

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONNEL CHERRY,

Defendant-Appellant.

UNPUBLISHED

January 5, 2001

No. 214108

Wayne Circuit Court

LC No. 97-007913

Before: Cavanagh, P.J., and Saad and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and felonious assault, MCL 750.82; MSA 28.277. The trial court sentenced defendant to a prison term of one to four years. We affirm.

This case arises from an altercation between defendant and his former girlfriend, Reba Herring, and her new boyfriend, Keith McNeil. On the night of September 23, 1997, defendant talked to Herring on the telephone and learned that McNeil was at Herring's house. A short time later, defendant arrived at Herring's door and Herring let him inside. A verbal and physical confrontation ensued between defendant and Herring, during which Herring was battered about the head, neck and shoulders. McNeil joined the fray after hearing the commotion from another room. Defendant and McNeil exchanged blows and defendant hit McNeil in the head with a coffee maker. Both men grabbed kitchen knives and continued the fight outside in the yard. Defendant sustained a wound above his right eye and McNeil suffered a stab wound to his chest and another stab wound to his back.

Defendant was charged with assault with intent to murder, MCL 750.83; MSA 28.278, for his injuries to McNeil, and, as to Herring, defendant was charged with assault with intent to do great bodily harm, MCL 750.84; MSA 28.279. The trial court convicted defendant of the lesser included offenses of assault with intent to do great bodily harm to McNeil and felonious assault for his injuries to Herring. See MCL 750.84; MSA 28.279 and MCL 750.82; MSA 28.277.

Defendant claims that his convictions were against the great weight of the evidence and that the trial court made erroneous findings of fact. We disagree.

We will grant a new trial based upon the weight of the evidence “only where evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.” *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). This Court reviews a trial court’s findings of fact for clear error. MCR 2.613(C).

The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or offer with force or violence to do corporal hurt to another, (2) coupled with an intent to do great bodily harm less than murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). Defendant admitted during trial that he stabbed McNeil in the chest with a kitchen knife as he pinned McNeil on the ground. The trial court, therefore, could reasonably infer intent to do great bodily harm from defendant’s use of a dangerous weapon to inflict the stab wounds. See, e.g., *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). Thus, there was ample evidence to support defendant’s conviction of the crime against McNeil.

Although defendant claimed he acted in self defense, McNeil testified that defendant stabbed him after he dropped his own weapon and that he repeatedly pleaded with defendant to stop the fight. McNeil further stated that defendant stabbed him after McNeil released his grip on defendant’s wrists. Herring’s son, Raleigh, also testified that he heard McNeil plead with defendant to stop fighting. This evidence indicates that defendant did not honestly and reasonably believe he was in danger of death or serious bodily harm, or that the action taken appeared at the time to be immediately necessary. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Ample testimony, including defendant’s own admissions, supported the trial court’s findings with regard to the elements of assault with intent to do great bodily harm and, despite defendant’s own version of events, eyewitnesses testified that he was the aggressor when McNeil was stabbed. Accordingly, the weight of the evidence did not preponderate against the trial court’s verdict.

Defendant’s other conviction, for felonious assault, requires proof of the following elements: (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 Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). This Court has held that a booted foot may satisfy the dangerous weapon element of felonious assault because it is an object that may be used in a dangerous manner. *People v Buford*, 69 Mich App 27, 31; 244 NW2d 351 (1976). Further, “whether it was in fact used as a dangerous weapon is a question for the . . . finder of fact.” *Id.* Herring testified that defendant used a booted foot to kick her in the head seven or eight times. McNeil testified that defendant kicked Herring in the head “repeatedly.” Photographic evidence corroborated the testimony regarding Herring’s injuries. Generally, circumstantial evidence and the reasonable inferences that arise therefrom can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Accordingly, the trial court could reasonably infer an intent to injure from the number of times Herring was kicked. See, e.g., *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

Defendant contends, however, that the trial court erred by finding that defendant wore boots when he kicked Herring. Herring testified that defendant wore black, thick-soled, army style boots when he kicked her in the head. In contrast, Sergeant Kenneth Blair testified that,

when he interviewed defendant shortly after his arrest, defendant was wearing black gym shoes. Thus, while this testimony conflicted, the trial court was in a superior position to judge the credibility of these witnesses and assess the evidence, and we do not conclude that the court's finding in this regard constituted clear error. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999); *Shields, supra*, 200 Mich App 558.

Defendant avers that the trial court erred in finding that a photograph of Herring's injuries showed a "heel mark" on Herring's breast. The trial court also described the mark depicted in the photograph as a shoe print. The photograph was admitted into evidence and the trial court stated that it examined it. Defendant has not submitted a copy of the photograph on appeal for our determination whether the trial court's conclusion was reasonable. Defendant asserts, however, that no testimony supported the trial court's conclusion that the photograph showed a specific shoe or boot mark. Indeed, Herring specifically denied that the horseshoe-shaped mark shown in the photograph was an injury related to defendant's attack. Therefore, this testimony suggests that the trial court erred in concluding that the mark was a heel print.

Error requiring reversal exists only where, after an examination of the entire record, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). Actual injury is not required to sustain a conviction of felonious assault. *Avant, supra*, 235 Mich App 506. However, here, witness testimony and several photographs confirmed Herring's assertion that defendant repeatedly kicked her about the head and neck. Therefore, the trial court's error in finding a certain mark in one photograph was harmless when weighed against the strength of other evidence. *Lukity, supra*, 460 Mich 495.

Accordingly, the trial court did not commit an error requiring reversal and, based on our review of the record, the evidence did not preponderate against the verdict and, in fact, amply supported the convictions.¹

¹ Defendant claims that the prosecutor presented insufficient evidence to support his convictions. We disagree.

This Court reviews a challenge to the sufficiency of the evidence at a bench trial by viewing the evidence presented in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000).

Defendant specifically contends that, because the trial court acquitted him of the principally charged offenses of assault with intent to murder McNeil and assault with intent to do great bodily harm less than murder to Herring, his convictions of the lesser included offenses must be vacated. However, defendant offers no argument on this issue other than his assertion that the trial court found insufficient evidence to support a conviction on the greater offenses, conclusions with which defendant appears to agree. We therefore deem this issue as abandoned because it has been insufficiently briefed. *People v Dilling*, 222 Mich App 44, 51; 564 NW2d 56 (1997), citing *Dresden v Detroit Macomb Hospital*, 218 Mich App 292, 300; 553 NW2d 387

(continued...)

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Patrick M. Meter

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(1996). A party may not merely announce a position and leave it to this Court to discover and rationalize a basis for the claim. *People v Williams*, 228 Mich App 546, 558; 580 NW2d 438 (1998), citing *Joerger v Gordon Food, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997).

Inexplicably, defendant also cites case law for the proposition that a motion for directed verdict of a charged offense must be granted where the prosecution fails to present sufficient evidence to allow a rational trier of fact to find the defendant's guilt of the charged offense beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). Despite defendant's recitation of this rule, he never moved for directed verdict in this case and, therefore, any argument in that regard is unpreserved. See MCR 6.419; *Lugo, supra*, 214 Mich App 711.