

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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IN THE MATTER OF SCHELLY JOHNSON, a Minor.

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCHELLY JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

March 27, 1998

No. 197463

Wayne Juvenile Court

LC No. 95-331229

Before: Young, Jr., P.J., and Michael J. Kelly and Doctoroff, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of felonious assault, MCL 750.82; MSA 28.277, possession of a BB gun by a minor, MCL 752.891; MSA 28.436, and carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423. Defendant was committed to a Family Independence Agency (FIA) approved facility. We affirm.

On August 9, 1995, defendant was shooting his BB gun in a field and shot Tiffany Butler twice in the back of the leg. After, Tiffany saw defendant shooting the BB gun, he ran. When Tiffany went home to tell her mother, her mother saw defendant walking down the street shooting the BB gun. There were other children playing on the street as well.

Defendant first argues that the trial court's findings of fact were clearly erroneous and that his convictions for felonious assault and carrying a dangerous weapon with unlawful intent were not supported by sufficient evidence. We disagree.

Findings of fact by the trial court will not be set aside unless they are clearly erroneous. MCR 2.613(C). This Court reviews a claim of insufficiency of the evidence by considering the evidence in a light favorable to the prosecution and determining whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. Circumstantial evidence and

reasonable inferences drawn therefrom may provide sufficient proof of the elements of the crime. *People v Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997).

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 Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). An assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). A battery is the consummation of an assault. *Id.* Intent may be established by circumstantial evidence. *Id.* at 663.

MCL 752.891; MSA 28.436 prohibits any person under the age of eighteen from using or possessing a BB gun outside the curtilage of their domicile unless that minor is accompanied by a person over the age of eighteen. The elements of carrying a dangerous weapon with unlawful intent are that the defendant possess the weapon with the intent to use it illegally against another person. *People v Jones*, 443 Mich 88, 102 n 19; 504 NW2d 158 (1993). Pursuant to MCL 750.226; MSA 28.423, a dangerous weapon is a “pistol or other firearm or dagger, dirk, razor, stiletto, or knife having a blade over 3 inches in length, or any other dangerous or deadly weapon or instrument.” A BB gun is not a firearm. MCL 8.3t; MSA 2.212(20). However, a BB gun can be a dangerous weapon if it is operable and capable of propelling an object when loaded. *People v Jones*, 150 Mich App 440, 445; 387 NW2d 875 (1986).

After a complete review of the record and the findings of fact, we hold that the findings of fact are supported by the evidence produced at trial and are not clearly erroneous. Tiffany testified that defendant shot her twice in the leg with the BB gun. A BB gun can be a dangerous weapon especially when loaded and aimed at another human being. Defendant’s intent to injure can be inferred by the fact that he shot Tiffany twice. Therefore, the findings of fact were not clearly erroneous. Furthermore, when viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of felonious assault and carrying a dangerous weapon with unlawful intent had been proven beyond a reasonable doubt. Therefore, defendant’s convictions were supported by sufficient evidence.

Defendant also claims that the verdict was against the great weight of the evidence. We disagree. Both complaining witnesses at trial testified that they saw defendant, a minor, shooting a BB gun. Nothing in the record suggests a reason for why the two witnesses should not be believed. Therefore the verdict was not against the overwhelming weight of the evidence. *People v Herbert*, 444 Mich 466, 478, 511 NW2d 654 (1993).

Finally, defendant argues that he was denied the effective assistance of counsel. We disagree. Because defendant did not move for a new trial or an evidentiary hearing, our review of this issue is limited to the lower court record. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). To establish ineffective assistance of counsel, the defendant must prove that counsel made errors that are so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment and that this deficient performance prejudiced the defendant’s trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997) (citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80

L Ed 2d 674 (1984)). There is a strong presumption that defense counsel's performance falls within the wide range of reasonable professional assistance. *Mitchell, supra*, 454 Mich 156. Counsel's performance must be

measured against an objective standard of reasonableness without the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The defendant must overcome the presumption that defense counsel's conduct was sound trial strategy. *Id.* To establish prejudice, the defendant must show that, but for defense counsel's deficient performance, the result would have been different. *Id.*

Defendant claims that his counsel did not assert a defense or cross-examine the witnesses. We disagree. Defense counsel cross-examined both prosecution witnesses and in closing arguments asserted the defense of accident. She also asserted the prosecution did not prove the element of intent. Defendant also claims that counsel failed to inform him of his right to remain silent or to testify at trial. However, since our review is limited to the record, we find no support for defendant's argument that counsel failed to advise her client of his rights. Defendant also argues that he was denied the effective assistance of counsel because his counsel failed to object to hearsay testimony. However, because of the limited record, defendant has failed to overcome the presumption that counsel's failure to object was sound trial strategy. *LaVearn, supra*, 448 Mich 216.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Michael J. Kelly

/s/ Martin M. Doctoroff