STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2001
v	No. 220259 Oakland Circuit Court
JEFFREY L. AARON, Defendant-Appellant.	LC No. 98-163993-FH

Before: K.F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of attempted unarmed robbery, MCL 750.92; MSA 28.287, MCL 750.530; MSA 28.798. The trial court sentenced defendant as a fourth-habitual offender, MCL 769.12; MSA 28.1084, to three to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

I. Basic Facts

On November 23, 1998, defendant entered the complainant's store ostensibly to purchase a pair of bib overalls. The complainant helped the defendant select the pair that he wanted to purchase, placed them on the counter, and rang in the purchase. Instead of paying for the bibs, the defendant grabbed the cash register and a "tug of war" between the complainant and the defendant ensued. The struggle ended when the defendant pushed her to the floor. When the complainant pulled herself up from the floor, she had her handgun. According to the testimony, the defendant saw the handgun, dropped the cash register, and attempted to run out of the store. The complainant fired her gun shattering the glass door causing the defendant to trip and fall momentarily. However, defendant managed to get back up and run out of the store. The complainant fired three more rounds at the defendant's automobile attempting to hit the tires and thwart the defendant's escape but to no avail.

Afterward, when the complainant was cleaning up the store, the complainant's son-in-law discovered a wallet which was immediately turned over to the police. The complainant identified the defendant by the photograph contained on the driver's license The defendant was charged, tried and convicted for unarmed robbery and sentenced as a fourth habitual offender

II. Denial of Defendant's Motion to Quash

First, defendant contends that the trial court erred by denying his motion to quash the information. When reviewing a trial court's denial of a motion to quash an information, we must determine whether it was an abuse of discretion for the district court to bind the defendant over for trial. *People v Riggs*, 237 Mich App 584, 587; 604 NW2d 68 (1999). An abuse of discretion may be found where the result is "so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993).

Generally, a defendant must be bound over for trial where the prosecution presents sufficient evidence to establish probable cause to believe that a felony was committed and that the defendant committed the felony. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). Although the prosecution need not prove each element beyond a reasonable doubt, there must be evidence from which each element can be inferred. *Woods, supra*, 287-288. If there is competent evidence both supporting and negating an inference that the defendant committed the crime charged, a factual question is raised that the district court must leave to the jury. *Northey, supra*, at 574.

In the instant case, defendant was charged with attempted unarmed robbery. In *People v Reeves*, 458 Mich 236, 242; 580 NW2d 433 (1998) our Supreme Court set forth the elements of an attempted unarmed robbery: (i) an attempted felonious taking of property from the person of another or in his presence; (ii) by force and violence or by assault or by putting in fear; and (iii) defendant being unarmed. In the case at bar, defendant only challenges the second element – that there was insufficient evidence introduced at the preliminary examination to support a taking by force or putting the victim in fear. The testimony adduced at the hearing belies defendant's position. The complainant testified that the defendant grabbed the cash register and in her attempt to retain it, a "tug of war[]" between them ensued resulting in defendant "pushing" the complainant backwards causing her to fall into the glass jewelry case behind her. Complainant further testified that in her mind, she had to do something to avoid a violent situation and that she pulled out her firearm to stop defendant.

On the record before us, we find that the prosecutor introduced sufficient evidence at the preliminary examination to support a taking either by force or by putting the victim in fear, as required to establish the second element of an attempted unarmed robbery. We hold that the district court did not abuse its discretion when binding the defendant over for trial on the attempted unarmed robbery charge. Consequently, the trial court did not err by denying defendant's motion to quash the information.

III. Sufficiency of the Evidence

Next, the defendant contends that the evidence submitted at trial was not sufficient to support his conviction. We disagree. The test for determining the sufficiency of the evidence supporting a conviction is "[w]hether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding defendant's guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

Again, defendant challenges the force or fear element. At the trial, the victim testified that defendant gave her a "scary look" when he grabbed the cash register, and that she was "very

scared." She further testified that she did not know what was going to happen to her or whether defendant was armed. The complainant also testified that she and the defendant struggled over the cash register and that the defendant ultimately gained complete possession of the cash register when defendant pushed her down toward the floor. Reviewing the evidence presented in a light most favorable to the prosecution, the record reveals that the prosecutor introduced sufficient evidence of both fear and force such that a "[r]ational tryer of fact could find the essential elements of the crime were proved beyond a reasonable doubt." *People v Randolph*, 242 Mich App 417, 419; 619 NW2d 168 (2000). Accordingly, we do not find any error requiring reversal in this regard.

IV. Directed Verdict Motion

Defendant further argues that the trial court erred by denying his motion for a directed verdict. A trial court's decision on a motion for a directed verdict is reviewed under essentially the same standard as sufficiency of the evidence, except that this Court only considers the evidence presented by the prosecution up to the time the motion is made. Reviewing the evidence in a light most favorable to the prosecution, the court must determine whether it is insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt. If indeed the evidence presented by the prosecutor is insufficient, then a directed verdict or judgment of acquittal must be entered. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). For the reasons stated in our discussion pertaining to the sufficiency of the evidence, we find that the prosecutor introduced ample evidence establishing all of the requisite elements of the charged offense allowing a trier of fact to find guilt beyond a reasonable doubt. The trial court did not commit error requiring reversal by denying defendant's motion for a directed verdict.

V. Alleged Prosecutorial Misconduct

Next, defendant argues that the prosecutor's acts of misconduct denied him a fair trial. Issues pertaining to prosecutorial misconduct are reviewed on a case by case basis. *People v Howard*, 226 Mich App 528; 575 NW2d 16 (1997). Ultimately, the test of prosecutorial misconduct is to determine whether the alleged misconduct deprived defendant of a fair and impartial trial. *Id.* at 544.

Defendant specifically contends that during closing arguments, the prosecutor improperly argued that after having the opportunity to hear all of the prosecutor's witnesses and view all of the prosecutor's evidence at pre-trial hearings, defendant was able to concoct a story that "[f]its real nicely into the evidence." Defendant also takes issue with the prosecutor's statement that defendant "got up here on the stand and committed perjury" arguing that by these statements, the prosecutor attempted to impermissibly shift the burden of proof onto the defendant to prove his innocence. We disagree.

This Court examines the pertinent portion of the record and evaluates the prosecutor's 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). In the instant matter,

defendant failed to object to the alleged prosecutorial misconduct.[1] Where a defendant fails to object to alleged prosecutorial misconduct, this Court will only review the issue "if a curative instruction could not have remedied the prejudicial effect of the prosecutor's comments or if the failure to consider the issue would result in a miscarriage of justice" ever mindful that "[a] miscarriage of justice will not be found where the prosecutor's comments could have been cured by a timely instruction." *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999).

As noted above, defendant contends that the challenged statements improperly shifted the burden of proof. However, in *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999) we rejected a similar argument, holding that:

> Where a defendant advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*Id.* (quoting *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995)).]

In this case, since defendant advanced an alternate theory of the case, the prosecutor was free to comment on the validity of the theory without impermissibly shifting the burden of proof. Moreover, we note that along with the allegedly improper statements, the prosecutor recognized that the defendant was entitled to the presumption of innocence but commented further that "[n]owhere in the law of either the federal or state constitutions is there any presumption that a witness, including the Defendant, is going to tell the truth." This comment essentially assails the defendant's credibility and reiterates that the jury, as ultimate fact finder, is charged with weighing the credibility of all witnesses; including the defendant. In fact, our Supreme Court in *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995) recognized that a defendant who takes the stand and testifies may have "[h]is testimony assailed like that of any other witness."(quoting *Brown v United States*, 356 US 148, 155-156; 78 S Ct 622; 2 L Ed 2d 589 (1958)).

In challenging defendant's veracity, the prosecutor used potent language. Notwithstanding, Michigan Courts have allowed prosecutors considerable latitude to challenge a defendant's veracity, and these challenges need not be couched in the most genial of all terms. As the *Fields* court recognized, a "[p]rosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief . . . and is not required to state inferences and conclusions in the blandest terms." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996)(citation omitted). The prosecutor's statement could fairly be construed as a forceful

[1] Defense counsel did make a vague objection to the prosecutor's closing argument. However, this objection appeared to be a reference to defendant's right to remain silent. Indeed, the prosecution may not comment on a defendant's failure to testify or exercise his or her constitutional right to remain silent. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995). Although the trial court did not rule on defendant's motion, defendant does not raise this issue on appeal. Nevertheless, the grounds for the objection asserted below were insufficient to properly preserve the issue for appeal on defendant's claim for prosecutorial misconduct.

commentary on the credibility contest between defendant and the victim. Any prejudicial effect occasioned by the prosecutor's comments could have been adequately remedied by a timely curative instruction. However, considering the prosecutor's statements in context, the commentary was not so egregious so as to deprive defendant of a fair and impartial trial. Accordingly, we do not find error requiring reversal on this issue.

VI. Proportionality of the Sentence

Finally, defendant challenges the proportionality of his sentence. The trial court sentenced defendant to three to fifteen years' imprisonment. We review sentences for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (2000). Although unarmed robbery carries a statutory penalty of up to fifteen years' imprisonment[2], an attempt is penalized by up to five years' imprisonment or no more than one year in the county jail[3]. As noted above, the trial court sentenced defendant as a fourth-habitual offender, thereby enhancing the statutorily imposed maximum sentence to "life or for a lesser term."[4]

As an habitual offender, defendant's sentence is reviewed only to consider whether it violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630, 635-636, 650-654; 461 NW2d 1 (1990). As the court in *Milbourn, supra*, stated:

> [A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id*. at 130.

In the case *sub judice*, defendant references several potentially mitigating circumstances, such as his work history, family support, parental obligations, and rehabilitation potential. Antithetically, the trial court noted defendant's recidivism and the fact that this offense was committed while he was on probation. In light of these circumstances, we are not persuaded that the sentence imposed upon defendant was disproportionate considering both the circumstances surrounding the offense and the individual offender. Consequently, the trial court's sentence did not constitute an abuse of discretion. For these reasons, and the reasons stated herein, we affirm the defendant's conviction in all respects.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Peter M. Meter

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[2] MCL 750.530; MSA 28.798.

[3] MCL 750.92(2); MSA 28.287(2).

[4] MCL 769.12(1)(a); MSA 28.1084(1)(a).