STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 26, 2002
V	No. 227062 Genesee Circuit Court
JOHNEZ JERRELL PASCAL, Defendant-Appellant.	LC No. 99-005337-FC

Before: Talbot, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for four counts of felonious assault, MCL 750.82, one count of felony-firearm, MCL 750.227b, one count of discharging a firearm into a building, MCL 750.234b, and one count of possession of a firearm by a felon, MCL 750.224f. Defendant was sentenced as a second offense habitual offender, MCL 769.101 to serve 28 to 72 months imprisonment for the assault and the discharging a firearm into a building convictions, the mandatory two years for felony-firearm conviction, and 30 to 90 months for the possession by a felon conviction. We affirm.

This case arises from a shooting that occurred following a party at the home of one of the victims, Yvette Frost. During the party, defendant accused Frost's daughter of stealing five dollars from his wallet. Defendant was escorted outside of the home, where Frost offered to replace the missing money after she went back inside to get her purse. Defendant continued to be angry and upset, so another partygoer offered five dollars to defendant. Defendant swung a bottle at the man, and the two started to fight. While Frost threatened to call the police, the fighting ceased and Frost asked everyone to leave. Shortly after Frost asked everyone to leave, she heard defendant calling to her from the back of the house. She told defendant she was going to call the police, and then walked to the front of the house to see if he had left. As Frost was on the side of her house she heard several pops that she first thought were firecrackers, then realized were gunshots. Frost worked her way up the stairs to get the phone to call 911, then went to the basement to check on her daughter. When she went to the basement, she found one of her friends, her daughter, and her daughter's boyfriend already hiding there. After the police arrived, Frost noticed a bullet hole in the dining room window. She also noticed that the glass in her front door was shattered.

Defendant contends that the evidence introduced at the preliminary hearing was not sufficient to support a finding of probable cause on the assault with intent to commit murder

charges. We deny defendant any relief on this claim. Defendant moved the court to quash the information. That motion, and defendant's later motion for a directed verdict, were denied. Ultimately, the jury was instructed that it could find defendant guilty of assault with intent to murder or felonious assault. As noted above, the jury convicted defendant of felonious assault. Defendant does not dispute that the jury verdict of felonious assault was supported by the evidence. Therefore, any error in the sufficiency of the proofs at the preliminary examination is considered harmless. *People v Moorer*, 246 Mich App 680, 682; 635 NW2d 47 (2001). In addition, any error arising from the submission of the [assault with intent to murder] charge[s] to the jury was rendered harmless when the jury acquitted defendant of [those] charge[s]. *Id*. at 682-683. Therefore, we deny defendant's claim for relief.

Next, defendant contends that his right against double jeopardy was violated. We again disagree.

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, ' 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). These guarantees are substantially identical and protect a defendant against either successive prosecutions or multiple punishments for the same offense. *Herron*, *supra*. Here, defendant claims that the instructions to the jury regarding felonious assault and discharge of a firearm into a building violated this right. This Court has stated that:

> [t]he purpose of the double jeopardy protection against multiple punishment for the same offense is to protect the defendant's interest in not enduring more punishment than was intended by the Legislature. Thus, we must consider the legislative intent underlying the two statutes under which defendant was convicted. When determining legislative intent in the present context, this Court looks to whether each statute prohibits conduct violative of a social norm distinct from that protected by the other, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, and the elements of each offense. [*People v Rivera*, 216 Mich App 648, 650-651; 550 NW2d 593 (1996) (citations omitted).]

Applying this test, we find no double jeopardy violation. While both felonious assault and discharge of a firearm into a dwelling carry a maximum sentence of four years in prison, MCL 750.82(1); MCL 750.234b, the statutes are not designed to protect the same societal norms. The assault statute is aimed at punishing crimes which are injurious to other people when any dangerous weapon is used. *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995). MCL 750.234b, which prohibits the discharge of a weapon into a building, is designed to punish conduct specific to the use of firearms which are directed at a dwelling. *People v Guiles*, 199 Mich App 54, 59; 500 NW2d 757 (1993). Moreover, the statutes are not hierarchical or cumulative because they are in separate chapters of the Penal Code and the elements of each crime are distinct. Felonious assault requires proof of (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, 505; 597 NW2d 864 (1999). In contrast, in order to prove that defendant is guilty of violating MCL 750.234b(1), a prosecutor must prove that the defendant (1) discharged a firearm, (2) at a building, (3) which the defendant knew or

had reason to believe was an occupied structure or a dwelling. *People v Wilson*, 230 Mich App 590, 592; 584 NW2d 24 (1998).

Finally, the crimes each require different mental states, with felonious assault being a specific intent crime, *People v Strong*, 143 Mich App 442, 446-448; 372 NW2d 335 (1985), and discharge of a firearm at a dwelling being a general intent crime. *People v Henry*, 239 Mich App 140, 143-145; 607 NW2d 767 (1999). Thus, addressing the factors in the test, we conclude that defendant's right to be free from double jeopardy was not violated by his convictions for felonious assault and for discharge of a firearm into a dwelling. Defendant is not entitled to relief.

Defendant also contends that the trial court erred when it refused to instruct the jury on the misdemeanor offense of reckless discharge of a firearm, MCL 752.862. There are five conditions to determine whether a misdemeanor instruction should have been provided to the jury. First, a proper request for the instruction must have been made. *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987). Defendant meets this criterion because he did request an instruction on the misdemeanor.

Second, an appropriate relationship must exist between the requested instruction and the charged offense. *Id*. This relationship requires that the greater and lesser offenses both relate to the protection of the same interests and also requires that generally, proof of the misdemeanor is necessarily presented as part of the proof of the greater charged offense. Because the prosecutor was required to prove that defendant acted intentionally in order to prove the felony charges, while the misdemeanor offense requires proof that defendant acted in a willful or wanton fashion, we find that defendant fails to meet the second criterion.

The evidence also fails to establish the third requirement that a conviction of the misdemeanor is justified, and the element[s] differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser offense. *Id.* at 19-20. In this case, the disputed element is whether defendant acted intentionally. A rational view of the evidence does not place defendant's intent sufficiently in dispute. Thus, defendant is also not entitled to relief on this claim.

Affirmed.

/s/ Michael J. Talbot
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder