STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT MICHAEL GIRARD,

Defendant-Appellant.

UNPUBLISHED
February 16, 1999

No. 202411
Cheboygan Circuit Court
LC No. 96-001600 FH

Before: Smolenski, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant was convicted by the trial court of four counts of felonious assault, MCL 750.82; MSA 28.277, and cutting down without title or permission any tree, trees or timber valued at $25 or more, MCL 752.701; MSA 28.151, repealed effective January 1, 1999, by 1998 PA 311 (hereinafter illegal cutting). Defendant was sentenced as a third-offense habitual offender, MCL 769.11; MSA 28.1083, to concurrent terms of forty-two to ninety-six months' imprisonment for each assault conviction and twelve months' imprisonment for the illegal cutting conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise out of an incident that occurred at an outdoor party at Cochran Lake in August, 1996. Allegedly believing that his money had been stolen, defendant removed a chain saw from his vehicle and cut down two trees valued at $25 or more, ostensibly to prevent persons from leaving the party. Defendant's conviction for illegal cutting arises from this conduct. When approached by a group of people attending the party, defendant used his chain saw in a threatening matter. For this conduct, defendant was convicted of feloniously assaulting Edward Shovan, Joseph Morrison and Stanley Florenski. Defendant's fourth felonious assault conviction arises out of his subsequent conduct in striking another person with a motor vehicle.

Defendant first contends that there was insufficient evidence that he feloniously assaulted Shovan, Morrison or Florenski.

A challenge to the sufficiency of the evidence tests whether all the evidence, considered as a whole, justifies submitting the case to the trier of fact. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). In reviewing whether sufficient evidence was presented, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v McFall*, 224 Mich App 403, 411-412; 569 NW2d 828 (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 fear or apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

Defendant specifically challenges the sufficiency of the evidence of the element of intent. A defendant's 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.'" *Lawton, supra*. Defendant also challenges the sufficiency of the evidence of the element of assault. An assault is an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Jones*, 443 Mich 88, 92, 100; 504 NW2d 158 (1993); *People v Grant*, 211 Mich App 200, 202-203; 535 NW2d 581 (1995). The defendant must have the present ability or apparent present ability to carry out the threatened harm. *Jones, supra*; *Grant, supra*; see also *People v Reeves*, 458 Mich 236, 242, 244; 580 NW2d 433 (1998). Proximity is a component of present ability. *Reeves, supra* at 243. As explained in *Reeves, supra* at 244 (citations omitted):

> Clearly, attempted-battery assaults, i.e., those that are sufficiently proximate to the intended victim, evince an assailant's actual ability to inflict injury on the victim. For the apprehension-type assault, however, actual ability to inflict the threatened harm is largely irrelevant and unnecessary, as long as the victim reasonably apprehends an *imminent* battery. . . . Thus, the inquiry turns on what the victim perceived, and whether the apprehension of imminent injury was reasonable. . . .

The *Reeves* Court further explained that with respect to apprehension-type assaults the appropriate focus is

> on the imminent danger that is threatened, rather than on the "actual" ability to inflict injury. Therefore, the assault element is satisfied where the circumstances indicate that an assailant, by overt conduct, causes the victim to reasonably believe that he will do what is threatened. [*Id.*]

With respect to Shovan, Morrison and Florenski, evidence was admitted that a group of persons attending the party approached defendant. Evidence was admitted that defendant began swinging his running chain saw at the group while stating words to the effect that if he did not get his money back he was going to kill people or cut people into little pieces. With respect to Shovan, evidence was admitted that Shovan was at the head of this group of people, that defendant "revved" the chain saw in Shovan's face from a distance of anywhere from one to six feet, that defendant could have

hit Shovan, and that Shovan jumped or was pulled back. The following exchange occurred during Shovan's testimony:

> *The Prosecutor*: Were you afraid?
>
> *Shovan*: Oh, yeah. Not so much for myself, but for other people that were there.
>
> *The Prosecutor*: What were you afraid would happen to them?
>
> *Shovan*: Injury.
>
> *The Prosecutor*: Okay. Seemed like defendant was capable of causing some injury at that point?
>
> *Shovan*: Yup.
>
> *The Prosecutor*: Was it a scary situation?
>
> *Shovan*: Oh, yup.

Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that defendant did an unlawful act and that as a result of defendant's unlawful act Shovan reasonably apprehended imminent bodily injury. *Id*. at 245; *Jones, supra*. We also conclude that a rational trier of fact could have found that defendant intended to injure or place Shovan in reasonable fear or apprehension of an immediate battery. *Lawton, supra*. Thus, with respect to Shovan, we conclude that sufficient evidence of the elements of assault and intent was presented. *McFall, supra*.

With respect to Morrison, he testified that he was part of the crowd that approached defendant and that at some point during the incident he and defendant "got real close." Morrison responded affirmatively when asked by the prosecutor whether he "personally fe[lt] threatened by this man with a chain saw." Another witness testified that "it seem[ed] like [defendant] went after Joe and Joe like sort of had to run away to get away from [defendant]." This witness also testified:

> It was down here and it was like he was walking back to his car, but Joe was like walking out of the woods for some reason, and I can remember seeing it too, because Joe had this look on his face and he was running to get away from him. The guy was right behind him.

The witness subsequently clarified that Morrison was unable to do a "flat out run" because of fallen trees and brush but that Morrison was trying to get away from defendant. The witness testified that defendant was "revving" the chain saw at the time Morrison was trying to get away from defendant.

Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that defendant did an unlawful act and that as a result of defendant's

unlawful act Morrison reasonably apprehended imminent bodily injury. *Reeves, supra*; *Jones, supra*. We also conclude that a rational trier of fact could have found that defendant intended to injure or place Morrison in reasonable fear or apprehension of an immediate battery. *Lawton, supra*. Thus, with respect to Morrison, we conclude that sufficient evidence of the elements of assault and intent was presented. *McFall, supra*.

With respect to Florenski, Morrison testified that Florenski was in the front of the group of people that approached defendant, that Florenski got to within ten feet of defendant, that defendant swung and came at Florenski with the chain saw, and that Florenski ran back out of the way. Timothy Wilson testified that defendant went toward Florenski with the chain saw and that Florenski moved back. Wilson responded affirmatively when asked by defense counsel whether defendant threatened Florenski with the chain saw.

Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that defendant did an unlawful act and that as a result of defendant's unlawful act Florenski reasonably apprehended imminent bodily injury. *Reeves, supra*; *Jones, supra*. We also conclude that a rational trier of fact could have found that defendant intended to injure or place Florenski in reasonable fear or apprehension of an immediate battery. *Lawton, supra*. Thus, with respect to Florenski, we conclude that sufficient evidence of the elements of assault and intent was presented. *McFall, supra*.

Next, defendant takes issue with the following findings of fact by the trial court:

> I find the elements of assault with a dangerous weapon are present as to the – as to the chain saw. Defendant did an illegal act – in effect, threatened [Shovan, Morrison and Florenski] so that they each reasonably feared an immediate battery, and defendant intended to make [Shovan, Morrison and Florenski] reasonably fear an immediate battery, and defendant appeared to have the ability to commit such a battery and defendant committed that assault or those assaults with the chain saw . . . .

Specifically, defendant raises a challenge to the present ability component of the element of assault by contending that the testimony of Shovan, Morrison and Florenski established that he (defendant) was never close enough to hurt anyone with the chain saw. Defendant contends that the trial court's findings of fact on the elements of intent and assault are thus clearly erroneous

This Court will not disturb a trial court's findings of fact unless the findings are clearly erroneous. *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). A finding of fact is clearly erroneous if, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Id*. This Court will generally defer to the trial court's resolution of factual issues, particularly where it involves the credibility of the witnesses. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997).

It is true that Shovan testified that at one point he was never closer than thirty to forty feet from defendant and that at another point he was never closer than fifteen feet to defendant. Shovan also testified that he did not know whether he had been physically assaulted.

However, the testimony of all the witnesses indicates that the scene during the group's encounter with defendant was one of utter chaos. Most of the witnesses, including Shovan, Morrison and Florenski, had been drinking that evening. Thus, this case required the trial court to find facts from the conflicting testimony of witnesses whose memories and perceptions were influenced by stress, fear and alcohol. Many of the witnesses gave testimony that placed Shovan at the head of the group of people who approached defendant and that indicated that Shovan came within only a few feet of defendant. Shovan himself corroborated this evidence to the extent that he testified that he was the first person "on the scene" and was "definitely closest" to defendant. Shovan also testified that, at least at one point, he was having a hard time seeing and that he did not get a good look at defendant because a spotlight was shining in his eyes. Thus, the trial court could have rejected Shovan's testimony that the closest he came to defendant was within fifteen feet (five yards) and credited the testimony of the other witnesses that Shovan and defendant were within just a few feet of each other. Moreover, as indicated previously, Shovan testified that it was a scary situation, that he was afraid of injury, albeit not so much for himself as for the others, and that defendant appeared capable of causing injury. In addition, assuming Shovan's testimony was correct, defendant could have quickly covered a distance of five yards by charging or throwing the chain saw at Shovan. Cf. *Grant, supra*. After reviewing the entire record with appropriate deference to the trial court's resolution of the factual issues, we are not left with a definite and firm impression that the trial court made a mistake in finding that defendant had the present ability to carry out his threatened harm on Shovan. *Gistover, supra*. We likewise are not left with a definite and firm impression that the trial court erred in finding that defendant committed an unlawful act that placed Shovan in reasonable apprehension of receiving an immediate battery and that defendant intended to place Shovan in reasonable fear of an immediate battery. *Id*.

With respect to Morrison, it is likewise true that he testified he did not get close enough to get "whacked" by the chain saw. However, as indicated previously, Morrison testified that he and defendant "got real close" and that he felt personally threatened by defendant. Other evidence was admitted indicating that defendant went after Morrison with the chain saw and that Morrison ran away from defendant. Even if Morrison was not close enough to get "whacked" by the chain saw, defendant, again, could have charged or thrown the chain saw at Morrison. Cf. *Grant, supra*. After reviewing the entire record with appropriate deference to the trial court's resolution of the factual issues, we are not left with a definite and firm impression that the trial court made a mistake in finding that defendant had the present ability to carry out his threatened harm on Morrison. *Gistover, supra*. We likewise are not left with a definite and firm impression that the trial court erred in finding that defendant committed an unlawful act that placed Morrison in reasonable apprehension of receiving an immediate battery and that defendant intended to place Morrison in reasonable fear of an immediate battery. *Id*.

Finally, with respect to Florenski, it is true that he testified that he was in the crowd of people who approached defendant but that he was not one of the first such people. In particular, Florenski testified that he never saw defendant with the chain saw at all and that he only saw defendant's vehicle.

Florenski's testimony is in direct conflict with the testimony of Morrison, who indicated that Florenski was in front of the group of people that approached defendant, that Florenski got within ten feet of defendant, that defendant came at and swung the chain saw at Florenski, and that Florenski ran back out of the way. Florenski's testimony is likewise in direct conflict with Wilson's testimony, who indicated that defendant went toward Florenski with the chain saw and that Florenski moved back.

In light of the substantial testimony indicating that Shovan was the person who was in front of the group that approached defendant, it is certainly possible that Morrison mistook Florenski for Shovan. Moreover, the trial court found that Wilson's testimony was not credible with respect to any assault by defendant on Wilson.[1] Conversely, as indicated previously, the entire record indicates that the scene was one of utter chaos. Florenski himself testified that he had been drinking throughout the night and that he had drank "[p]ossibly a twelve pack." Moreover, the trial court was not required to accept Florenski's testimony that he did not see defendant with the chain saw, particularly where there was other evidence in the record indicating to the contrary. Cf. *People v Coddington*, 188 Mich App 584, 594; 470 NW2d 478 (1991). Rather, it is apparent that the trial court must have rejected Florenski's testimony and accepted the testimony of Morrison and Wilson. In light of the testimony of Morrison and Wilson, we are not left with a definite and firm impression that the trial court made a mistake in finding that defendant had the present ability to carry out his threatened harm on Florenski. *Gistover, supra*. We likewise are not left with a definite and firm impression that the trial court erred in finding that defendant committed an unlawful act that placed Florenski in reasonable apprehension of receiving an immediate battery and that defendant intended to place Florenski in reasonable fear of an immediate battery. *Id*.

In summary, we conclude that the trial court's findings of fact with respect to Shovan, Morrison and Florenski were not clearly erroneous. We likewise conclude, upon review of the entire record, that the trial court's verdicts of guilty of felonious assault with respect to Shovan, Morrison and Florenski were not against the great weight of the evidence. MCR 7.211(C)(1)(c); *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

Finally, defendant challenges his conviction of illegal cutting. The illegal cutting statute is part of the timber act, 1867 PA 165, MCL 752.701 *et seq*.; MSA 28.151 *et seq*. The timber act, including the illegal cutting statute, was repealed effective January 1, 1999, by 1998 PA 311. However, when defendant committed his offenses in August, 1996, the illegal cutting statute provided in relevant part as follows:

> That, every person having no color of title, either tax, equitable, or otherwise, who shall willfully and without permission of the owner thereof, enter upon the lands of another and shall cut down, destroy, or remove therefrom *any tree, trees, timber*, wood, logs, or lumber, growing, standing, lying, or being thereon, of the value of 25 dollars or more . . . shall be deemed guilty of a felony, and shall be punished by imprisonment in state prison, not more than 1 year, or by fine of not more than 500 dollars or imprisonment in the county jail not more than 12 months. [MCL 752.701; MSA 28.151, repealed effective January 1, 1999, by 1998 PA 311 (emphasis supplied).]

In *People v Bolling*, 140 Mich App 606, 608-609; 364 NW2d 759 (1985), defendant Bolling was charged under this statute for cutting down a pine tree that he subsequently used as a Christmas tree. Bolling argued in the trial court that at the time the 1867 Legislature enacted the illegal cutting statute the word "timber" had the specific meaning of wood felled or usable for building purposes. Bolling further argued that because the prosecution had failed to present evidence that the pine tree was capable of being used for building purposes the information had to be quashed for lack of probable cause. *Id*. at 609. The trial court denied Bolling's motion to quash and he pleaded guilty to illegal cutting. *Id*. at 608-610. Bolling appealed, raising the same argument in this Court.

This Court reversed Bolling's conviction. In so doing, this Court recognized that the word "timber" must be construed in accordance with its common meaning and that the common meaning of a term may be ascertained by resort to a dictionary definition. *Id*. at 611. However, this Court rejected the use of a contemporary dictionary, which defined "timber" as "'growing trees or their wood,'" to ascertain the meaning of "timber," and instead found that "the definition of the word timber as it was known by the 1867 Legislature is the appropriate common understanding that applies." *Id*. at 612. This Court noted that in *Balderson v Seeley*, 160 Mich 186; 125 NW 37 (1910), a case involving a timber contract, our Supreme Court had found that various dictionaries then defined "timber" as trees useable for building or construction purposes. *Bolling*, *supra* at 612 (citing *Seeley*, *supra* at 189). This Court also looked to cases from other jurisdictions that had essentially defined the term "timber" as wood suitable for building purposes. *Id*. at 612-613. This Court then concluded:

> Given the above definitions and the fact that timber trees were commonly understood to be limited to oak, ash, or elm we agree with defendant's argument that by adding the terms "any tree" or "trees" into the body of the timber's act's penalty provision, the Legislature intended to broaden the commonly understood definition of "timber" to include any other kind of tree, i.e., maple, pine, fir, etc. Nevertheless, we do not agree that the term "any tree," as commonly understood at the time the Legislature passed the timber act, also included "any growing trees or their wood" as the people urge. We would restrict the meaning of the term "any tree" to trees that can be felled for wood suitable for buildings or construction, the definition found in *Seeley*, *supra*. We so limit the definition of "timber" and "any tree" in the timber act in order that the spirit and purpose of that statute might prevail over its strict letter. . . . [*Id*. at 613-614.][2]

Because the prosecution had failed to present proof that the pine tree could have yielded wood that could have been used for "constructive purposes," this Court held that the trial court had erred in denying defendant's motion to quash the information. *Id*. at 614-615. This Court also noted that the defendant could have been charged under one of three separate misdemeanor statutes. *Id*.

In this case, defendant contends in reliance on *Bolling* that his conviction of illegal cutting must be reversed because insufficient evidence was presented that the two trees he cut down were suitable for building or construction purposes. We agree that no such evidence was presented. However, we conclude that such evidence is not necessary to sustain defendant's conviction. In arriving at this

conclusion, we emphasize that we need not consider and express no opinion with respect to the *Bolling* court's construction of the term "timber."

Rather, what we find analytically suspect is the *Bolling* Court's application of the same judicial gloss to the terms "any tree" or "any . . . trees" as it applied to the term "timber." This unwarranted leap appears to violate several rules of statutory construction. First and foremost, if the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). We believe that the plain and ordinary meaning of the terms "any tree" or "any . . . trees" is clear and unambiguous. The *Bolling* Court cited no authority from which it would appear that plain meaning of these terms was different at the time the 1867 Legislature enacted the timber act. Thus, judicial construction is unnecessary. Moreover, in construing a statute, a court should presume that every word has some meaning and should avoid any construction that would render the statute, or any part of it, surplusage or nugatory. *People v Nickerson*, 227 Mich App 434, 439; 575 NW2d 804 (1998). In light of the *Bolling* Court's construction of the term "timber," its similar construction of the terms "any tree" or "any . . . trees" renders these latter terms surplusage. In addition, statutory language should be construed reasonably, keeping in mind the purpose of the act. *People v Seeburger*, 225 Mich App 385, 391; 571 NW2d 724 (1997). As found by the *Bolling* Court, the purpose of the timber act was "'for the protection of land, and to punish the cutting and carrying away of timber therefrom.'" *Id*. at 611 (quoting the title of the timber act). Punishing one who cuts without permission or title any tree or trees valued at $25 or more protects land. Moreover, trees that do not yet qualify as timber may become timber if they are not cut down or destroyed. Again, punishing one who illegally cuts such trees protects land. Thus, contrary to the *Bolling* Court's conclusion, we believe that according the terms "any tree" or "any . . . trees" their plain and ordinary meaning does not produce an unreasonable or unjust result, but rather furthers the purpose of the timber act. *People v Fetterley*, 229 Mich App 511, 526; 583 NW2d 199 (1998).

Except for the recent repeal of the illegal cutting statute, the Legislature has otherwise been silent with respect to the *Bolling* Court's interpretation of this statute. Silence by the Legislature for many years following judicial construction of a statute suggests consent to that construction. See *Parker v Byron Center Pub Schools Bd Of Ed*, 229 Mich App 565, 570; 582 NW2d 859 (1998). However, we simply cannot extend such an implied consent to the *Bolling* Court's construction of the terms "any tree" or "any . . . trees" where, as indicated by the previous analysis, such construction does not appear to be soundly reasoned. See *Parker, supra* at 571.

The plain language of the illegal cutting statute, as in force in August 1996, makes clear that the Legislature intended to punish one who, without title or permission, cut down "any tree" or "any . . . trees" with a value of $25 or more. In this case, there was no question that in August, 1996, defendant, without title or permission, cut down two trees with a value of $25 or more. Accordingly, sufficient evidence was presented to sustain defendant's conviction of illegal cutting.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Hilda R.Gage

[1] The trial court thus acquitted defendant of all charges with respect to Wilson.

[2] This Court had earlier noted that the timber act was an act "'for the protection of land, and to punish the cutting and carrying away of timber therefrom.'" *Id*. at 611 (quoting the title of the timber act).