

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE THEODORE GORSUCH,

Defendant-Appellant.

UNPUBLISHED
November 4, 1997

No. 182888
Recorder's Court
LC No. 94-008894

Before: MacKenzie, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277, and was sentenced as a third felony offender, MCL 769.11; MSA 28.1083, to ~~2~~^{2½} to eight years' imprisonment on both counts. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court applied the wrong standard of proof when it rendered its verdict. The claim is without merit. Although defendant is correct that *at sentencing* the court recalled that the evidence adduced at trial was "clear and convincing," it is apparent from the trial transcript that the court applied the guilt beyond a reasonable doubt standard. The court specifically found that complainant Lydia Ferguson was not credible. The court further stated the testimony of complainant Pamuel Ferguson and witness Lanita Ferguson made it "terribly clear in my view what happened," and that based on their testimony defendant "would quite easily be found guilty in [sic] both counts." These remarks make it clear that the court was convinced beyond a reasonable doubt of defendant's guilt.

In two related arguments, defendant also claims that there was insufficient evidence to sustain his convictions and that the convictions were against the great weight of the evidence. We disagree. When reviewing a claim of insufficient evidence following a bench trial, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). 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 Wardlaw*, 190 Mich App 318, 319; 475 NW2d 387 (1991). Generally, proof of a gun's

operability is not an element of a prima facie case in a felonious assault prosecution. *People v Prather*, 121 Mich App 324, 329; 328 NW2d 556 (1982). A criminal assault constitutes either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Intent, like any other fact, may be proven indirectly by inference from the conduct of the accused and surrounding circumstances from which it logically and reasonably follows. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992).

Viewed in a light most favorable to the prosecution, the evidence in this case indicated that on August 9, 1994, defendant, while holding a gun in his hand, slapped Lydia Ferguson with the other hand, pushed her around, and threatened to shoot her. Pamuel and Lanita Ferguson, who are Lydia's mother and sister, also testified that they saw defendant hit Lydia with the gun. The following day, defendant returned and tried to force his way into Pamuel Ferguson's upstairs flat. Pamuel testified that defendant elbowed her in the chest, showed a gun he was carrying in his pants pocket, and threatened to "waste the family." This evidence was sufficient to establish that defendant feloniously assaulted both Lydia and Pamuel Ferguson and the convictions were not against the great weight of the evidence.

Defendant's final claim is that he was denied the effective assistance of counsel. We disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). In applying this test, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*, p 156. Further, the burden is on the defendant to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.*

In this case, defendant claims that counsel's decision not to call police officers as witnesses and his advice that defendant not take the stand constituted ineffective assistance. These, however, were matters of trial strategy that this Court will not second-guess. We also reject defendant's claim that counsel should have argued that the prosecution failed to prove the existence or the operability of a gun when he assaulted the victims. The existence of a gun was established with the testimony of Lydia, Pamuel, and Lanita Ferguson, and operability was not an element of the crime under the circumstances of this case. *Prather, supra*. Defendant has therefore failed to establish that he was prejudiced by counsel's performance, or that he was denied the effective assistance of counsel.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ David H. Sawyer
/s/ Janet T. Neff