STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL BRIAN JANIK,

Defendant-Appellant.

UNPUBLISHED
January 23, 1998

No. 193870
Recorder's Court
LC No. 95-001596

Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of assault with intent to commit murder, MCL 750.83; MSA 28.278, and arson of a dwelling house, MCL 750.72; MSA 28.267. Defendant was sentenced to 180 to 250 months in prison for the assault conviction and one to ten years for the arson conviction. We affirm.

Defendant first argues that the trial court erred by denying his motion to dismiss based on double jeopardy grounds. We disagree. Although double jeopardy attached after defendant's first trial, defendant requested the mistrial because of prosecutorial misconduct. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997) (jeopardy attaches once the jury is impaneled and sworn, and unless the defendant consents to the trial's interruption or a mistrial occurs because of manifest necessity, the defendant cannot be brought to trial again for the same offense). The mistrial was granted on defendant's own motion thereby waiving double jeopardy protection, unless the mistrial was provoked by intentional prosecutorial misconduct. *People v Dawson*, 431 Mich 234, 253; 427 NW2d 886 (1988). The trial court's conclusion that the prosecutor's misconduct was not intentionally calculated to provoke a mistrial was not clearly erroneous. *Id*. at 254, 258 (in determining the intent of the prosecutor, the trial court should rely on objective facts and circumstances, and its finding in this regard will not be disturbed on appeal unless clearly erroneous). The trial court based its finding on its personal observations of the trial and because the prosecution's case was going well. The prosecutor therefore had no motivation to provoke a mistrial. Further, the prosecutor made numerous attempts to dissuade the trial court from declaring a mistrial. Therefore, the trial court's conclusion was not clearly erroneous.

Defendant next argues that the trial court erred by failing to sua sponte give a cautionary instruction on flight, or alternatively, that defense counsel was ineffective for failing to request such an instruction. We disagree. Although an instruction on flight was not specifically requested by defense counsel, the trial court specifically instructed the jury that defendant's flight could be interpreted in a variety of ways. Although the words used did not perfectly mimic the standard jury instruction on flight, CJI 2d 4.4, the instruction given adequately expressed the law on flight and protected defendant's rights. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995) (evidence of flight is probative because it may indicate consciousness of guilt, although evidence of flight by itself is not sufficient to support a conviction); *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994) (no error is created if the instruction fairly presented the issue to be tried and sufficiently protected defendant's rights). Therefore, there was no error because a proper instruction was given to the jury and no prejudice occurred as a result of defense counsel's failure to request such an instruction.

Defendant next argues that he is entitled to a new trial because the prosecutor improperly questioned a defense witness and made improper arguments to the jury. We disagree. Defendant was not denied a fair and impartial trial by any of these claimed errors. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). No error was created by the prosecutor's questioning of a defense witness about her failure to approach the authorities at an earlier time. These questions did not amount to the prosecutor asking the jury to convict defendant on the basis of his personal knowledge or the prestige of his office. Cf. *People v Ignofo*, 315 Mich 626, 631-636; 24 NW2d 514 (1946); *People v Fuqua*, 146 Mich App 250, 254; 379 NW2d 442 (1985). The prosecutor's purpose was to impeach the witness by insinuating that the late disclosure of this evidence implied that her testimony was fabricated, and such questioning is not impermissible. See *People v Phillips*, 217 Mich App 489, 494-496; 552 NW2d 487 (1996). If there is a good reason for the witness' failure to come forward earlier, then that information can be elicited upon further examination by defense counsel. *Id*. at 494. Whether her failure to come forward sooner indicated that her testimony was fabricated was an issue for the jury to decide, and the prosecutor's questions on this subject were not improper. In addition, defendant waived any objections to the prosecutor's closing argument by failing to object at trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994) (appellate review is precluded if the defendant fails to timely and specifically object to the prosecutor's remarks unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice). No miscarriage of justice would result from declining to review this issue because the prosecutor did not shift the burden of proof as asserted by defendant nor did the prosecutor infringe on defendant's right to remain silent. Further, the prosecutor's comments in support of its own witness and with regard to defendant's flight were not improper.

Defendant next argues that there was insufficient evidence to support his conviction for assault with the intent to commit murder. We disagree. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence of defendant's intent to kill to allow a rational trier of fact to find defendant guilty of the assault charge beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992); *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). An intent to kill may be established by inference from any facts in evidence. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907

(1993). At trial, the prosecution presented evidence that defendant came around a corner and grabbed the complainant, threw her to the kitchen floor, climbed on top of her, threw lighter fluid in her face more than once, and repeatedly attempted to set her on fire until he was successful. Death would be the natural and likely result of such actions. Also, the complainant testified that the lighter fluid was in a glass on the kitchen counter, thereby indicating that it had been prepared in advance. Therefore, there was sufficient evidence to establish that an assault occurred and that defendant intended to kill the complainant. See *People v Barclay*, 208 Mich App 670, 674-675; 528 NW2d 842 (1995) (evidence of intent to kill a store's occupants was sufficient where the defendant doused a store with gasoline and fled after the resulting explosion).

We affirm.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Stephen J. Markman