STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24 2001
v	No. 222126 Ottawa Circuit Court
PHILIP RAY COMBS, Defendant-Appellant.	LC No. 99-023035-FC

Before: Hoekstra, P.J., and Whitbeck and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, and resisting or obstructing a police officer, MCL 750.479; MSA 28.747. He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to concurrent prison terms of twelve to twenty years for the assault with intent to commit murder conviction and six to thirty-six months for the resisting or obstructing conviction. He appeals as of right. We affirm.

Defendant claims that his assault conviction must be vacated because there was insufficient evidence that he intended to murder the victim. We disagree. In determining whether sufficient evidence was presented in a criminal case, we view the evidence in the light most favorable to the prosecution to determine whether a rationale trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). As the Court in *Nowack* explained:

> The standard of review is deferential; a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."
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> . . . [The prosecution] is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility; it need only convince the jury "in the face of whatever contradictory evidence the defendant may provide." [*Id.* at 400 (Citations omitted.).]

The elements of assault with intent to commit murder are: (1) an assault; (2) with an actual intent to kill; (3) which, if successful, would make the killing murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). "The intent to kill may be proved by inference from any facts in evidence . . . [and due to the] difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). All evidentiary conflicts are to be resolved in the prosecution's favor. *Id*. The court will not usurp the jury's role in weighing the evidence or the credibility of the witnesses. *Id*.

> Viewed most favorably to the prosecution, the evidence in the instant case indicated that, although the victim admitted throwing the first punch, defendant was in control of the situation after that point. Defendant was on top of the victim throughout the struggle and gained possession of the knife. According to one witness, nothing prevented defendant from getting off the victim and walking away. The victim sustained several serious wounds, including a slash across his neck that, if slightly deeper, could have been fatal. Shortly after the offense, defendant made statements indicating that he wanted to kill the victim. This evidence was sufficient to enable the jury to find, beyond a reasonable doubt, that defendant intended to kill the victim during the assault.

Next, defendant argues that the trial court erred by failing to instruct the jury on "mutual fight." Because defendant did not preserve this issue by requesting an instruction on "mutual fight," appellate relief is unwarranted absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999), lv den 461 Mich 916 (1999). After reviewing the record, we conclude that it is not plainly apparent that the doctrine of "mutual fight" is applicable to the facts presented. See *People v McGee*, 66 Mich App 164; 238 NW2d 564 (1975); *People v Sherman*, 14 Mich App 720, 722; 166 NW2d 22 (1968). A trial court is not required to give instructions that are unsupported by the facts. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Since plain error has not been shown, appellate relief is not warranted.

Defendant further contends that his arrest was illegal and that his subsequent statements should have been suppressed under the fruit of the poisonous tree doctrine. Defendant did not preserve this issue by challenging the legality of his arrest before or during trial. *People v Carroll*, 396 Mich 408, 412; 240 NW2d 722 (1976). Accordingly, defendant must demonstrate a plain error affecting his substantial rights. *Carines, supra*.

A review of the record reveals no plain error in this regard. Rather, the facts indicate that the police were notified about a fight involving two men and that one man was believed to have been cut by a knife. When the police reached the scene, defendant, who matched the description of one of the suspects, began to flee and ignored an officer's command to stop. Once the officer stopped the defendant, he noticed blood on the defendant's hands. The facts available to the officer at the time he chased defendant, provided an objective basis for believing that defendant had been engaged in criminal activity. *People v Champion*, 452 Mich 92, 98-99; 549 NW2d 849 (1996). Moreover, the observation of blood on defendant's hands, considered in conjunction with the other facts known to the officer, provided the officer with probable cause to arrest

defendant. *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). Because defendant initially fled from the officer, the officer was not required to inform defendant of the officer's authority or the cause of the arrest, pursuant to MCL 764.19; MSA 28.878. Thus, defendant was legally arrested and his statements were properly admitted.

Our review of the trial court's jury instruction on resisting or obstructing a police officer, reveals that the jury was adequately informed of the applicable law. *Grzesick v Cepela*, 237 Mich App 554, 558; 603 NW2d 809 (1999).

The court did not err in declining to submit the question of the lawfulness of defendant's arrest to the jury. See *id*. In this regard, defendant's reliance on *People v Tice*, 220 Mich App 47, 54-55; 558 NW2d 245 (1996), is misplaced. Here, the court did not instruct the jury that an essential element of resisting an officer existed as a matter of law. Rather, the court correctly ruled that the facts did not warrant the instruction. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). A trial court is not required to give instructions unsupported by the facts. *Id*.

We also conclude that the evidence, when viewed most favorably to the prosecution, was sufficient to support the jury's conviction of resisting or obstructing a police officer. MCL 750.479; MSA 28.747; see *People v Philabaun*, 461 Mich 255, 262; 602 NW2d 371 (1999); *People v Pohl*, 207 Mich App 332, 333; 523 NW2d 634 (1994).[1]

Defendant further argues that an instruction on jury nullification should have been given at trial. However, since defendant failed to request such an instruction, this issue was not preserved. Because the court's failure to instruct on jury nullification was not plain error, see *People v Demers*, 195 Mich App 205, 207; 489 NW2d 173 (1992), this issue does not warrant appellate relief. *Carines*, *supra*.

Defendant also argues that his statements following his arrest should have been suppressed. Because defendant did not move to suppress his statements before trial, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra*. The record indicates that defendant did receive his *Miranda*[2] warnings and, although he initially asked for an attorney, he subsequently made statements without any initiation or prompting from the police officers. Under these circumstances, defendant has not shown that the admission of these statements amounted to plain error. *People v Cheatham*, 453 Mich 1, 14, 21; 551 NW2d 355 (1996); *People v Wells*, 238 Mich App 383, 387; 605 NW2d 374 (1999).

Defendant next claims that the trial court's admission of photographs, taken of the victim and the crime scene, was prejudicial. However, defendant failed to object to their admission at trial and has not shown plain error. *Carines*, *supra*; see also *People v Mills*, 450 Mich 61, 76;

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[1] Because we conclude that the resisting or obstructing charge was properly submitted to the jury, we reject defendant's claim that retrial is required on the charge of assault with intent to murder. *People v Graves*, 458 Mich 476, 481-484; 581 NW2d 229 (1998).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995); *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972).

Defendant further contends that he was denied a fair trial due to prosecutorial misconduct. However, defendant also did not preserve this issue with an appropriate objection to the challenged conduct at trial. *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000). Thus, appellate relief is precluded absent a demonstration of plain error affecting defendant's substantial rights. *Carines, supra*.

The prosecutor's statement in closing argument, that the testimony was undisputed, was proper, particularly when defense counsel had earlier stated, in his opening statement, that the facts were not really in dispute. *People v Guenther*, 188 Mich App 174, 177-178; 469 NW2d 59 (1991). Moreover, a review of the record indicates that the prosecutor's comments were based on the evidence and reasonable inferences arising therefrom. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Further, it is not plainly apparent that the prosecutor improperly injected remarks designed to arouse prejudice or inflame the passions of the jury. *Id*. at 266-267. Although defendant argues that the prosecutor misstated the law, he has not presented any legal support or examples in support of this claim and, therefore, has failed to show plain error. *Griffin*, *supra* at 45. Even though other witnesses gave conflicting testimony, the record does not support defendant's claim that the prosecutor had any knowledge that the complainant's testimony regarding his possession of the knife was false, nor is there any indication that the testimony was in fact false. *People v Lester*, 232 Mich App 262, 277-279; 591 NW2d 267 (1998). In sum, defendant has not demonstrated plain error affecting his substantial rights in connection with the prosecutor's conduct at trial. *Carines, supra*. Moreover, even if error occurred, a curative instruction could have removed any undue prejudice. *McAllister, supra*.

The court's instruction that possible penalty "should not" influence the jury's decision was sufficient to present this issue to the jury. CJI2d 3.13; *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Accordingly, appellate relief is not warranted on the basis of this unpreserved issue. *Carines*, *supra*.

Finally, limiting our review to the record, and in light of the foregoing discussion, we conclude that defendant has not established any entitlement to relief on the basis of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999); *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000).

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Jessica R. Cooper