STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MYRON DAVIS,

Defendant-Appellant.

UNPUBLISHED
September 24, 2002

No. 234898
Wayne Circuit Court
LC No. 00-004955

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of felonious assault, MCL 750.82, and one count of arson of a dwelling house, MCL 750.72. He was sentenced to 36 to 72 months for each of the assault convictions, and sentenced to 36 to 360 months for the arson conviction, with credit for time served. Defendant appeals as of right. We affirm.

In March 1998, Angelo Murphy awoke in a home he was visiting to the sound of a window breaking and a fire erupting inside. A city fire investigator confirmed that two "Molotov cocktails"[1] had been thrown through a window, causing two fires in the home. Murphy's arms were burned, and at least two other persons in the home, Donald Robertson and Dorin Jones, were also injured by the fire. Murphy testified at trial that after he awoke, he briefly saw the side profile and backs of two men running away from the house and jumping over a fence. Murphy identified them as defendant and a companion, Glen Stephenson.

Murphy testified that on the evening of the fire, he observed defendant and Robertson having an altercation at the home. Stephenson's sister and Jones, also testified to the altercation, stating that it involved Stephenson and Jones as well, and that it ended in Robertson pulling a gun on defendant, who ran away. Jones testified that following the altercation, he saw defendant and Stephenson driving by the home every twenty to thirty minutes. Then, Jones stated, he saw defendant throw the two "cocktail" bottles into the house. Jones testified that after the fire erupted, defendant called Jones' pager and said that defendant's mother told defendant to kill everyone in the house.

[1] A "Molotov cocktail" is defined as "a crude incendiary device consisting usually of a corked bottle filled with gasoline and a piece of rag that serves as a wick and is ignited just before throwing." *Random House Webster's College Dictionary* (1992).

On direct examination at trial, Stephenson testified that two other persons – and not defendant – were with him when Stephenson prepared the cocktail bottles and threw them into the house. He added that he had been convicted of the instant crimes. On cross-examination, the prosecutor asked Stephenson if he had any previous criminal convictions. Stephenson specified without objection that in connection with the present matter, he was convicted of two counts of assault with intent to do great bodily harm and arson, and that he received sentences of three to ten years and five to twenty years, respectively.

Defendant first claims that his convictions were obtained based on insufficient evidence and in violation of his due process rights. To comport with due process, a prosecutor must introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Similarly, our standard of review requires that we give the prosecutor's evidence the benefit of the doubt when we determine whether a rational factfinder could adjudge that the elements of the crime were proven beyond a reasonable doubt. *Id*. However, it is within the province of the trier of fact to determine the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478, amended on other grounds 441 Mich 1201 (1992). Further, because of the difficulty of proving an actor's state of mind, the element of intent is inferable from all the facts and circumstances. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987); *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Specifically, defendant contends that even if he did throw the cocktail bottles into the home and intend to commit arson, this was not sufficient evidence of intent to assault with a dangerous weapon. That is, defendant claims that the evidence did not establish that he intended to assault a *person* with the bottles – only that he intended to commit arson. We disagree.

MCL 750.82(1) states: "[A] person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, *or other dangerous weapon* without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony . . . " (emphasis added). CJI2d 17.8, the definition of a dangerous weapon, provides:[2]

> (1) A dangerous weapon is any object that is used in a way that is likely to cause serious physical injury or death.
>
> (2) Some objects, such as guns or *bombs*, are dangerous because they are specifically designed to be dangerous. . . . The way an object is used or intended to be used in an assault determines whether or not it is a dangerous weapon. If an object is used in a way that is likely to cause serious physical injury or death, it is a dangerous weapon.
>
> (3) You must decide from all of the facts and circumstances whether the evidence shows that the _____ in question here was a dangerous weapon. [Emphasis added. See also CJI2d 17.8; *People v Goolsby*, 284 Mich 375, 378; 279

[2] Criminal jury instructions are not binding precedent. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).

NW 867 (1938) (definition of "other dangerous weapon" under former version of the felonious assault statute).]

We consider a Molotov cocktail similar enough to a bomb to be a dangerous weapon under these principles. See also *Random House Webster's College Dictionary* (1992). Furthermore, defendant's intent to assault a person is implied from the fact that the cocktail bottles were thrown into a dwelling house, where people are likely to be present. See MCL 750.72, 750.82(1); *Safiedine*, *supra* at 29; *Carines*, *supra* at 757. Therefore, we will not disturb the trial judge's factual determination that the cocktail bottles were dangerous weapons and that defendant intended to assault the victims with them. See CJI2d 17.8(3); *Wolfe*, *supra* at 514.

Second, defendant claims that he was denied a fair trial when, during cross-examination, the prosecution elicited defense witness Stephenson's testimony that he was convicted and sentenced for the instant crimes. We disagree.

If prosecutorial misconduct denies a defendant a fair and impartial trial, redress is required. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct claims are generally reviewed de novo, but a trial court's factual findings are reviewed for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, as a threshold matter, we note that defendant failed to preserve this issue below. Thus, our review is limited to a determination whether the prejudicial effect of Stephenson's answers elicited by the prosecution was so great that it could not have been cured by an appropriate instruction, had one been requested. *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977); see also MRE 103; MCL 769.26. We are not persuaded that there was prejudice in this case.

Evidence which shows bias or prejudice of a witness is always relevant at trial because the credibility of witnesses is a material issue in any case. *Powell v St John Hospital*, 241 Mich App 64, 72; 614 NW2d 666 (2000). MCL 600.2159 permits impeachment of a witness' credibility by using prior convictions, but only if the convictions satisfy the criteria set forth in MRE 609. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). Convictions of dishonesty or false statement are directly probative of truthfulness and are automatically admissible under MRE 609(a)(1), and theft convictions require explication of the balancing test of MRE 609(a)(2)(B). *People v Allen*, 429 Mich 558, 596; 420 NW2d 499, amended and reh den sub nom *People v Pedrin*, 429 Mich 1216 (1988), habeas corpus den 198 F3d 247 (CA 6, 1999). All other types of crimes must be excluded from cross-examination. *Id*. However, absent an objection at trial, there can be no abuse of a trial court's discretion in a decision to allow impeachment with prior convictions. *People v Rice (On Remand)*, 235 Mich App 429, 438-439; 597 NW2d 843 (1999).

In the present case, Stephenson volunteered as a defense witness that he had committed the crimes of assault and arson with which defendant was charged. Stephenson also testified that defendant was not with him when Stephenson committed the crimes. Consequently, while the prior convictions did not fit the types allowed in MRE 609, *Allen*, *supra* at 596, the evidence was harmless because Stephenson had already volunteered on direct examination that he committed and was convicted of the instant crimes. *People v Reed*, 172 Mich App 182, 188; 431 NW2d 431 (1988). Moreover, two witnesses had testified to seeing defendant commit the crimes or run away from the scene with Stephenson. Thus, the prosecutor's questioning of Stephenson and his

answers that he was convicted of and sentenced for the instant offenses, which he had already testified about, was harmless error. See MRE 103; MCL 769.26; *Duncan*, *supra* at 15-16; *Rice (On Remand)*, *supra* at 438-439.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin

I concur in result only.

/s/ Joel P. Hoekstra