STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 19, 2004
V	No. 243612 Macomb Circuit Court
PAUL JAMES MOLONEY, a/k/a PAUL JAMES MALONEY, Defendant-Appellant.	LC No. 1998-001606-FH

Before: Schuette, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from convictions of felonious assault, MCL 750.82, and carrying a concealed weapon in a motor vehicle, MCL 750.227(2). We affirm in part and reverse in part. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the evidence was insufficient to sustain the verdict as to the felonious assault charge.

A challenge to the sufficiency of the evidence in a bench trial is reviewed de novo on appeal. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002). This Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The trial court's factual findings are reviewed for clear error. 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 Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

"Felonious assault is defined as a simple assault aggravated by the use of a weapon." *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). "The elements of felonious assault are (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). "A simple assault is either an attempt to commit a battery or

an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996).

According to the evidence, defendant displayed the weapon while both McComb and Qandah were at the driver's window of his van in an effort to get them to leave, but he only pointed the weapon at McComb. Even if defendant merely displayed the weapon but did not point it at Qandah, the evidence was sufficient to sustain the conviction because "[a] felonious assault conviction can be sustained without proof of the use or attempt to utilize any force at all," the mere display of a weapon implying a threat of violence. *People v Pace*, 102 Mich App 522, 534; 302 NW2d 216 (1980). Moreover, defendant fired the weapon in the direction of the car while Qandah was returning to it. "The intentional discharge of a firearm at someone within range is an assault." *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). Accordingly, we find that the trial court did not err in finding defendant guilty of felonious assault.

Defendant next contends that the trial court erred in convicting him of CCW/MV because he did not have notice of the charge. We agree.

A defendant has a constitutional right to adequate notice of the charges against him. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). "Lack of adequate notice violates a defendant's right to due process and mandates reversal." *Id.* at 601. "Fair notice requirements are met if the" offense of which the defendant is convicted "is a lesser included offense of the originally charged greater offense." *People v William James*, 142 Mich App 225, 227; 369 NW2d 216 (1985).

Defendant was originally charged with possession of a firearm during the commission of a felony. MCL 750.227b. The court acquitted defendant of that charge because it found that he lacked the specific intent to commit a felony when he first took possession of the weapon, but found him guilty of CCW/MV because he admittedly carried the weapon in his vehicle. CCW/MV is not a necessarily included lesser offense of felony-firearm because the latter offense does not include all the elements of the former such that it is impossible to commit felony-firearm without first committing CCW/MV. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). Nor is CCW/MV a cognate lesser offense of felony-firearm. *People v Sturgis*, 130 Mich App 54, 65; 343 NW2d 230 (1983), aff'd 427 Mich 392 (1986). Therefore, the court lacked authority to convict defendant of CCW/MV. *People v Pasha*, 466 Mich 378, 383; 645 NW2d 275 (2002).

Affirmed in part, reversed in part.

/s/ Bill Schuette
/s/ Patrick M. Meter
/s/ Donald S. Owens