

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES T. CARTER,

Defendant-Appellant.

UNPUBLISHED

August 1, 2000

No. 214110

Wayne Circuit Court

LC No. 97-010009

Before: White, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of domestic assault, MCL 750.81(2); MSA 28.276(1)(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to thirty days in prison for the domestic assault conviction and two years in prison for the felony-firearm conviction, the sentences to run consecutively. We affirm.

Defendant first argues that the trial court erred in denying defendant's motion for order of acquittal where the transcript shows that the jury found defendant not guilty of domestic assault. We disagree. This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C); *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). A finding of fact is considered "clearly erroneous" if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made. *People v Hermiz*, 235 Mich App 248, 255; 597 NW2d 218 (1999).

In this case, defendant was charged with felonious assault, but the jury was also instructed on the lesser offense of domestic assault. The jury verdict form offered these possible verdicts on the felonious assault charge: "Not guilty"; "Guilty of felonious assault"; "Guilty of the lesser offense of domestic violence." The box for "Guilty of the lesser offense of domestic violence" is clearly marked, as is the "Guilty" box under the felony firearm count.

The trial transcript indicates that the jury foreperson, in response to the clerk's inquiry how the jury found "on the first count of felonious assault," stated "not guilty." The clerk then asked how the

jury found as to count two, and the foreperson responded “guilty.” The court then inquired “Possession of a firearm?” and the foreperson responded “guilty.” The transcript then contains the following:

The Clerk: All stand and raise your right hand, please. Do you say upon your oath that you find the defendant not guilty of domestic violence in count one and guilty of possession of felony firearm, so say you, Mr. Forman, so say you members of the jury.

The jury was polled and the jurors agree that this was their verdict. The court entered a judgment of sentence stating that defendant was convicted of domestic violence and felony firearm. Following sentencing for these offenses, defendant moved for an order of acquittal as to the domestic assault conviction. A successor judge examined the verdict form signed by the foreperson, which indicated that defendant was found guilty of domestic assault, and determined that the original trial court did not err in entering the verdict and that the domestic assault conviction was consistent with the transcript.

After reviewing the transcript and lower court file, this Court is not left with a definite and firm conviction that the second trial court erred when it determined that the in-court delivery of the verdict was consistent with the signed jury verdict form. Comparing the transcript with the verdict form, it appears that the foreperson answered the questions asked by the clerk and court as if there were three counts, felonious assault, domestic violence, and felony-firearm. The foreperson gave three separate verdicts, not guilty, guilty, and guilty. Those separate verdicts correspond to the signed verdict form. The clerk’s inquiry upon polling the jury was either misstated or mistranscribed. At the time the verdict was given, neither party or the trial court questioned the jury’s verdict. Later at sentencing, defendant and defense counsel were present and raised no objection to the sentence on the domestic assault conviction. We conclude that no error was committed in entering a verdict of guilty of domestic assault and a judgment of sentence thereon.

Next, defendant argues that the prosecution presented insufficient evidence for the jury to find him guilty of domestic assault and felony-firearm. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Johnson, supra* at 723; *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998).

Domestic assault is a specific intent crime that is proven by establishing that (1) the defendant and the victim were associated in a way described by statute,¹ and (2) the defendant either intended to batter the victim or the defendant's unlawful act placed the victim in reasonable apprehension of being battered. MCL 750.81(2); MSA 28.276(1)(2); *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996). In this case, viewing the evidence in the light most favorable to the prosecution, the evidence establishes that defendant was a resident in the complainant’s home. Defendant argued with

¹ The statute describes the association between the victim and the defendant as either a “spouse or former spouse, an individual with whom he or she has had a child in common, or a resident of his or her household.” MCL 750.81(2); MSA 28.276(1)(2).

the complainant and then pulled out a gun. The complainant fled with her daughter to the upstairs bathroom where defendant grabbed the complainant by the collar and pointed the gun at her face. The complainant thought that defendant was going to kill her.

Conviction of felony-firearm requires proof that the defendant carried or possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b; MSA 28.424(2); *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). In this case, both the complainant and her daughter testified that defendant had a gun in his possession during the incident. The complainant stated that she saw the gun when defendant removed it from his pants pocket. The complainant recognized the gun as one that defendant regularly carried in a holster. The complainant's daughter also testified that she saw defendant with the gun. Although defendant argues that the witnesses' testimony was contradictory and inconsistent, questions of credibility are left to the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). The prosecution presented sufficient evidence for the jury to find beyond a reasonable doubt that defendant was guilty of domestic assault and felony-firearm.

Defendant also argues that his felony-firearm conviction was inconsistent with his acquittal of the felony charge of felonious assault, and conviction only of the misdemeanor, domestic assault. However, conviction of the underlying felony is not necessary for a conviction of felony-firearm. *People v Lewis*, 415 Mich 443, 454-455; 330 NW2d 16 (1982). Further, in *People v Hooper*, 152 Mich App 243, 247; 394 NW2d 27 (1986), this Court extended the rationale of *Lewis* to convictions of lesser included offenses, explaining, "If a conviction for felony-firearm should stand when a defendant is convicted of no underlying crime, then logic dictates that it should also stand when the jury convicts a defendant of lesser included offenses which happen to be misdemeanors."

Defendant's final argument on appeal is that he was denied his constitutional right to effective assistance of counsel. We again disagree. To establish a denial of effective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and the deficiency so prejudiced the defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant contends that defense counsel was deficient when he failed to investigate and call witnesses, failed to properly cross-examine a witness, failed to adequately communicate with defendant, failed to object to the presence of the complainant and her niece in the courtroom while the complainant's daughter testified, and failed to object to improper argument. A review of the record is void of any evidence that defense counsel was deficient in calling or questioning witnesses, communicating with defendant, or that defendant was prejudiced by the presence of the complainant and her niece in the courtroom. Furthermore, decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *Rockey*, *supra*, at 76. Defendant mischaracterizes the prosecutor's argument to the jury regarding "taxpayers' money." The argument was not a civic duty argument;

rather, it was directed at defendant's questioning regarding whether the police obtained a search warrant in an effort to recover the gun. Thus, the argument was not inappropriate, and defense counsel was not deficient for failing to object.

Affirmed.

/s/ Helene N. White

/s/ Martin M. Doctoroff

/s/ Peter D. O'Connell