

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID J. LEWIS,

Defendant-Appellant.

UNPUBLISHED

November 23, 1999

No. 205835

Recorder's Court

LC No. 96-504041

Before: Talbot, P.J., and Neff and Saad

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for aggravated assault, MCL 750.81a; MSA 28.276(1). Defendant was sentenced to twelve months in jail. We affirm.

I

Defendant challenges the evidence presented at trial as insufficient to establish beyond a reasonable doubt that defendant committed aggravated assault. Defendant argues that there was no direct evidence that he inflicted the serious injuries upon the complainant. We disagree. Reviewing the sufficiency of the evidence, we view the evidence in the 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 Johnson*, 460 Mich 720, 722-723; 568 NW2d 80 (1999).

Aggravated assault is an assault and battery without a weapon that inflicts a serious or aggravated injury on the complainant. MCL 750.81a; MSA 28.276(1). The elements of aggravated assault are: (1) the defendant tried to physically injure another person; (2) the defendant intended to injure the victim; and (3) the assault caused a serious or aggravated injury. CJI2d 17.6; *People v Brown*, 97 Mich App 606, 610-611; 296 NW2d 112 (1980).

Defendant does not dispute that he held complainant in a headlock, but argues that there is no evidence that he punched complainant or caused him injury. He maintains that the other combatants in the brawl inflicted complainant's injuries. Defendant's argument ignores the substantial evidence that he inflicted injuries on complainant. Tatro testified that when he went to complainant's defense, he saw

defendant punching and kicking complainant while he was motionless on the ground. Although a police officer testified that Tatro had earlier reported that he did not see who assaulted the complainant, this is a question of credibility that should be left to the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). In addition to Tatro's testimony, Savas saw defendant choking complainant, and a police officer arriving on the scene observed defendant trying to punch complainant. After the altercation, complainant's eyes and mouth were bloody, his face was swollen, and his ear was nearly ripped off. This evidence was sufficient to support defendant's conviction.

II

Defendant claims that he was denied a fair trial because of prosecutorial misconduct. Defendant's claim of prosecutorial misconduct is unpreserved because he failed to object to the alleged misconduct. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). However, this Court will review the issue to prevent manifest injustice. *Id.* The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* Claims of prosecutorial misconduct are decided on a case by case basis and the reviewing court examines the record and evaluates the alleged improper remarks in context. *Id.*

Defendant incorrectly argues that the prosecutor denied him a fair trial by referring to a third party (Hamilton) as "the person who pleaded guilty." We disagree. The reference to the third party as "the person who pleaded guilty" did not prejudice defendant because the trial court was the trier of fact and is deemed to be less prejudiced by error. *People v Edwards*, 171 Mich App 613, 619; 431 NW2d 83 (1988). In fact, the trial court had taken Hamilton's guilty plea earlier that day, and therefore already knew about it. Furthermore, the record indicates that the witness forgot the name of the third party and the prosecutor was merely trying to establish the identity of that person.

Defendant raises a meritless complaint that the prosecutor improperly commented on defendant's constitutional right to remain silent. The prosecutor's question to the police witness regarding whether he had interviewed defendant was a follow-up question to the officer's testimony that he had obtained everyone's statement. The question was not an attempt to place the issue of defendant's silence before a jury, therefore, reversal is not required. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996) (emphasis added). As noted above, this matter was tried with the court sitting as the trier of fact and any error is deemed less likely to be prejudicial. *Edwards, supra*, 171 Mich App 619.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Henry William Saad