

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SONYA P. BYRD,

Defendant-Appellant.

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UNPUBLISHED

April 23, 2002

No. 229325

Wayne Circuit Court

LC No. 99-010003

Before: Cooper, P.J., and Hood and Kelly, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to do great bodily harm less than murder, MCL 750.84, and assault with intent to rob while armed, MCL 750.89. She was sentenced to concurrent terms of seventeen months to fifteen years' imprisonment for the assault with intent to do great bodily harm conviction and fifty-four months to fifteen years' imprisonment for the assault with intent to rob while armed conviction. Defendant appeals as of right, and we affirm defendant's convictions, but remand for correction of the judgment of sentence.

The victim was at home when defendant knocked on his front door. Defendant told the victim that she had previously helped him with his garden. After defendant identified the items that the victim planted in his garden, she was given permission to enter his home. The victim left his home to purchase alcohol, but locked defendant in his home when he left. When the victim returned, he consumed alcohol with defendant. Defendant asked the victim for money to purchase crack cocaine, but he refused. Defendant struck the victim repeatedly with a pipe wrench and a bottle. Later, the victim's nephew, Albert White, Jr., arrived at the victim's home to take him to a friend's house. White went to the front door, but the inner door was slammed in his face. When he called out to the victim, defendant opened the inner door and advised White that she had fought with the victim. Defendant could not exit the home because the doors were locked, and she instructed White to open the door. There was blood covering defendant's clothes, and the victim was observed lying on the floor covered in blood. White did not have keys to the home, but drove to the home of his aunt, Lottie Dandridge, to obtain keys. They returned to the victim's home where defendant demanded to be let out of the home. Dandridge observed the victim on the floor, but refused to unlock the door until the police arrived. Defendant told Dandridge not to telephone the police. When the police entered the home, defendant was found hiding in the basement wearing two pairs of the victim's pants. The victim's wallet was found in one of the pairs of pants worn by defendant. Officers testified that

defendant did not cooperate and resisted arrest. Consequently, defendant was sprayed with mace.

Defendant testified that she went to the victim's home to use his telephone to call a taxicab. The victim locked defendant in the home when he left to purchase drugs and alcohol. Defendant testified that she smoked crack cocaine and consumed alcohol. The victim refused to allow her to leave because he had spent \$35 on her. While armed with a rifle, the victim ordered defendant to disrobe and raped her vaginally and anally. After being given permission to shower, defendant obtained a pipe wrench and struck the victim once or twice. The two struggled and "fell" on glass. Defendant could not explain why she was hiding in the basement from police or why she was wearing two pairs of the victim's pants. Defendant attributed her lack of memory to seizures. A medical examination confirmed penetration of defendant, but there were various plausible explanations for her injuries.

Defendant first alleges that there was insufficient evidence to support her assault with intent to rob while armed conviction. We disagree. When evaluating a challenge to the sufficiency of the evidence, a reviewing court must examine the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining whether there was sufficient evidence to sustain a conviction, all conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant was armed. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). In the present case, defendant challenges the proofs presented to support the intent requirement. The specific intent for this offense is the subjective desire or knowledge that the prohibited result, robbery, will occur, *People v Spry*, 74 Mich App 584, 596; 254 NW2d 782 (1977), and intent may be inferred from the surrounding facts and circumstances. *People v Harris*, 110 Mich App 636, 641; 313 NW2d 354 (1981). Questions of credibility and intent are properly resolved by the trier of fact, *In re Forfeiture of \$25,505*, 220 Mich App 572, 581; 560 NW2d 341 (1996), and deference must be given to the trier of fact's determination. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). The jury rejected defendant's testimony, that her assault upon the victim was in response to the rape and the acquisition of the victim's wallet occurred during a seizure, and we do not resolve credibility assessments anew. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). On the record presented, a reasonable juror could conclude that defendant's attack was done with the specific intent of accomplishing a taking. *Johnson, supra; Harris, supra.*

Defendant next alleges that the prosecutor's reference to prostitution constituted misconduct where there was no evidence to support the assertion in the record and that trial counsel was ineffective for failing to object to all of the prosecutor's remarks. We disagree. This Court reviews issues of prosecutorial misconduct on a case by case basis, examining the remarks in context to determine if defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the connection they bear to admitted evidence. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). While a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, he is free to argue the

evidence and all reasonable inferences there from as they relate to his theory of the case. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

Here, we find no error. The contest was one of credibility between competing theories, and the prosecutor's comments were made in response to counsel's opening statement and defendant's testimony. When we examine the pertinent portion of the record in context, it becomes apparent that the precipitating statement was made by defense counsel, thus opening the door to the subsequent prosecutorial comments.<sup>1</sup> *People v Pesquera*, 244 Mich App 305, 320-321; 625 NW2d 407 (2001). Even otherwise improper prosecutorial remarks need not require reversal if they addressed issues raised by the defense. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Because of our conclusion, that the prosecutorial comments were responsive to the arguments and testimony offered by defendant, we cannot hold that trial counsel was ineffective for failing to object to the prosecutor's remarks. Defense counsel is not required to make frivolous or meritless objections. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

Defendant next challenges the admission of photographs depicting the victim's injuries as unduly prejudicial. We disagree. The decision to admit evidence rests within the trial court's discretion and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Photographs are admissible if instructive to demonstrate material facts or conditions. *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994). Photographs, admissible for a proper purpose, are not rendered inadmissible merely because they demonstrate the details or a gruesome or shocking crime, even where the passion or prejudice of the jurors may be aroused. *Id.* Photographs may be used to corroborate a witness' testimony, and photographic evidence of injury is admissible to demonstrate the intent to kill. *People v Mills*, 450 Mich 61, 71, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). The test for admission is whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Id.* at 76.

The photographs admitted in the present case were indicative of an intent to kill, *Mills, supra*, and defendant was charged with assault with intent to murder, but convicted of the lesser offense. Additionally, the jury was presented with diametrically opposed versions of events, and the photographs corroborated the victim's testimony. *Id.* The victim testified that he was struck with a pipe wrench and cut with a bottle. Defendant testified that she struck the victim with a pipe wrench once or twice, and the two merely fell onto glass. The photographs depicted wounds that were consistent with the victim's testimony. Finally, the probative value of the photographs was not substantially outweighed by unfair prejudice. Therefore, we cannot conclude that the trial court abused its discretion by admitting the photographs evidencing the victim's injuries. *Starr, supra*.

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<sup>1</sup> Specifically, in opening statements, defense counsel acknowledged that defendant was a crack cocaine addict. Defense counsel argued that drug addicts utilize their income to support their habits and also resort to crime to pay for their habits. However, defense counsel denied that defendant was a prostitute apparently to dispel any notion that this was a consensual sex for drug deal gone awry or that the penetration injuries were an occupational hazard.

Defendant next alleges that her convictions must be reversed because she was denied her right to a speedy trial. We disagree. The right to a speedy trial is set forth in the federal and state constitutions. US Const, Ams VI and XIV; Const 1963, art 1, § 20. To determine whether a defendant has been denied a speedy trial, we consider: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant as a result of the delay. *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000). We review this constitutional issue de novo. *Id.* Defendant has the burden of proof regarding prejudice when the delay is less than eighteen months. *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). Additionally, the length of the delay is not determinative of a speedy trial claim. *Id.*

On the record available, we cannot conclude that defendant was denied the right to a speedy trial. Defendant did not seek dismissal of the charges based on a speedy trial violation.<sup>2</sup> Furthermore, defendant's general allegations of prejudice, anxiety, and oppressive pretrial incarceration are insufficient to establish the denial of a right to a speedy trial. *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). Accordingly, defendant's claim of error is without merit.

Lastly, defendant alleges, and the prosecutor concedes, that the trial court improperly sentenced defendant to a maximum term of fifteen years' imprisonment for the assault with intent to do great bodily harm less than murder conviction instead of the statutory maximum ten years.<sup>3</sup> MCL 750.84; MCL 771.16d. Accordingly, we remand for the limited purpose of correcting the judgment of sentence. *Avant, supra*; MCR 7.216(A)(1).

Affirmed, but remanded for the ministerial task of correcting the judgment of sentence. We do not retain jurisdiction.

/s/ Jessica R. Cooper  
/s/ Harold Hood  
/s/ Kirsten Frank Kelly

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<sup>2</sup> Defendant filed a motion for release on personal recognizance that did not allege prejudice as a result of any delay. An order in the record provides that the motion was denied. The lower court docket entries indicate that a hearing was held on the motion, but a transcript has not been provided with the record on appeal. Defendant, as the appellant, had the obligation to submit the transcript on appeal. MCR 7.210(B)(1)(a). Accordingly, there is no indication that defendant asserted a violation of the right to a speedy trial.

<sup>3</sup> Defendant also argues that the seventeen month minimum sentence imposed was an "intermediate sanction" such that a sanction, other than prison, should have been imposed. See MCL 769.34(4)(a); MCL 771(d); *People v Stauffer*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (2002). Defendant has served the minimum term of this sentence, and therefore, we cannot fashion a remedy. *People v Mansour*, 206 Mich App 81, 82; 520 NW2d 646 (1994). Furthermore, defendant's minimum term for the assault with intent to rob while armed conviction did not qualify as an intermediate sanction.