

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS JOHNSON,

Defendant-Appellant.

UNPUBLISHED
October 22, 1999

No. 206339
Recorder's Court
LC No. 96-008691

Before: Whitbeck, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Plaintiff charged defendant with assault with intent to commit murder, MCL 750.83; MSA 28.278, assault with a dangerous weapon (felonious assault), MCL 750.82; MSA 28.277, intentional discharge of a firearm at a dwelling or occupied structure, MCL 750.234b; MSA 28.431(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a bench trial, the court convicted defendant of two counts of felonious assault, MCL 750.82; MSA 28.277, intentional discharge of a firearm at a dwelling, MCL 750.234b; MSA 28.431(2), and felony-firearm, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to two years' imprisonment for the felony-firearm conviction, six to forty-eight months' imprisonment for each felonious assault conviction and six to forty-eight months' imprisonment for the intentional discharge of a firearm at a dwelling conviction. The felonious assault sentences and intentional discharge of a firearm at a dwelling sentence were to be served concurrently, but consecutive to the felony-firearm sentence. Defendant appeals as of right, and we affirm.

Defendant says that there was insufficient evidence to support his convictions for felonious assault and intentional discharge of a firearm at a dwelling. We disagree. "In reviewing the sufficiency of the evidence presented at trial in a criminal case, we view the evidence in a light most favorable to the prosecution and determine whether a rational factfinder could conclude that the essential elements of the crime were proved beyond a reasonable doubt." *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (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). Review of the testimony of Frederick McKinney and Delmarchia Cammon reveals that defendant exchanged words with McKinney, pointed an AK-47 at both McKinney and Cammon, and threatened to kill McKinney and Cammon. Accordingly, there was sufficient evidence to support defendant's convictions for the felonious assault of McKinney and Cammon.

Defendant argues that he did not intend to injure anyone, but rather, intended to deter McKinney and Cammon from breaking into his home again. Defendant's argument is merely an exercise in semantics. Arguably, defendant did act to deter McKinney and Cammon from breaking into his home, but he deterred them *by placing them in fear of an immediate battery*. Accordingly, defendant's contention that there was insufficient evidence to support the felonious assault convictions is without merit.

Defendant also alleges that there was insufficient evidence to support his conviction for intentional discharge of a firearm at a dwelling. To prove this crime, the prosecutor must show that the defendant intentionally discharged a firearm, the discharge was at a dwelling or occupied structure and the defendant knew or had reason to believe that the facility was a dwelling or occupied structure. CJI2d 11.26a. Here, McKinney and Cammon testified that defendant intentionally fired the weapon at Cammon's residence, and defendant knew they resided in the home because they were neighbors for years. McKinney's testimony established that defendant intentionally fired the AK-47 at a residence he knew to be a dwelling. Defendant testified that he did not intend to fire a second shot at Cammon's dwelling; he said that the second shot was accidental. Where the resolution of an issue involves the credibility of two diametrically opposed versions of events, the test of credibility rests in the trier of fact. *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998). The trial court held that defendant's version of events was not credible, and defendant intentionally fired at the home, knowing it to be a dwelling. Accordingly, there was sufficient evidence to sustain the conviction for intentional discharge of a firearm at a dwelling.

Defendant further erroneously contends that his acquittal of the assault with intent to commit murder charge and conviction for intentional discharge of a firearm at a dwelling resulted in an inconsistent verdict. "Questions of law and questions of the application of the law to the facts receive de novo review." *People v Barrera*, 451 Mich 261, 269 n 7; 547 NW2d 280 (1996). There is no factual inconsistency warranting reversal of defendant's convictions. The trial court found that defendant did not have an intent to kill. However, the trial court expressly found that defendant intended to shoot at a dwelling which defendant knew was occupied. In reaching this conclusion, the trial court found that defendant's testimony, that the second shot which hit the residence was accidental, was not credible. Accordingly, defendant's contention that the verdict was inconsistent warranting reversal is without merit. *People v Smith*, 231 Mich App 50, 52-53; 585 NW2d 755 (1998).

Defendant also says that his acquittal on the assault with intent to commit murder charge, but convictions for felonious assault resulted in an inconsistent verdict. We disagree. Felonious assault is a cognate offense of assault with intent to commit murder. *People v Vinson*, 93 Mich App 483, 485-496; 287 NW2d 274 (1970). Here, the trial court found that defendant did not possess the egregious intent required for assault with intent to commit murder, an intent to kill. *People v Plummer*, 229 Mich

App 293, 305; 581 NW2d 753 (1998). However, the trial court expressly found that defendant possessed the intent to injure, despite defendant's assertion to the contrary. Specifically, the trial court held that defendant committed an illegal act toward Cammon causing her to be fearful of an immediate battery, defendant "intended to injure her" and defendant had the ability to commit the battery because he had an AK-47, which he fired. Regarding the felonious assault upon McKinney, the trial court held that defendant had the specific intent to assault McKinney with the AK-47, which caused McKinney to fear injury and a battery. The trial court's finding that defendant lacked the requisite intent to kill did not result in an inconsistent verdict because the intent required to satisfy the offense of felonious assault is a less egregious intent.

Defendant also contends that his convictions for felonious assault, intentional discharge of a firearm at a dwelling and felony-firearm violate the Double Jeopardy Clauses of the Federal and Michigan Constitutions. We disagree. Defendant did not preserve this issue below. However, the question of double jeopardy involves a constitutional claim and will nevertheless be addressed on appeal. *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996). "A double jeopardy issue constitutes a question of law that is reviewed de novo on appeal." *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995).

In *Lugo*, *supra* at 705-706, this Court set forth the criteria to determine whether a defendant's double jeopardy rights had been violated:

In the multiple punishment context, both the federal and state Double Jeopardy Clauses [US Const, Am V; Const 1963, art 1, §15] seek to ensure that the total punishment does not exceed that authorized by the Legislature. Because the power to define crime and fix punishment is wholly legislative, the Double Jeopardy Clauses are not a limitation on the Legislature, and the Legislature may specifically authorize penalties for what would otherwise be the "same offense." Cumulative punishment of the same conduct does not necessarily violate the prohibition against double jeopardy under either the federal system or the state system. The determinative inquiry is whether the Legislature intended to impose cumulative punishment for similar crimes.

Determination of legislative intent involves traditional considerations of the subject, language, and history of the statutes. The court should consider whether each statute prohibits conduct violative of a social norm distinct from the norm protected by the other, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, and any other factors indicative of legislative intent. [Citations omitted.]

In *People v Guiles*, 199 Mich App 54, 59-60; 500 NW2d 757 (1993), this Court held that the Legislature intended that the felony-firearm statute applied to individuals who committed the offense of intentional discharge of a firearm at a dwelling or occupied structure. While this Court recognized that some of the elements of intentional discharge of a firearm at a dwelling necessarily included the elements of felony-firearm, it was bound by the clear intent of the Legislature. Moreover, in *United States v Dixon*, 509 US 688; 113 S Ct 2849; 125 L Ed 2d 556 (1993), the United States Supreme Court held

that the Double Jeopardy clause is not violated where one charge requires proof of an element not required in the other charge. Because the intentional discharge at dwelling charge requires elements not required in the felony-firearm charge, there is no double jeopardy violation. Accordingly, it was not a violation of the Double Jeopardy Clauses of the Michigan and United States Constitutions against multiple punishments for the same offense to be convicted of felony-firearm and intentional discharge of a firearm at a dwelling. Therefore, the trial court in *Guiles* erred in dismissing the felony-firearm charge. *Id.* Additionally, convictions of both felonious assault and felony-firearm do not violate the Double Jeopardy Clauses because the felony-firearm statute reflected a clear legislative intent to impose multiple punishment for a single wrongful act. *People v Sturgis*, 427 Mich 392, 406-407; 397 NW2d 783 (1986); *People v Parker*, 133 Mich App 358, 364; 349 NW2d 514 (1984).

Defendant contends that the crimes of felonious assault and intentional discharge of a firearm at a dwelling violate double jeopardy because, factually, the felonious assault conviction is inclusive of the elements of the intentional discharge of a firearm at a dwelling offense. That is, during the chain of events which transpired, defendant fired two shots without the intention of hurting anyone, although one bullet allegedly hit the upper level of Cammon's residence.

The purpose of the assault statutes is to punish crimes against persons. *Lugo, supra* at 708. However, the Legislature intended to punish reckless conduct in firing at or toward and even above the direction of a dwelling or occupied structure. *People v Wilson*, 230 Mich App 590, 592-594; 585 NW2d 24 (1998). Accordingly, defendant's contention that the offenses punish the same behavior is without merit. Additionally, in *Lugo, supra*, this Court held there is no violation of double jeopardy protections if one crime is complete before the other takes place, even where the offenses share common elements or one constitutes a lesser offense of the other. The acts of felonious assault were complete when defendant committed the offense of intentional discharge of a firearm at a dwelling. Furthermore, the felonious assault charge requires that the defendant assault a person, while the intentional discharge statute does not require that a person be present in the dwelling. MCL 750.234b(5); MSA 28.431(2)(5). *Dixon, supra*. There was no double jeopardy violation as a result of defendant's convictions.

Affirmed.

/s/ William C. Whitbeck

/s/ Henry William Saad

/s/ Joel P. Hoekstra