

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATT JACKLYN,

Defendant-Appellant.

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UNPUBLISHED

August 13, 1999

No. 204422

Kalamazoo Circuit Court

LC No. 97-000084 FH

Before: Holbrook, Jr., P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of malicious destruction of personal property over \$100, MCL 750.377(a); MSA 28.609(1), aggravated assault, MCL 750.81a; MSA 28.276(1), and two counts of assault or assault and battery, MCL 750.81; MSA 28.276. Defendant was sentenced to five years' probation for the malicious destruction of property conviction, one year in jail and two years' probation for the aggravated assault conviction, and forty-five days in jail and two years' probation for each assault or assault and battery conviction. We affirm.

Defendant's convictions resulted from his participation in a melee involving opposing groups of college students outside defendant's fraternity house. The evidence against him derived in part from plaintiff's use of the investigative subpoena procedure authorized by MCL 767A.1 *et seq.*; MSA 28.1023A(1) *et seq.* Defendant now claims that reversal of his convictions is required because the prosecutor's use of this procedure was faulty in several respects. We disagree. We first note that defendant failed to preserve his claims for appellate review by raising them in the trial court. *People v Sabin*, 233 Mich App 530, 532; 566 NW2d 677 (1997). Further, because we find no error in the prosecution's use of the procedure, we necessarily find that further review is unnecessary. *People v Hurt*, 211 Mich App 345, 352; 536 NW2d 227 (1995).

Defendant next contends that certain actions taken by the prosecutor served to deny defendant a fair trial. We disagree. "Claims of prosecutorial misconduct are decided case by case. . . . The test is whether defendant was denied a fair and impartial trial" *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defendant's claim of prosecutorial misconduct is based on several alleged instances of improper behavior. Two of those instances involve remarks made by the prosecutor at trial. We examine those "remarks in context in order to determine whether the defendant was denied a fair and impartial trial." *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). First, defendant asserts the prosecutor improperly referred to defendant's Fifth Amendment right to remain silent when during rebuttal closing argument he stated that during the investigative subpoena hearing, defendant "[a]dmitted being right there in the middle of all this, and never said what his involvement was." We believe this remark was proper commentary on the evidence. Furthermore, even if the comment was improper, our review of the record convinces us that any potential impropriety was harmless. *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994).

Second, defendant argues that during his closing and rebuttal closing arguments, the prosecutor made an improper civic duty argument that played upon the jurors fears and prejudices. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Again, we disagree. The comments cited were either proper commentary on the evidence or legitimate response to comments made by defense counsel during his closing argument. As for defendant's remaining allegations of misconduct, after carefully reviewing the record we conclude that each allegation is without merit. See *Paquette, supra* at 342. Defendant was not denied a fair and impartial trial by the prosecutor's conduct.

Next, defendant argues that the evidence adduced at trial was insufficient to support his convictions of malicious destruction of personal property, and assault or assault and battery on Matthew Markley. "This Court reviews sufficiency of the evidence claims by considering the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the charged crime were proved beyond a reasonable doubt." *People v DeKorte*, 233 Mich App 564, 567; 593 NW2d 203 (1999). "Circumstantial evidence and reasonable inferences 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 malicious destruction of personal property over \$100 are: (1) that the property belonged to someone else; (2) that defendant damaged that property; (3) that defendant did so knowing that it was wrong, without just cause or excuse, and with the intent to damage the property; and (4) that the extent of the damage was over \$100. CJI2d 32.2. Viewing the evidence in a light most favorable to the prosecution, we conclude that sufficient evidence was presented to enable the jury to reasonably infer that defendant himself, and in association with others, caused over \$100 in damage to the victims' automobile, and that he acted with the requisite intent.

The elements of assault are: (1) that defendant either attempted to commit a battery on the victim or did an illegal act that caused the victim to reasonably fear an immediate battery; (2) that defendant intended either to injure the victim or make the victim reasonably fear an immediate battery; and (3) that at the time, defendant had the ability to commit a battery, appeared to have the ability, or thought he had the ability. CJI2d 17.1. The elements of assault and battery are: (1) that defendant committed a battery on the victim; and (2) that defendant intended either to injure the victim or make the victim reasonably fear an immediate battery. CJI2d 17.2. Again viewing the evidence in a light most

favorable to the prosecution, we conclude that sufficient evidence was presented at trial to support defendant's conviction on this charge.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ William B. Murphy

/s/ Michael J. Talbot