

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL PAUL KURTH,

Defendant-Appellant.

UNPUBLISHED

May 30, 1997

No. 193661

Delta Circuit Court

LC No. 95-005880-FH

Before: O'Connell, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by jury of felonious assault, MCL 750.82; MSA 28.227. He later pleaded guilty to being a habitual offender third offense, MCL 769.12; MSA 28.1084, and was sentenced to eighteen to ninety-six months in prison. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction of felonious assault, MCL 750.82; MSA 28.227. To prove felonious assault, the prosecution must show that (1) there was an assault; (2) with a dangerous weapon; and (3) that the defendant intended to injure or place the victim in a reasonable apprehension of immediate battery. *People v Wardlaw*, 190 Mich App 318, 319; 475 NW2d 387 (1991), citing *People v Crook*, 162 Mich App 106; 412 NW2d 661 (1987). The defendant must also have the present ability to commit a battery. *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). At trial, the prosecution produced accounts from the victim and four other witnesses, who all agreed on these basic facts: (1) defendant approached the victim with knife in hand; (2) he lunged at the victim with a knife in his hand; (3) defendant threatened to injure or kill the victim; and (4) the victim responded to the knife by coming to a halt. Based on this evidence, a rational trier of fact could have concluded beyond a reasonable doubt that there was an assault with a dangerous weapon that placed the victim in reasonable apprehension of an imminent battery. See *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

Defendant argues that his actions did not qualify as an assault since he was unable to reach the victim with his girl friend interposed between them. He cites *People v Smith*, 89 Mich App 478; 280 NW2d 862 (1979), quoting *People v Lilley*, 43 Mich 521; 5 NW 982 (1880), for this proposition.

Smith involved the question of whether a defendant could be convicted of assault with intent to commit murder if the victim knew that the defendant's instrumentality posed no threat (i.e., the defendant threatened the victim with the victim's unloaded gun). *Smith* was not concerned with whether the defendant committed acts sufficient to constitute an assault, as alleged here, but with whether the defendant had the present ability to carry out an assault. *Id.* at 485. A criminal assault occurs upon the happening of *either* (1) an attempted battery, or (2) an unlawful act that places another person in reasonable apprehension of receiving an immediate battery. *People v Williams*, 143 Mich App 574; 374 NW2d 158 (1985), quoting *People v Sanford*, 402 Mich 460; 265 NW2d 1 (1978). There was testimony that although the victim approached defendant as if to fight with him, he pulled back when defendant displayed the knife. An assault requires that the victim reasonably apprehend a battery, not that he fear it. A reasonable jury could have determined that the act of pulling back at the sight of a knife was a reasonable apprehension. Accordingly, there was sufficient evidence from which a jury could have concluded that defendant committed felonious assault.

Defendant next argues that the trial court erred in admitting evidence of Rodella Johnson's state of mind at the time of defendant's arrest and her testimony concerning defendant's appearance at the time of his arrest. Defendant claims the evidence was irrelevant and prejudicial. Legal relevance is determined by applying MRE 401 and 402. *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993); *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). MRE 401 provides:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

MRE 402 provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

Although evidence may be relevant, it may be excluded in the court's discretion if its probative value is substantially outweighed by unfair prejudice to the defendant. MRE 403; *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909 (1995).

Johnson admitted lying to arresting officers when asked about defendant's whereabouts. She told arresting officers that defendant was in Minnesota when she knew that he was somewhere in the house. The prosecution then asked Johnson how she felt when defendant was arrested. She said she was "upset." When asked why, she replied, "I don't know. I love Dan. And, you know, I knew [the arrest] probably had to do something with [the victim], and I just don't think it's fair." These questions were designed to elicit Johnson's bias as a witness. She was the only witness whose testimony differed from the others, so her credibility was at issue. As was pointed out in *People v Bouchee*, 400 Mich 253; 253 NW2d 626 (1977), "any witness who testifies, including a defendant in a criminal case, 'puts

in issue' his credibility." *Id.* at 266. Moreover, counsel may cross-examine an adverse witness regarding any facts that tend to show the witness' relation with, feelings toward, bias, or prejudice for either party. *United States Fire Ins Co v Citizens Ins Co of America*, 156 Mich App 588, 592; 402 NW2d 211 (1986), citing *Hayes v Coleman*, 338 Mich 371; 61 NW2d 634 (1953). Given Johnson's testimony, the trial court did not abuse its discretion in concluding that these questions were probative as to her credibility and were not substantially outweighed by the danger of unfair prejudice to defendant. MRE 403; *Price v Long Realty, Inc.*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

Finally, we agree with defendant that the questions concerning his appearance at the time of his arrest were irrelevant. These questions did not meet even the very low threshold of "making any fact" which is "of consequence" more or less probable under MRE 401, nor could the comments be fairly held to probe the witness' credibility. Yet we do not find that the testimony was so prejudicial as to require reversal because the decision to admit the evidence was not inconsistent with substantial justice. MCR 2.613; MCL 769.26; MSA 28.1096; *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). There was ample evidence that defendant committed felonious assault, and the admission of this evidence did not deny defendant a fair trial.

Affirmed.

/s/ Peter D. O'Connell

/s/ David H. Sawyer

/s/ Stephen J. Markman