

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN JEROME EDWARDS,

Defendant-Appellant.

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UNPUBLISHED

September 13, 1996

No. 182284

LC No. 93-010615

Before: Cavanagh, P.J., and Marilyn Kelly and J.R. Johnson,\* JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to three terms of five to twenty years' imprisonment for the assault with intent to commit murder convictions and a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

I

Defendant argues that the admission of the codefendant's statement violated his right of confrontation. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

In evaluating whether a statement against penal interest that inculcates a person in addition to the declarant bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against the other person, courts must evaluate the circumstances surrounding the making of the statement as well as its content. The totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the declarant is unable to cross-examine the declarant. *People v Poole*, 444 Mich 151, 165; 506 NW2d 505 (1993).

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\* Circuit judge, sitting on the Court of Appeals by assignment.

In the present case, the codefendant was unavailable as a witness because he was exercising his Fifth Amendment privilege not to testify against himself. *People v Richardson*, 204 Mich App 71, 74; 514 NW2d 503 (1994). The codefendant's statement was strongly against his penal interest because he indicated that he purchased the weapon, supplied defendant with the weapon, and also fired at the victims. The codefendant was not offered leniency in exchange for his statement. The codefendant did not attempt to shift responsibility from himself to defendant. The testimony of eyewitnesses substantially corroborated the codefendant's description of the shootings. We conclude that the trial court did not abuse its discretion in finding that the statement at issue has sufficient guarantees of trustworthiness to allow its admission into evidence.

## II

Defendant contends that the prosecutor's prejudicial comments during closing argument deprived him of a fair trial.

### A

Defendant first asserts that the prosecutor made an impermissible "civic duty" argument. However, defendant did not object at trial to the prosecutor's comments. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of the jurors. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). We find no error requiring reversal. Simply because the shootings occurred on public streets near a school does not make commentary about that fact impermissible. See *id.* at 284. The prosecutor was not injecting issues broader than the guilt or innocence of the accused, but was rather asking the jury to convict based on evidence presented at trial. Moreover, defendant did not object to the comments at trial, and we conclude that a curative instruction could have ameliorated any prejudicial effect, had one been requested.

### B

Defendant also argues that the prosecutor engaged in an improper attack on defense counsel. The propriety of a prosecutor's conduct depends on all the facts and circumstances of a case and must be evaluated in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995). After reviewing the prosecutor's remarks in their entirety, we find no error. It is clear that the prosecutor's comments were in direct response to defense counsel's arguments. Comments intended to rebut a defense theory, even where normally inadmissible, do not constitute error requiring reversal. *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1995).

### III

Defendant next claims that there was insufficient evidence to support the conviction of assault with intent to commit murder against complainant Tadarlyl Wilson. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

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). Under the doctrine of transferred intent, the prosecution did not have to prove that defendant intended to kill Wilson; rather, the prosecution only had to establish that defendant intended to kill someone. *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992). The evidence presented at trial indicated that defendant and codefendant were following a car containing complainants Kushawn Austin and Keith Myricks at high speed and firing shots in the direction of the car. At the time of the chase Wilson, a pedestrian, was struck in the head by bullet fragments. Accordingly, there was sufficient evidence to support defendant's conviction with regard to complainant Wilson.

### IV

In his last issue, defendant argues that the trial court erred in denying his motion to suppress the lineup identification. A decision to admit identification evidence will not be reversed unless it is clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993) (Griffin, J.), cert den 510 US 1058; 114 S Ct 725; 126 L Ed 2d 689 (1994).

The fairness of an identification procedure is evaluated in light of the totality of the circumstances. *Id.* at 311-312. When a defendant is represented by counsel at a lineup, the defendant bears the burden of showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

In the present case, defendant was represented by counsel at the lineup, and defendant's counsel made no objection to the procedure. We conclude that defendant has not met his burden of showing that the lineup was impermissibly suggestive. Defendant claims that the lineup was impermissibly suggestive because defendant weighed more than the others in the lineup and is at least three inches taller than another participant in the lineup. However, discrepancies as to the physical characteristics of lineup participants do not necessarily render the proceeding defective if the participants approximate the defendant's description. *Kurylczyk, supra* at 312. We do not believe that

the trial court clearly erred in ruling that because defendant was in a car, the differences in height and weight between defendant and the other participants were not significant.

Defendant also argues that the lineup was flawed because the police informed the witnesses that the lineup included the perpetrators. However, that fact by itself does not make the lineup unduly suggestive. Whenever a witness is called to view a lineup, he will naturally infer that the lineup will contain possible suspects. *People v Brady Smith*, 108 Mich App 338, 343-344; 310 NW2d 235 (1981).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Marilyn Kelly

/s/ J. Richardson Johnson