

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL HATCH, JR.,

Defendant-Appellant.

UNPUBLISHED

May 10, 1996

No. 168438

LC No. 93-284-FC

Before: Doctoroff, C.J., and Hood and Gribbs, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to do great bodily harm less than murder. MCL 750.84; MSA 28.1084. Because defendant pleaded guilty to a charge of habitual offender, fourth offense, the trial court sentenced defendant to seven to twenty years of imprisonment. MCL 769.12; MSA 28.1084. Defendant appeals as of right. We affirm.

Defendant got involved in an argument with Steven Simpson in a parking lot in Ypsilanti. Defendant left, but returned with another person and began to fight with Simpson. Although the testimony is unclear about what happened first, defendant grabbed Simpson and Simpson hit defendant with a beer bottle. Simpson, and one of his friends, saw defendant make several “poking motions” at defendant with his arm. Simpson and his friend thought defendant had punched Simpson. Then the friend saw a knife and realized that defendant had stabbed Simpson. Simpson was treated for lacerations to his upper abdomen. The physician who treated Simpson testified that the stab wounds were initially life-threatening.

First, defendant argues that the trial court erred when it refused to allow him to impeach two prosecution witnesses with their prior convictions for the unlawful driving away of an automobile (UDAA). The two prosecution witnesses were friends of Simpson. They witnessed the stabbing. We review the trial court’s ruling on the admissibility of impeachment evidence for an abuse of discretion. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992).

For the purposes of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall generally not be admitted. However, evidence of a witness' prior conviction may be admitted if the crime contained an element of theft, the crime was punishable by imprisonment in excess of one year, and the trial court determined that the evidence had significant probative value on the issue of credibility. MRE 609(a)(2).

Defendant argues that, because UDAA is a theft crime, evidence of the witnesses' prior convictions should have been admitted for impeachment purposes. However, UDAA, more commonly known as "joyriding" is not a theft offense. *People v Hendricks*, 446 Mich 435, 448; 521 NW2d 546 (1994). Therefore, the trial court properly excluded these prior convictions.

Next, defendant maintains that the trial court erred when it failed to grant his motion for a directed verdict because insufficient evidence existed to convict him. When reviewing a denial of a motion for a directed verdict, this Court views the evidence in a light most favorable to the prosecution to determine whether the evidence was sufficient to permit a rational factfinder to find the essential elements of the crime proven beyond a reasonable doubt. *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995). Defendant was charged with assault with intent to murder. MCL 750.83; MSA 28.278. The elements of an assault with intent to murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. Intent may be inferred from any facts in evidence. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995).

Defendant claims that insufficient evidence existed to prove that he possessed an intent to kill Simpson. Eyewitnesses testified that defendant swung his arm in a stabbing motion several times at Simpson. Simpson's coat bore two holes which did not exist prior to the stabbing. From the fact that defendant attempted to stab Simpson more than once, we can infer that defendant had an intent to kill Simpson. The trial court properly denied defendant's motion for a directed verdict.

Third, defendant argues that the trial court failed to swear in the court officer pursuant to MCL 768.16; MSA 28.1039, and failed to conduct the selection of an alternate juror in the presence of defendant. Because defendant failed to object to these alleged errors in the trial court, these issues are not preserved for review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). The purpose of appellate preservation requirements is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). If defendant had objected to these alleged errors in the trial court, then the errors could have been rectified.

Finally, defendant claims that the prosecutor engaged in misconduct during closing argument when he told the jury that it did not have to give the benefit of the doubt to defendant. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Guenther*, 188 Mich App 174, 181; 469 NW2d 59 (1991). During his closing argument, the prosecutor told the jury:

The judge has given you the instruction on reasonable doubt, and what he told you is that a reasonable doubt is a fair and honest doubt based on reason and common sense. Its not a mere imaginary or possible doubt. I submit to you that that [sic] means that it doesn't mean giving the defendant the benefit of the doubt, but it is doubt based on reason and common sense and the evidence in this case; and so what I'm going to ask you to do is to take the evidence, the testimony, the physical exhibits and treat them like one solid mass of evidence because you should look at what evidence makes sense with other evidence, and the other things that you know about the case and all that evidence up to the light of reason and common sense coupled with the instructions which the judge has given you. . .

This Court must examine the prosecutor's comments in context to determine whether they denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Read in context, the prosecutor's remark that the jury should not give defendant the benefit of the doubt did not mean that the jury did not have to find defendant guilty beyond a reasonable doubt. The prosecutor meant that defendant was not entitled to imaginary doubt and that the jury should base its decision on the evidence in the case. The prosecutor's comments during closing argument did not deny defendant a fair trial.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Harold Hood

/s/ Roman S. Gribbs