

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ANGELA SIMMS,

Defendant-Appellant.

UNPUBLISHED

April 8, 2003

No. 238245

Wayne Circuit Court

LC No. 01-006027-01

Before: Gage, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of reckless use of a firearm, MCL 752.863a, and domestic violence, MCL 750.81(2). Defendant was sentenced to eighteen months' probation with conditions including a condition that defendant must terminate her employment with the Detroit Police Department within seven days. Defendant appeals as of right. On December 7, 2001, this Court granted defendant's motion for immediate consideration, and granted her motion for stay of the order of probation provision requiring her to resign from the Detroit Police Department. We affirm. This appeal is being heard without oral argument pursuant to MCR 7.214(E).

Defendant's first issue on appeal is that the prosecution presented insufficient evidence to support defendant's reckless use of a firearm conviction. We disagree. Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415; 615 NW2d 691 (2000). In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Johnson, supra*; *People v Lueth*, 253 Mich App 670, 680; ___ NW2d ___ (2002). Circumstantial evidence and the reasonable inferences, which arise from the evidence, can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

MCL 752.863a provides:

Any person who shall recklessly or heedlessly or willfully or wantonly use, carry, handle or discharge any firearm without due caution and circumspection for the rights, safety or property of others shall be guilty of a misdemeanor.

Defendant argues that there was no evidence presented by the prosecution that defendant's use or carrying of her firearm was reckless, heedless, willful, wanton, or without due caution and circumspection for the safety of others. Additionally, defendant argues that there was no evidence presented that defendant knowingly or intentionally created a danger.

Defendant and Charles Clark began arguing when Clark came to defendant's home to pick up their daughter. Clark testified that defendant struck him five times, and went into her kitchen where she retrieved a gun that was issued to her as an officer for the Detroit Police Department. Clark further testified that while defendant was waiving the gun by her side, she stated, "I'll blow your motherfucking brains out." When Clark was leaving defendant's residence he was hit in the back of the head with a hard object. The daughter, of Clark and defendant, was present throughout the incident. Clark also testified that defendant was waiving the gun at her side, and suggested that he leave.

Defendant incorrectly argues that to be reckless¹ or heedless² you need to intentionally or knowingly create a danger. There was plenty of evidence, when viewed in a light most favorable to the prosecution, to establish that defendant used, carried or handled a firearm in a reckless or heedless fashion. Holding a gun, during an altercation, where you are striking someone and pushing someone out the door can be considered reckless or heedless. Defendant was only carrying the gun at her side, but there is testimony that she was using it to threaten Clark and was acting in an aggressive manner towards him while the gun was in her hand. Further, viewing the evidence and the surrounding circumstances, including the aggressive behavior with a gun in hand and with people in close vicinity, in a light most favorable to the prosecution, there was plenty of evidence to establish that defendant acted without due caution for the safety of Clark and of their daughter. Therefore, sufficient evidence was presented for a rationale trier of fact to convict defendant of reckless use of a firearm.

¹ Black's Law Dictionary (6th Ed) defines "reckless" as:

Not recking; careless, heedless, inattentive; indifferent to consequences. According to circumstances it may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive, or negligent. For conduct to be "reckless" it must be such as to evince disregard of, or indifference to, consequences, under circumstances involving danger to life or safety to others, although no harm was intended.

The Random House Webster's College Dictionary (1997), defines "reckless" as:

1. utterly unconcerned about consequences; rash; careless . . .
2. characterized by or proceeding from such carelessness.

² Heedless is defined as "careless; thoughtless; unmindful." *Random House Webster's College Dictionary* (1997).

Defendant's second issue on appeal is that the prosecution presented insufficient evidence to support defendant's domestic violence conviction. We disagree.

Defendant argues that there is no evidence of assault, assault and battery, or battery. Defendant's argument is without merit. Domestic assault is a specific intent crime that is proven by establishing that (1) the defendant and the victim were associated in a way described by statute,³ and (2) the defendant either intended to batter the victim or the defendant's unlawful act placed the victim in reasonable apprehension of being battered. MCL 750.81(2); *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996). Intent may be inferred from all the facts and circumstances. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). It is undisputed that defendant and Clark were associated in the way described by the statute, thus, the question is whether there is sufficient evidence of assault.

Sufficient evidence was present to conclude that defendant assaulted Clark. Clark testified that defendant grabbed him by the collar, threatened to blow his brains out, and struck him five times. Clark also testified that defendant was threatening him with a gun in her hand, and that as he left, with their daughter in his hands, he was hit in the back of the head with a fist. Clark further testified that defendant snatched a gold chain off of his neck, and hit him in the back of the head with a hard object. Clark explained that he was afraid when defendant began walking towards his car with a gun in her hand because of the threats she had made. Officer Lester Matthews testified that when he saw Clark, immediately after leaving defendant's place, his ear was bleeding. The testimony, viewed in a light most favorable to the prosecution, establishes that an actual battery occurred and that defendant was in reasonable apprehension of being battered when he was leaving in his car and was afraid of defendant who was holding a gun. Further, defendant's intent to batter can be inferred from the facts and circumstances.

Defendant appears to be making arguments based on credibility. However, questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). It is for the trier of fact, rather than this Court, to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Viewing the evidence, in light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant assaulted Clark, a person that she has a common child with.

Defendant's final issue on appeal is that the condition of probation which required defendant to immediately terminate her employment, with the Detroit Police Department, was unconstitutional, unlawful, and an abuse of discretion. We disagree.

"Whether probation is to be granted, and its conditions, are determinations that rest in the sound discretion of the trial court based upon authority provided by the Legislature." *People v Whiteside*, 437 Mich 188, 192; 468 NW2d 506 (1991). This Court will find an abuse of

³ The statute describes the association between the victim and the defendant as either a "spouse or former spouse, an individual with whom he or she has had a child in common, or a resident of his or her household." MCL 750.81(2). It was not disputed that defendant and Clark have a daughter in common.

discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). MCL 771.3(4) provides that beyond the required terms of probation the sentencing court may “impose other lawful conditions of probation as the circumstances of the case require or warrant or as in its judgment are proper.” Therefore, only if the condition is unlawful or unwarranted, given the facts of the case, can a defendant prove that the court has abused its discretion in setting the terms of probation. “A sentence of probation is an alternative to confining a defendant in jail or prison and is granted as a matter of grace in lieu of incarceration,” rather than as a matter of right. *People v Johnson*, 210 Mich App 630, 633-634; 534 NW2d 255 (1995).

Defendant’s reckless use of a firearm conviction establishes a direct connection between defendant, the crime, her employment, and the safety of the public. As a Detroit police officer defendant was required to have a weapon on her when leaving home. Defendant was convicted of recklessly using a firearm without due caution for the safety of others. Defendant’s reckless use of a firearm is contrary to some of her duties as a police officer, which include to protect others and to handle firearms responsibly.

This Court in *People v Miller*, 182 Mich App 711, 713; 452 NW2d 890 (1990), explained the sentencing judges discretion and restrictions in setting conditions for probation as follows:

A sentencing judge is accorded wide discretion in setting conditions of probation. *People v Gonyo*, 173 Mich App 716, 718; 434 NW2d 223 (1988); *People v Graber*, 128 Mich App 185, 190, 191; 339 NW2d 866 (1983), lv den 419 Mich 880 (1984). Only if the conditions are unlawful will the judge’s determination be disturbed. *Id.*, p 191; *People v Winqest*, 115 Mich App 215, 220; 320 NW2d 346 (1982). While there is no ultimate catalog of legal or illegal terms, *People v Johnson*, 92 Mich App 766, 768; 285 NW2d 453 (1979), and the Legislature did not define what constitutes a “lawful” term of probation, *People v Branson*, 138 Mich App 455, 458; 360 NW2d 614 (1984); MCL 771.3(4); MSA 28.1133(4), there must be a rational relationship between the restriction and rehabilitation, *Johnson, supra; Branson, supra*.

We cannot say that the trial court abused its discretion by imposing the condition on defendant’s probation that she resign from the Detroit Police Department. As a matter of grace defendant was given probation in lieu of a prison term. We are unable to say that the condition of resigning from the Detroit Police Department was not rationally related to defendant’s rehabilitation. Such a course of action would address defendant’s reckless use of firearms by removing her from a situation where she was required to handle a firearm, and thus, was lawful. Further, it was not a constitutional violation because the probation was a matter of grace. *Johnson, supra*, 210 Mich App 634. Defendant could have declined the probation, with its conditions, and submitted herself for sentencing. *People v Oswald*, 208 Mich App 444, 446, 528 NW2d 782 (1995). Therefore, the trial court did not abuse its discretion by placing a condition on defendant’s probation that she resign from the Detroit Police Department.

Affirmed.

/s/ Hilda R. Gage
/s/ William B. Murphy
/s/ Kathleen Jansen