

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE WILLIAM VARNER,

Defendant-Appellant.

UNPUBLISHED

June 17, 2004

No. 245613

Wayne Circuit Court

LC No. 01-014069

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of assault with intent to rob while armed, MCL 750.89, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In reviewing a sufficiency of the evidence question, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). A trier of fact may make reasonable inferences from direct or circumstantial evidence in the record. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed. This offense is a specific intent crime. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991).

Defendant argues that the evidence was insufficient to support his conviction in that it did not show that he was armed. We disagree. To support a conviction of armed robbery some objective evidence must show the existence of a weapon or article, such as a bulge under clothing, in a place where a weapon could be concealed. *People v Banks*, 454 Mich 469, 480-481; 563 NW2d 200 (1997). Complainant testified that defendant kept his right hand in his pocket and held his hand in a manner that made her believe that he was holding a gun. In addition, defendant made a remark that complainant interpreted as a demand for the money she had removed from an ATM machine. Sufficient circumstantial evidence was presented to allow the jury to determine the existence of a weapon or an article fashioned to resemble a weapon.

People v Jolly, 442 Mich 458, 470; 502 NW2d 177 (1993). The evidence, viewed in a light most favorable to the prosecution, was sufficient to support defendant's conviction. *Wolfe, supra*.

Defendant next argues that the prosecutor denied him a fair trial by expressing a personal belief in his guilt. Defendant did not object to the prosecutor's remark at trial; therefore, absent plain error, he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant also argues the trial counsel's failure to object to the prosecutor's remark constituted ineffective assistance of counsel. We conclude there is no merit to defendant's claims.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis. The reviewing court must evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600.

In rebuttal closing argument the prosecutor responded to defense counsel's argument that the evidence did not establish defendant's guilt beyond a reasonable doubt by stating that the question before the jury was whether defendant would be held accountable for his actions. The prosecutor did not state a personal belief in defendant's guilt. The prosecutor's rebuttal argument, read in context, was based on the evidence and was proper. *Noble, supra*; *Schutte, supra*. Any prejudicial effect of the remark could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). No plain error occurred, *Carines, supra*, and defense counsel did not render ineffective assistance by failing to object to the remark. *Carbin, supra*.

Affirmed.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray