

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN MOTT,

Defendant-Appellant.

UNPUBLISHED

August 11, 2000

No. 214699

Wayne Circuit Court

LC No. 98-002441

Before: Murphy, P.J., and Kelly and Talbot, JJ.

MEMORANDUM.

Following a bench trial, defendant was convicted of 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). He appeals as of right and we affirm.

Defendant argues on appeal that the trial judge, sitting as trier of fact, improperly considered as substantive evidence of guilt a police officer's testimony regarding hearsay statements made by the complainant. Defendant's nonconstitutional challenge to the admission of this evidence is raised for the first time on appeal. This Court reviews unpreserved claims of nonconstitutional error for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999). A "reviewing court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id.* at 774. Here, defendant does not assert innocence and we find no plain error affecting his substantial rights where the trial judge convicted him of the lesser offense of felonious assault, reflecting the evidence that, at a minimum, defendant pointed a gun at the complainant. Furthermore, the complainant's statements to the police officer may have been admissible as excited utterances under MRE 803(2). See *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998); *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995). Thus, defendant has not established that any substantial right was affected by the admission of this evidence.

Defendant next argues that the complainant's testimony that defendant pointed a "handgun" at him was insufficient, standing alone, to sustain a conviction of felony-firearm. Defendant argues that the prosecution failed to meet its burden of proof given that the alleged weapon was not recovered by the

police for testing to determine whether it was an operable “firearm” as defined in MCL 8.3t; MSA 2.212(20). We disagree.

A conviction of felony-firearm requires proof that the defendant carried or possessed a firearm during the commission or attempted commission of a felony. *People v Burgenmeyer*, 461 Mich 431; 606 NW2d 645 (2000). The prosecutor need not present proof of operability as an element of a prima facie case in a felony-firearm prosecution. *People v Thompson*, 189 Mich App 85, 86-87; 472 NW2d 11 (1991); *People v Broach*, 126 Mich App 711, 714-715; 337 NW2d 642 (1983). Accordingly, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant possessed a firearm during the commission of a felony.

Affirmed.

/s/ William B. Murphy

/s/ Michael J. Kelly

/s/ Michael J. Talbot