STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS HINES,

Defendant-Appellant.

UNPUBLISHED
December 11, 2003

No. 237776
Wayne Circuit Court
LC No. 00-008382

Before: Cavanagh, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of arson of a dwelling house, MCL 750.72, and ten counts of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant's convictions stem from the firebombing of the home of his ex-girlfriend's family. Defendant denied firebombing the home, but witnesses testified that he admitted suggesting the crime, knowing about the firebomb, and driving the firebomber to and from the home's location. Defendant was originally charged with ten counts of assault with intent to commit murder. MCL 750.83. The jury returned guilty verdicts on the lesser offense of assault with intent to do great bodily harm. Defendant was sentenced to concurrent terms of ten to twenty years' imprisonment for the arson conviction, and five to ten years' imprisonment on each of the ten assault counts. We affirm.

Defendant first argues that the prosecutor improperly injected issues other than guilt or innocence when he made general reference to news stories of juvenile crime. We disagree. Because defendant failed to preserve this issue, we review it for plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial . . . . Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *People v Abraham*, 256 Mich App 265, 272-273; 662 NW2d 836 (2003). "[O]therwise improper remarks by the prosecutor might not require reversal if they respond to issues raised by the defense." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Moreover, unless defense counsel objects, we will not reverse based on prejudice from prosecutorial misconduct that the trial court could have cured with a timely instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

A prosecutor may not urge or imply that a jury should convict because it has a civic duty to do so. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). "Such arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence . . . ." *Id.* Through an appeal to a juror's sense of civic responsibility, fear, and prejudices, a civic duty argument "unfairly encourages jurors not to make reasoned judgments" based on the evidence. *Abraham, supra* at 273.

In context, however, the challenged remarks of the prosecutor were an appropriate response to an issue raised by defendant during his closing argument. Defense counsel argued that defendant should not be convicted of assault with intent to murder because the evidence did not support a finding that defendant possessed the requisite intent to kill. Counsel argued that the evidence showed that "this young man had no intention of killing anyone, period." "If you believe that [defendant] . . . participated and he is part of the arson," counsel continued, "you have to say did he intend to kill anybody? . . . The answer is no." Defense counsel cited evidence that defendant had only a 9th grade education to support this argument.

The prosecutor's rebuttal comments responded to this argument. The prosecutor first referred the jurors to newspaper articles they may have seen about juveniles who had committed crimes and were charged as adults. "People are pretty sophisticated," the prosecutor inferred, "even if they have a 9th grade education." The point of the prosecutor's response was that contrary to defendant's assertion, even a juvenile with an abbreviated education can have the sophistication necessary to form the requisite intent to commit a crime. This response to defense counsel's lack-of-education argument was not so much an appeal to the jury's civic duty as an appeal to their common sense. The trial court obviated any prejudice this comment caused by its instructions that the jury should decide the case on the evidence and the lawyers' statements and arguments were not evidence. *Abraham, supra* at 276. Moreover, because defendant failed to move immediately for a curative instruction that would have erased any prejudice in this case, the defendant's arguments for reversal on this ground fails. *Stanaway, supra*.

We also reject defendant's argument that insufficient evidence was adduced to support his assault convictions. We review de novo a defendant's insufficient evidence claim. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Evidence is sufficient when, viewing all the evidence in the light most favorable to the prosecutor, a rational jury could find that each element of the charge in question was proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of assault with intent to do great bodily harm are "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The specific intent necessary to convict for assault may be inferred from a defendant's words or conduct. *People v Jackson*, 25 Mich App 596, 598; 181 NW2d 794 (1970).

Expert testimony was presented that someone deliberately set the fire by throwing a firebomb through a first floor window. On the day of the fire, defendant told his ex-girlfriend's sister that because of the breakup, "everybody going to pay, y'all going to fry." Indeed, in his own statement to the police, defendant admitted telling his ex-girlfriend "that it wouldn't be funny if her mother's house got burnt up." Defendant further admitted that he "suggested" that

his ex-girlfriend's home should be firebombed, drove the firebomber to the location, waited while he threw the firebomb into the home, and then drove him away from the crime scene.

Viewing this evidence in a light most favorable to the prosecution, a reasonable jury clearly could have found beyond a reasonable doubt that defendant intended the assaults. The fact that defendant only assisted and did not actually throw the firebomb does not relieve defendant of full criminal responsibility, *Carines, supra* at 757-758, and the firebombing of an occupied residence certainly constitutes "an attempt or threat with force or violence to do corporal harm to another." *Parcha, supra* at 239. Contrary to defendant's arguments, defendant sufficiently "touched" the victims to support the assault charges when the firebomber he assisted willfully set the smoke and flames in motion. *People v Solack*, 146 Mich App 659, 666; 382 NW2d 495 (1985). Finally, the intent to harm defendant's ex-girlfriend alone is nevertheless transferred to all the other people in the home. *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979). Therefore, the prosecutor presented sufficient evidence to sustain defendant's conviction on all the assault charges.

Finally, defendant relies on *People v Densmore*, 87 Mich App 434; 274 NW2d 811 (1978) for the proposition that an assault may not stem from an act of arson because, he argues, the crimes are treated as distinct for double jeopardy purposes. We disagree. The victim in *Densmore* was placed in the trunk of a car and set on fire by the defendant. *Id.* at 436. The defendant was convicted of first-degree premeditated murder and first-degree felony murder. *Id.* On appeal, the defendant argued that, "the arson in effect, is an assault resulting in murder. Accordingly, the arson should merge with the killing, precluding a felony murder conviction." *Id.* at 440. We held that the clearly worded felony-murder statute and the elemental differences between arson and *homicide* precluded defendant's merger theory. *Id.* We therefore concluded that the defendant's double jeopardy argument, although successful on other grounds, could not rely on the merger of arson into first-degree murder. *Id*. We did not decide that an act of arson can never support an assault charge, so *Densmore* is inapposite. Because an act of arson can supply the necessary element of "touching" to support an assault charge, defendant's assault convictions stand.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Peter D. O'Connell