STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 19, 2000
v	No. 213002 Macomb Circuit Court
EDDIE LEWIS, JR., Defendant-Appellant.	LC No. 96-001769-FH

Before: McDonald, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Defendant was charged with felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following a jury trial, defendant was convicted of the lesser offense of simple assault, MCL 750.81(1); MSA 28.276(1), and felony-firearm. Defendant was sentenced to ninety days time served for the assault conviction and to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues two errors with regard to the jury instructions. Because defendant did not object to the instructions, these issues are not preserved and our review is therefore limited to determining whether defendant has demonstrated a plain error that was prejudicial, i.e., that could have affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Mass*, 238 Mich App 333, 338-339; 605 NW2d 322 (1999).

Defendant first contends that CJI2d 11.34, the felony-firearm instruction, impermissibly encouraged the jury to render inconsistent verdicts because it provides both that the prosecutor must prove that "the defendant committed or attempted to commit the crime of [felonious assault]" and that "[i]t is not necessary, however, that the defendant be convicted of that crime." We find no error. While we recognize that the Michigan Criminal Jury Instructions do not have the official sanction of our Supreme Court and that their use is not required, *People v Gadomski*, 232 Mich App 24, 32 n 2; 592 NW2d 75 (1998), the felony-firearm instruction is consistent with the holding announced in *People v Lewis*, 415 Mich 443; 330 NW2d 16 (1982). As the Supreme Court noted, conviction of a felony or an attempt to commit a felony is not an element of felony-firearm. *Id.* at 454-455. Consequently, CJI2d 11.34 accurately reflects the law, and the trial court did not err in giving the instruction.

Defendant also argues that the trial court erred in failing to give CJI2d 3.9, the specific intent instruction, with respect to the simple assault charge when it gave the instruction with respect to the felonious assault charge. Defendant contends that the omission may have led the jury to convict him of simple assault based on a finding that he lacked the specific intent required to establish felonious assault. Again, we find no error. The jury was properly instructed regarding the specific intent required for simple assault as follows: "Second, that the defendant intended either to injure Officer Friese or to make Officer Friese reasonably fear an immediate battery. An assault cannot happen by accident." *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979); see also *People v Lardie*, 452 Mich 231, 264 n 55; 551 NW2d 656 (1996) (when the defendant is charged with simple assault, "the jury should be instructed that there must be either an intent to injure or an intent to put the victim in reasonable fear of apprehension of an immediate battery"). Further, CJI2d 3.9 simply reiterated the intent requirement that was already included in the standard instructions for both simple and felonious assault. Because the simple assault instruction fairly presented the issues to be tried and sufficiently protected defendants rights reversal is not required based on this unpreserved issue. *People v Whitney*, 228 Mich App 230, 252-253; 578 NW2d 329 (1998).

Defendant next argues that the trial court erred in denying his motion for a new trial on the ground that the verdict was against the great weight of the evidence. We disagree. This Court reviews the trial court's decision on a motion for a new trial for an abuse of discretion. *Gadomski, supra* at 28. A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

The elements of simple assault are that the defendant (1) either attempted to commit a battery or performed an unlawful act which placed another in reasonable apprehension of receiving an immediate battery, (2) with the specific intent to injure or to put the victim in reasonable fear or apprehension of an immediate battery. *Johnson, supra* at 210; *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

In the present case, Officer Friese testified that he saw defendant armed with a sawed-off shotgun approximately twenty to twenty-five feet away. When Friese pointed his weapon at defendant, identified himself as a police officer and ordered defendant to drop the gun, defendant "wheeled around" and pointed his gun at Friese. Friese testified that he was in fear for his life, that he took cover behind a building, and that defendant then ducked down behind a large bush for approximately ten seconds before standing up and walking toward Friese with the gun still in his hands. While defendant contends that Friese's testimony, even if believed, does not establish that defendant possessed the requisite specific intent for assault, minimal circumstantial evidence is sufficient to prove an actor's state of mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). From Friese's testimony, the jury could have determined that defendant intended to put Friese in reasonable fear or apprehension of an immediate battery. Although defendant testified that he did not see or hear the

officers until they arrested him, the credibility of witnesses' testimony is a matter for the trier of fact to ascertain, and will not be resolved anew on appeal. *Lemmon*, *supra* at 637; *Gadomski, supra* at 28.

Defendant also argues that the verdict was against the great weight of the evidence because in convicting defendant of the lesser included misdemeanor of simple assault, the jury apparently determined that defendant did not commit a felony; therefore, defendant argues, he could not be guilty of felony-firearm. However, as previously noted, conviction of a felony is not an element of felony-firearm. *Lewis*, *supra* at 454-455. A conviction for felony-firearm in this case required proof that defendant "committed" felonious assault, which differs from assault only in that it requires that the assault occur with a dangerous weapon. MCL 750.227b(1); MSA 28.424(2)(1); *Avant*, *supra* at 505. We conclude that such a finding was not against the great weight of the evidence. In any event, a felony-firearm conviction may stand where, as here, the defendant is convicted of the lesser included misdemeanor of the underlying felony. *People v Bonham*, 182 Mich App 130, 136; 451 NW2d 530 (1989). Consequently, after carefully reviewing the record, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Gary R. McDonald
/s/ Hilda R. Gage
/s/ Michael J. Talbot