# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY BURNS,

Defendant-Appellant.

UNPUBLISHED
August 9, 1996

No. 182143
LC No. 94-003486

Before: Sawyer, P.J. and Bandstra and M.J. Talbot,* JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to rob while armed, MCL 750.89; MSA 28.284. Defendant pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. The trial court sentenced defendant to six to fifteen years in prison. Defendant now appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial because the prosecutor referred to defendant's business of selling gold chains as "criminal" and told defendant that he should go into a "legitimate" business during cross-examination. The prosecutor also called defendant a "con man" in closing argument. We disagree that defendant was denied a fair trial. A review of the record discloses that defendant did not object to any of these allegedly improper remarks. Where no objection or request for curative instruction has been made in response to allegedly improper prosecutorial remarks, review of this issue is precluded unless failure to consider the issue would result in a miscarriage of justice. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993); *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992), aff'd 445 Mich 369; 518 NW2d 418 (1994). A miscarriage of justice is found when the prejudice was so great that it could not be cured by an instruction. *People v Vaughn*, 186 Mich App 376, 385; 465 NW2d 365 (1990). Prosecutorial comments must be read in context and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. See *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). A prosecutor is free,

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

however, to relate the facts adduced at trial to his theory of the case and to argue the evidence and all reasonable inferences arising from it to the jury. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Reviewing the arguments of both parties, this Court concludes that the prosecutor made a permissible closing argument based on the facts presented at trial. Defendant testified that he bought brass neck chains at wholesale prices and then sold them as gold necklaces at a ninety percent markup. The prosecutor argued this evidence in his closing argument. As for the prosecutor's remarks during cross-examination that defendant's business was criminal and that defendant should go into a legitimate business, this Court does not find that the remarks created a prejudice so great that it could not have been cured by an instruction.

Defendant also argues that the prosecutor should not have been allowed to elicit testimony from defendant on cross-examination that defendant bought brass neck chains at wholesale prices and then sold them as gold chains at a ninety percent markup. We decline to review this issue because it was not included in defendant's statement of questions presented, *People v McMiller*, 202 Mich App 82, 83 n 1; 507 NW2d 812 (1993), nor did defendant object at trial to the prosecutor's line of questioning, *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994).

Next, defendant argues that he was denied a fair trial because the trial court disallowed testimony regarding what reactions defendant encountered from people as he walked into their stores trying to sell neck chains. During cross-examination, the prosecutor accused defendant of being paranoid because he testified that he "picked up" from the store clerk that the store clerk thought defendant was robbing him. On redirect examination, defense counsel asked defendant what sort of reactions he got from people when he walked into their stores. The trial court disallowed this testimony as hearsay. We agree that the trial court should have allowed the testimony, but find that the error was harmless. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

MRE 801(c) defines hearsay as "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(a) defines a statement as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended to be an assertion." In *People v Davis*, 139 Mich App 811, 813; 363 NW2d 35 (1984), this Court held that evidence that a girl burst into tears was not hearsay because the spontaneous act was an "instance of behavior [i.e., nonverbal conduct] so patently involuntary that it cannot by any stretch of the imagination be treated as a[n]…assertion by the victim within the scope of MRE 801(a)(2)." Similarly, a person's reaction to any event is a spontaneous, intuitive, and involuntary act. Therefore, it was not hearsay for defendant to testify to store clerks' reactions that he observed upon entering the stores. The trial court abused its discretion when it disallowed defendant's testimony.

We find nonetheless that the trial court's error was harmless. Appellate courts should not reverse a conviction unless the error was prejudicial. MCL 769.26; MSA 28.1096; *People v Robinson*, 386 Mich 551, 562; 194 NW2d 709 (1972). Defendant testified that he was not paranoid and that the whole incident was a misunderstanding. The jurors had the opportunity to decide for themselves whether defendant was paranoid because defendant was a witness. Further, this was, at best, a minor factual question having little to do with defendant's guilt or innocence. We do not find that prejudice resulted from the trial court's exclusion of the evidence.

Defendant also claims that the trial court gave confusing, misleading, and ambiguous instructions to the jury. Defendant argues that the fact that the jury requested a second reading of the instructions evidences its confusion. We disagree. Defendant failed to object to the instructions at trial. In fact, defense counsel noted on the record that he was satisfied with the instructions after they were given. Failure to object to jury instructions at trial waives error unless relief is necessary to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

Upon review of the instructions in their entirety, this Court finds that the instructions fairly presented the elements of assault with intent to rob while armed, attempted armed robbery, and armed robbery. The record indicates that the judge misspoke while preliminarily summarizing the elements of assault with intent to rob while armed, but the judge immediately corrected himself. The judge then carefully and correctly explained the elements of each offense in a logical manner. Upon instructing the jury the second time, the judge utilized analogies in an effort to demonstrate the slight differences between the offenses on which he instructed.

Finally, defendant argues that he is entitled to resentencing because the trial judge sentenced him under the mistaken perception that the offense of assault with intent to rob while armed carried a mandatory minimum prison term. We disagree. Upon review of the record, we do not think that the sentencing judge was under the impression that the offense of assault with intent to rob while armed carried a mandatory minimum prison term. Rather, the record reflects that the sentencing judge thought that this defendant deserved to spend some time in prison for the crime of which he was convicted. The sentencing judge informed defendant of this before accepting defendant's guilty plea to the habitual offender charge. We find no error.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Michael J. Talbot