if successful, would make the killing murder. However, the evidence indicated that defendant possessed the intent required for murder, and there were no circumstances in the instant case that would excuse, justify, or mitigate the crime. Accordingly, a finding of murder would have been justified had complainant died from his wounds. *People v Lipps*, 167 Mich App 99, 105-106; 421 NW2d 586 (1988).

Defendant further claims that the prosecution failed to prove beyond a reasonable doubt that he was the shooter. However, complainant's testimony that defendant was the shooter was sufficient evidence to justify the jury's finding that defendant was the shooter. The credibility of the identification testimony was a matter for the jury to decide. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Accordingly, defendant's conviction of assault with intent to commit murder was supported by sufficient evidence.

Defendant next argues that the prosecutor committed misconduct by appealing to the jurors' sympathy for complainant and by expressing her personal belief in defendant's guilt during her closing argument. We disagree. Defendant failed to object at trial to the prosecutor's closing remarks which he now challenges on appeal. Therefore, appellate review of the remarks is precluded unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1998).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). A prosecutor is free to relate the facts adduced at trial to the prosecution's theory of the case and to argue the evidence and all reasonable inferences arising from it to the jury. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). Here, the prosecutor's closing argument was based on the evidence. The prosecutor did not ask the jurors to suspend their judgment and decide the case on the basis of sympathy and did not improperly express her personal belief in defendant's guilt. The prosecutor merely recapped the evidence and asked the jury to decide the case on the basis of the evidence. Further, the trial judge instructed the jurors not to let sympathy or prejudice influence their decision. Accordingly, the prosecutor's closing argument did not deny defendant a fair and impartial trial.

Defendant's final argument is that the trial court erroneously instructed the jury on the issue of flight. We disagree. Jury instructions are reviewed by this Court in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. *Daniel, supra*, 207 Mich App 53. Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

To give a particular instruction to a jury, it is necessary that there be evidence to support the giving of the instruction. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). Here, the prosecution presented evidence that immediately after the shooting, defendant got into his car and left the scene. A police investigator testified that defendant had been sought from the time the arrest warrant was issued on July 21, 1996, until his arrest on September 1, 1996. Thus, contrary to defendant's assertion, there was evidence to support the giving of the instruction regarding flight. Furthermore, the instructions to the jury fairly presented the issues to be tried and sufficiently protected defendant's rights.

Affirmed.

/s/ Michael R. Smolenski

/s/ Gary R. McDonald

/s/ Martin M. Doctoroff