

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SONYA R. HALE,

Defendant-Appellant.

UNPUBLISHED

February 22, 2007

No. 265910

Wayne Circuit Court

LC No. 98-003911-01

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Following a jury trial, defendant Sonya R. Hale was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, malicious destruction of personal property, MCL 750.377a, possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b, and assault and battery, MCL 750.81. Defendant received concurrent sentences of ten months’ to ten years’ imprisonment for the assault with intent to do great bodily harm conviction, 10 to 48 months’ imprisonment for the malicious destruction of personal property conviction, a consecutive sentence of two years’ imprisonment for the felony-firearm conviction, and 80 days’ time served for the assault and battery conviction. She appeals as of right. We affirm.

Early in the morning of March 9, 1998, defendant saw her ex-boyfriend, Clyde Bates, III, leave the Mel Plaza Hotel in Melvindale with Dina Tannehill.¹ When defendant attempted to confront Bates in the hotel parking lot regarding money he owed her for shoes, Bates and Tannehill left in his 1972 Buick LeSabre.

Bates and Tannehill drove to Bates’ grandfather’s home in Detroit. Bates parked his car in his grandfather’s driveway. Defendant apparently had followed Bates, and she parked her car on the street near his grandfather’s house. She exited her car and walked toward Bates’ LeSabre. Bates exited the LeSabre, but Tannehill remained in the car. Tannehill and Bates noticed that defendant had a revolver in her hand. As Bates stood near the front fender of his car, defendant yelled that she was going to kill him, pointed the revolver toward his chest, and shot. Bates

¹ Defendant and Bates had ended their relationship less than two weeks before the March 9, 1998 incident. Tannehill was Bates’ new girlfriend.

ducked behind his car. Defendant then began chasing Bates around his car, firing two additional shots during the chase. Neither Bates nor his car was hit.

Defendant then ordered Tannehill to leave the LeSabre. She told Tannehill that she could die with Bates and threatened to kill her. Defendant and Tannehill had a scuffle, and defendant struck Tannehill on her cheek with the revolver. Tannehill escaped and ran to a neighboring home to contact the police.

Bates' grandfather had been sleeping inside and was awakened by the commotion in his driveway. Bates' grandfather looked out his window and saw defendant pointing a gun at Bates. He then approached his front door; at this point, he saw defendant chasing Bates around his LeSabre. He told defendant to stop, but defendant replied that she was going to kill Bates.

At this point, Bates ran to the front door and entered the house. Defendant followed Bates to the front door, yelling to Bates' grandfather that she was going to kill Bates. Bates' grandfather stopped defendant from entering the home and told her that her behavior was unacceptable.

Defendant then grabbed a brick lying on the porch and began beating the windows of Bates' LeSabre, causing damage. Bates told defendant that he was contacting the police. At this point, defendant threw the brick at the LeSabre, breaking the windshield. Defendant then left the scene.

I. Sufficiency of the Evidence

First, defendant argues that the trial court erroneously denied her motion for a directed verdict because the prosecutor presented insufficient evidence to establish that she committed assault with intent to commit murder. However, defendant was not convicted of that offense. Instead, she was convicted of the lesser included offense of assault with intent to commit great bodily harm less than murder. Because it would be impossible for this Court to grant relief for this alleged error, this issue is moot. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

Assuming defendant meant to challenge the sufficiency of the evidence leading to her conviction for assault with intent to commit great bodily harm less than murder, we hold that the prosecutor presented sufficient evidence to establish that defendant committed this offense. We review de novo a claim of insufficient evidence in a criminal trial. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We examine the evidence "in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), quoting *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992).

"Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The prosecutor presented evidence establishing that defendant threatened to harm Bates. Specifically, Bates, Tannehill, and Bates' grandfather testified that

defendant threatened to kill Bates while chasing him and shooting at him with a revolver. A reasonable juror could conclude that defendant was attempting and threatening to harm Bates. Further, after considering this testimony, a reasonable juror could conclude that defendant intended to do great bodily harm to Bates. Accordingly, the prosecutor presented sufficient evidence to permit a reasonable juror to conclude that defendant committed assault with intent to do great bodily harm less than murder.

Although not included in her statement of questions presented, defendant briefly argues that there was insufficient evidence presented to convict her of felony-firearm. “To be guilty of felony-firearm, one must *carry* or *possess* the firearm, and must do so *when* committing or attempting to commit a felony.” *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). Because a reasonable juror could conclude that defendant possessed a revolver at the time she committed the felony of assault with intent to commit great bodily harm less than murder, he could also conclude that defendant committed felony-firearm. Accordingly, the prosecution presented sufficient evidence to establish this offense.

II. Hearsay

Second, defendant argues that the trial court improperly admitted hearsay testimony establishing that she possessed the requisite intent to commit murder. Specifically, defendant argues that the prosecutor improperly elicited, and the trial court improperly admitted, hearsay statements establishing that she had the requisite intent to kill Bates. We disagree. As discussed *supra*, defendant was convicted of assault with intent to commit great bodily harm less than murder, not of assault with intent to commit murder. Intent to kill is not an element of assault with intent to commit great bodily harm less than murder; instead, the prosecutor must establish that defendant had the requisite intent to do great bodily harm to the victim, but did not have the intent to kill. *Parcha, supra* at 239. Because defendant argued that the trial court erroneously admitted hearsay evidence tending to establish an element of a crime for which defendant was acquitted, it would be impossible for this Court to grant relief for the alleged error. See *B P 7, supra* at 359. Accordingly, this issue is moot.

Again assuming defendant meant to challenge the admission of certain evidence establishing that she possessed the requisite intent to commit great bodily harm less than murder, we hold that the trial court properly admitted the contested statements. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). Hearsay is admissible only where it is subject to an established exception. MRE 802. A statement is not hearsay if it is offered against a party and is the party’s own statement. MRE 801(d)(2)(A); *People v Kowalak (On Remand)*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996). In this case, Bates, Tannehill, and Bates’ grandfather testified that defendant repeatedly remarked that she intended to kill Bates when she chased him around his car. Because defendant’s statements were used against her at trial, they were not hearsay.

In addition, “[a] statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) . . .” is admissible as a hearsay exception. MRE 803(3).

Statements of mental, emotional, and physical condition, offered to prove the truth of the statements, have generally been recognized as an exception to the hearsay rule because special reliability is provided by the spontaneous quality of the declarations when the declaration describes a condition presently existing at the time of the statement. [*People v Moorer*, 262 Mich App 64, 68-69; 683 NW2d 736 (2004).]

Defendant made the contested statements when she was shooting at defendant, and the statements, made in this context, indicate that, at the time, she intended to kill Bates. Accordingly, even if the contested statements constituted hearsay, they would be admissible at trial because they established defendant's then-existing state of mind.

III. Ineffective Assistance of Counsel

Third, defendant argues that she was denied effective assistance of counsel because her trial counsel failed to object to the contested hearsay statements. We disagree. As discussed *supra*, the question whether the trial court erroneously admitted defendant's statements that she intended to kill Bates is moot. Further, the trial court properly admitted the disputed statements. "Counsel is not ineffective for failing to make a futile objection." *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Accordingly, defendant was not denied effective assistance of counsel.

IV. Prosecutorial Misconduct

Finally, defendant argues that she was denied a fair trial because the prosecutor argued facts not in evidence and injected religion in the case. We disagree. Because defendant did not object at trial to the prosecutor's allegedly improper closing remarks, she fails to preserve this issue for appeal. Accordingly, we review her allegation for plain error affecting her substantial rights. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). Reversal is not required if a curative instruction could have alleviated the alleged prejudice. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

We review claims of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the prosecutor's remarks in context. *Thomas, supra* at 454. We evaluate the prosecutor's comments as a whole, in light of the defendant's arguments and the relationship that these comments bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

"A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). A prosecutor may use emotional language during a closing argument, but she may not appeal to the jury to sympathize with the victim. *Id.* at 454; *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). The defendant's opportunity for a fair trial may be jeopardized if the prosecutor interjects issues broader than the guilt or innocence of the accused, as when extraneous religious matters are introduced at trial. *People v Rohn*, 98 Mich App 593, 596-597; 296 NW2d 315 (1980), overruled on other grounds *People v Perry*, 460 Mich 55, 64-65 (1999).

Defendant argues that the prosecutor committed misconduct by commenting during her closing argument that defendant was a “bad shot,” because this remark was unsupported by the evidence. However, this comment was proper because it was a reasonable inference arising from the evidence. See *Ackerman, supra* at 450. Bates, Tannehill, and Bates’ grandfather testified that defendant exclaimed that she intended to kill Bates, pointed a revolver at him, and fired approximately three shots. Further, Bates testified that he saw the gun spark when fired, although he was not hit by any bullets. Although the police did not find bullet casings at the crime scene, Bates testified that defendant used a revolver. Officers Johnson and Harris explained that, had defendant fired a revolver, it would leave no casings. Given this evidence, the prosecutor argued a “reasonable inference” that Bates was not hit by the bullets that defendant fired because defendant was a “bad shot.” Therefore, the prosecutor’s statements did not constitute misconduct.²

Defendant also claims that the prosecutor improperly injected religion in her closing argument by stating at three points that, “but for the grace of God,” defendant would have killed Bates. However, this phrase is a common idiom used in the English language to express that, if not for luck or good fortune, a bad or tragic event could have occurred. The prosecutor used this expression to explain that defendant was lucky to not have been struck by shots fired by defendant. This remark did not infuse religious matters in the trial.

Affirmed.

/s/ Donald S. Owens

/s/ Janet T. Neff

/s/ Helene N. White

² Nevertheless, even if the prosecutor’s statements constituted misconduct, a curative instruction would have alleviated any prejudicial effect. See *Callon, supra* at 329-330.