

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 20, 2012

v

DUREL M. ADSIDE,

No. 304044
Wayne Circuit Court
LC No. 10-010944-FH

Defendant-Appellant.

Before: STEPHENS, P.J., and OWENS and MURRAY, JJ.

PER CURIAM.

Defendant appeals his bench trial convictions of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 2 years' imprisonment for the felony-firearm conviction, and to 2 years' probation for the felonious assault conviction.¹ We affirm.

I. UNDERLYING FACTS

At approximately 1:30 a.m. on September 26, 2010, Thomas Bailey, Jereme Demers, and Jay Held left a Detroit bar after attending a baseball game. As they crossed the street at a crosswalk, a blue GMC Envoy SUV driven by defendant sped toward and abruptly stopped in front of them. This action led to an argument between defendant, the other occupants of the SUV, and the three men. According to Bailey, defendant brandished a semi-automatic pistol, pointed it at Bailey's face, raised it slightly, and fired one or possibly two shots.

Lieutenant Christopher Vintevoghel, a uniformed Detroit police officer in a marked squad car, was parked near the altercation. Vintevoghel stated that he heard a gunshot while driving toward an apparent altercation between a white male in the street and the occupants of a blue GMC Envoy. As the SUV drove away, he followed for several blocks and waited for

¹ The Judgment of Sentence indicates that the sentences are to be served concurrently. The trial court appears to have erred in allowing defendant to serve his two-year term of probation from prison. "The person subject to the sentence mandated by this section is not eligible for parole or probation during the mandatory term imposed pursuant to subsection (1)." MCL 750.227b(3).

assistance from other units before stopping the SUV. During the ensuing traffic stop, Vintevoghel asked defendant whether there were any weapons in the vehicle, and defendant responded that “he had a gun in the glove box and a CCW permit for that gun.” In addition, in the course of removing one of the SUV’s passengers, another police officer overheard defendant say that there was a gun in the vehicle. Police then searched the SUV and recovered a black .40-caliber semi-automatic pistol from the glove compartment. The pistol, which holds 12 rounds, contained one round in the chamber and nine in the magazine, for a total of 10 rounds.

II. ANALYSIS

Defendant argues that the prosecution failed to present evidence sufficient to sustain his felonious assault and felony-firearm convictions. We disagree.

“Criminal defendants do not need to take any special steps to preserve a challenge to the sufficiency of the evidence.” *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). This Court reviews challenges to the sufficiency of the evidence in bench trials de novo. *People v Lanzo Const Co*, 272 Mich App 470, 473-474; 726 NW2d 746 (2006). “When ascertaining whether sufficient evidence was presented in a bench trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008). The requirement that every criminal conviction be supported by sufficient evidence “is an attempt to give concrete substance” to a defendant’s due process rights by precluding irrational verdicts. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). The weight of the evidence and the credibility of witnesses are to be determined by the trier of fact. *Kanaan*, 278 Mich App at 619.

FELONIOUS ASSAULT, MCL 750.82

The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). “An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.” *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). Testimony that a complainant “was scared when he point [sic] the gun at me” was found to have been sufficient evidence to satisfy the fear element of felonious assault. *See Avant*, 235 Mich App at 506. In this case, defendant pointed the gun at Bailey and fired one or two shots. Bailey testified that he ran behind defendant’s SUV because he feared that he could be shot.

Defendant argues that conditions “were not the best to make a correct identification of the person possessing the firearm.” The appropriate question in this case is not whether conditions were ideal, but whether the trial court judge, sitting as the finder of fact, was rational in finding that the prosecution had proved each element of both crimes beyond a reasonable doubt.

There is sufficient record evidence to connect defendant to the incident. The complainants’ testimony and the undisputed observations of Lieutenant Vintevoghel establish

that an argument took place in the crosswalk, and that one or two shots were fired. Bailey testified that the defendant pointed a pistol at his face. After running behind the SUV, Bailey observed the vehicle's license plate number, which he promptly recited to Vintevoghel, who included the number in his radio call. That radio call resulted in several police cars, including that of Officer Lawrence Addison, following and stopping the SUV. The driver's license and vehicle registration provided to Officer Addison indicated that defendant is the registered owner of the blue GMC Envoy.

The pistol recovered from the SUV was missing two rounds, which comports with witness reports of having heard one or two gunshots. Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). Accordingly, the trial judge was justified in inferring that the gun recovered from the SUV was the same gun reported to have been fired during the incident earlier that morning at the crosswalk.

Bailey testified, and the trial court believed, that he ran behind the SUV, fearing that he could be shot. Bailey and Held each identified defendant as the driver of the SUV. This Court affords great weight to the finder of fact's judgments of witness credibility. See *Kanaan*, 278 Mich App at 619. Bailey having been placed in fear of imminent danger by defendant, there was sufficient evidence to satisfy the fear element of felonious assault.

The "dangerous weapon" element of felonious assault is satisfied because defendant used a loaded pistol to assault Bailey. Pistols are explicitly listed in the felonious assault statute as qualifying dangerous weapons. See MCL 750.82(1).

With respect to the third element, defendant's intent to injure or place Bailey in reasonable apprehension of an immediate battery, the trial judge found that "I don't believe, based upon the testimony, that the Defendant was trying to shoot Mr. Bailey. I believe, based upon the testimony, that it was a situation where it was, you know, back off, I got a gun and he fired it." That is, defendant intended to encourage Bailey to move away from his SUV by scaring him with his pistol. Merely pointing a gun, even an unloaded one, at a person is sufficient to satisfy this specific intent, which can be inferred from the circumstances. See, e.g., *People v Counts*, 318 Mich 45, 54; 27 NW2d 338 (1947); *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998). Testimony that defendant pointed his loaded pistol at Bailey's face and fired one or two shots, as corroborated by three witnesses and one police officer, was sufficient evidence for the trial judge to find that the third element had been proved beyond a reasonable doubt.

FELONY-FIREARM, MCL 750.227b

The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). There was sufficient evidence in the record for a rational trier of fact to have found that defendant committed a felony while in possession of a firearm; specifically, felonious assault while in possession of a semiautomatic pistol.

Bailey testified that defendant pointed a semiautomatic pistol at him and fired one or two shots. Bailey also obtained the license plate number from the SUV, and Demers and Held each identified the offending vehicle as having been driven by defendant. Bailey, Demers, and Held also testified that they heard gunshots fired from close range. Bailey testified that defendant “proceeded to raise [the gun] a little bit and fire a shot.” Demers said, “I could tell that they were pretty close.” Held testified that the gunfire “was clearly like right behind us.” A rational trier of fact could have concluded that defendant had fired, from close range, the semiautomatic pistol he was seen holding, and that was later recovered from his SUV.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Donald S. Owens

/s/ Christopher M. Murray