STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN LAWRENCE EDWARDS,

Defendant-Appellant.

UNPUBLISHED
October 4, 1996

No. 180598
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 two counts of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, one count of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to five to ten years' imprisonment for the assault with intent to do great bodily harm convictions, thirty-two to forty-eight months' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I

Defendant argues that the trial court erred in denying his motion to suppress his pretrial statements to the police because his waiver was not voluntary. Whether the defendant's statement was knowing, intelligent, and voluntary is a question of law which the court must determine under the totality of the circumstances. In determining voluntariness, the court should consider all the circumstances, including the duration of the defendant's detention and questioning; the age, education, intelligence, and experience of the defendant; whether there was unnecessary delay of arraignment; the defendant's mental and physical state; and whether the defendant was threatened or abused. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988).

Our review of the issue of voluntariness is required to be independent of that of the trial court. However, to the extent that resolution of the disputed factual questions turns on the credibility of

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

witnesses or the weight of the evidence, this court will ordinarily defer to the trial court, which has a superior opportunity to evaluate these matters. *People v Young*, 212 Mich App 630, 634; 538 NW2d 456 (1995).

Defendant relies on *People v Wright*, 441 Mich 140; 490 NW2d 351 (1992). In *Wright*, the Supreme Court issued a plurality opinion on whether suppression of an accused's pretrial statement is required when the police fail to notify him of retained counsel's attempts to contact him. Although four justices concluded in *Wright* that the defendant's confession should be suppressed, no majority opinion was reached and therefore the result is not binding. *Young, supra* at 636. More recently, the Supreme Court clarified this issue by holding that the police must inform a suspect that a retained attorney is immediately available to consult with him. See *People v Bender*, 452 Mich 594, 597; ___ NW2d ___ (1996).

Nevertheless, we find no violation of the rule set forth in *Bender*. Defendant was taken to an interrogation room where he was read his *Miranda*[1] rights and signed a notification of rights form. Defendant was being questioned by Sergeant Pitts when Pitts was informed that an attorney had been retained for and was asking to see defendant. Pitts halted the interrogation and contacted the prosecutor's office to determine the proper course of action. Pitts then told defendant that an attorney had been retained for him and asked whether he wanted to talk to the attorney. Defendant replied affirmatively and counsel was brought to the room. After conferring with the attorney, defendant refused to answer any more questions. Under these facts, the trial court did not err in finding that there was no deliberate police subterfuge to prevent defendant from talking with counsel. Accordingly, we conclude that defendant's statement was voluntary.

Defendant also argues that his statement should be suppressed because it was the product of an arrest made without a warrant or probable cause. We find this issue to be without merit because the police had probable cause to arrest defendant based on the statements of the complainants and the Mackenzie High School security staff implicating him.

II

Defendant contends that the trial court erred in denying the motion to quash the count of assault with intent to commit murder, MCL 750.83; MSA 28.278, as to complainant Tadarryl Wilson. A defendant must be bound over for trial if evidence is presented that a crime has been committed and there is probable cause to believe that the defendant was the perpetrator. Although the prosecutor is not required to prove every element beyond a reasonable doubt, there must be some evidence from which these elements may be inferred. On appeal, we must determine whether the examining magistrate committed an abuse of discretion in finding that there was probable cause to believe that the defendant committed the offense charged. *People v Tower*, 215 Mich App 318, 319-320; 544 NW2d 752 (1996).

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 the preliminary examination 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, we find that the trial court did not err in denying defendant's motion to quash the count of assault with intent to commit murder with regard to Wilson.

III

Next, defendant asserts that the trial court improperly denied 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 expressed satisfaction with 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).

IV

Defendant argues that his conviction must be reversed because the trial court disparaged defense counsel in front of the jury, thereby denying him a fair trial. A trial judge has wide discretion in matters of trial conduct. This power, however, is not unlimited. If the trial judge's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to

determine whether the trial judge's comments or conduct pierced the veil of judicial impartiality is whether the comments or conduct were of such a nature as to unduly influence the jury and thereby deprive the defendant of his right to a fair and impartial trial. *People v Romano*, 181 Mich App 204, 220; 448 NW2d 795 (1989).

Defendant did not object to the trial court's conduct below, and therefore appellate review is precluded absent manifest injustice. *People v Weatherford*, 193 Mich App 115, 121; 483 NW2d 924 (1992). After carefully reviewing the record, we find no manifest injustice. Counsel admitted that he intentionally attempted to mislead a witness about the latter's preliminary examination testimony. The trial court informed counsel that this was improper and instructed him to quote the transcript accurately. The comments defendant complains of constitute a legitimate exercise of the trial court's responsibility to control the proceedings. See MCR 611(a). Accordingly, we find no error.

V

Next, defendant claims that the trial court erred in refusing to instruct the jury on the lesser offense of aggravated assault, MCL 750.81a; MSA 28.276(1). Because defendant requested an instruction on aggravated assault at trial, this issue has been preserved for appellate review.

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

A cognate lesser offense is one which shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater. *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994). Before a court instructs on a cognate lesser offense, it must examine the record to determine whether the evidence would support a conviction of the lesser offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991).

We conclude that the trial court did not err in refusing to instruct the jury on the offense of aggravated assault. The three complainants were all shot. Eyewitnesses testified that both defendant and codefendant were leaning out of the car windows firing weapons in the direction of complainant Austin's vehicle. Giving an instruction on a lesser offense which does not involve the use of a weapon would only have detracted from the rationality and reliability of the fact-finding process. See *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991).

VI

Defendant also argues that the prejudicial comments made by the prosecutor during closing argument and rebuttal denied him a fair trial.

A

Defendant first claims that the prosecutor made an improper "civic duty" argument during closing argument. 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 in the present case. Simply because the shootings occurred on public streets near a school does not make commentary about that fact impermissible. 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. See *id*. at 284. 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 contends that the prosecutor improperly argued to the jury that defendant had failed to prove matters that were raised in his opening statement. We agree that the prosecutor's comment was improper. However, the trial court immediately interrupted the prosecutor, admonished him, and gave a cautionary instruction to the jury. We find that the trial court's swift action cured any prejudice to defendant. Accordingly, defendant was not denied a fair trial.

C

Finally, defendant charges that the prosecutor improperly attacked defense counsel by saying that the latter was trying to mislead the jury. 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 argument, even where normally inadmissible, do not constitute error requiring reversal. *Id*. at 286

VII

Defendant asserts that he was unfairly prejudiced when the trial court allowed the prosecutor to read defendant's statement to the jury during closing argument. Defendant objected to the alleged misconduct and therefore preserved this issue for appellate review. 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).

Generally, prosecutors are afforded great latitude in their arguments and conduct. They are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Bahoda*, *supra* at 282. In the present case, the prosecutor argued that defendant was not

credible and that the jury should instead rely on the statement that he gave the Sergeant Pitts. Sergeant Pitts testified as to what defendant told him during the interrogation. The trial court did not err in permitting the prosecutor to discuss that testimony during closing argument.

VIII

Defendant contends that there was insufficient evidence to support the conviction of felonious assault as to complainant 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 felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993).

Defendant argues that the prosecution did not establish that he had the requisite intent with regard to complainant Wilson. For the reasons discussed in Issue II, we find defendant's claim to be without merit.

IX

In his final issue, defendant claims that his sentence violates the principle of proportionality. We disagree. Defendant's sentences are within the guidelines and are therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has not presented the sentencing court and this Court with any mitigating factors sufficient to overcome the principle of proportionality. *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). Defendant's sentences are proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Marilyn Kelly
/s/ J. Richardson Johnson

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).