

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID RALPH BUCKINGHAM,

Defendant-Appellant.

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UNPUBLISHED

September 23, 2004

No. 247430

Oakland Circuit Court

LC No. 2002-186450-FH

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by right from his bench trial conviction of assault with a dangerous weapon (felonious assault), MCL 750.82. The trial court sentenced defendant to probation. This case stems from an incident where defendant was accused of threatening his mother's neighbor with an ax. We affirm.

Defendant first argues that the trial court misapprehended the elements of the crime charged. We disagree. "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).

Defendant argues that the trial court incorrectly focused on how the victim felt during the incident in determining whether defendant had the specific intent necessary for felonious assault. Having reviewed the record, we conclude that the court did not error with respect to the intent element of the crime. While the court did inquire and comment on how the victim felt when he was approached by defendant carrying an ax, it did so because it was necessary not to the intent element, but to the assault element of the crime. An 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 Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995), quoting *People v Johnson*, 407 Mich 196; 210; 284 NW2d 718 (1979). It is this second form of assault that was in issue at trial. In addition, although the trial court stated several times that a finding on intent is not based on what was in the mind of defendant, the trial court was merely stating that intent is not based only on what defendant claims his intent was. Convictions would be rare if the criminal had to confess his intent. *People v Lawton*, 196 Mich App 341, 349-350; 492 NW2d 810 (1992), quoting *People v Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974).

Defendant's credibility was for the trial court as trier of fact, and we will "not resolve it anew" on appeal. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

Defendant also argues that the trial court erred by determining that the ax was a dangerous weapon. See *People v Brown*, 406 Mich 215, 222-223; 277 NW2d 155 (1979) ("The fact that a pointed instrument, such as a machete, has great potential as a dangerous weapon does not render it a dangerous weapon per se.").<sup>1</sup> Here, the ax was a dangerous weapon because the evidence clearly establishes that it was adapted to accomplish "the assault and [is] capable of inflicting serious injury." *People v Goolsby*, 284 Mich 375, 378; 279 NW2d 867 (1938).

Defendant further argues that the trial court did not understand that it must find that defendant committed an unlawful act that caused the victim to fear an immediate battery. However, the trial court specifically acknowledged that it needed to find that defendant "either attempted to commit a battery or did an illegal act that caused the complainant in this case to reasonably fear an immediate battery." Accordingly, we see no error on the part of the trial court with respect to its understanding of the elements of felonious assault.

Next, defendant argues that the trial court improperly handled his motion to correct a mistake brought under MCR 6.435(B).<sup>2</sup> Defendant's motion was based on the assertion that the trial court had erred in its understanding of the testimony of defendant's mother. Specifically, defendant argues that he was denied due process when the trial court refused to delay sentencing to review defendant's motion. However, the trial court allowed defendant to present his motion orally before the court during sentencing. The court then addressed each of the arguments, denying them and giving its reasons for the denial. The court found it had not made a substantive mistake regarding defendant's mother's testimony. Further, even if it misunderstood defendant's mother's testimony, the trial court stated that it convicted defendant on the basis of the victim's testimony, not the testimony of defendant's mother.

Next, defendant argues that the trial court improperly questioned the witnesses, thereby depriving defendant of his right to a fair trial. We disagree. This Court reviews unpreserved claims for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "The court may interrogate witnesses, whether called by itself or by a party." MRE 614(b). "While a trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). A judge has more discretion to question witnesses in a bench trial than during a jury trial. *People v Meatte*, 98 Mich App 74, 78; 296 NW2d 190 (1980).

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<sup>1</sup> *Brown* involved a conviction of carrying a dangerous weapon in a motor vehicle, MCL 750.227. *Brown*, *supra* at 217.

<sup>2</sup> MCR 6.435(B) provides: "After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous."

Defendant notes that the judge asked leading questions and elicited testimony from several witnesses. But this questioning does not demonstrate bias because it was not intimidating, argumentative, prejudicial, unfair or partial. *Cheeks, supra* at 480. Therefore, defendant has failed to show plain error affecting his substantial rights. *Carines, supra* at 763.

Finally, defendant argues that there was insufficient evidence adduced to convict him of felonious assault. We disagree. This Court reviews claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and 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, 722-723; 597 NW2d 73 (1999). Eyewitness testimony is sufficient to prove the commission of a crime beyond a reasonable doubt. *Daniels, supra* at 378.

Preliminarily, defendant claims that witnesses' use of non-verbal gestures and responses makes it impossible to determine how defendant held the ax. We find the record sufficiently recounts how each witness described the positioning of the ax.

As for the strength of the testimonial evidence, the victim testified that defendant approached him swearing, with an ax pointed toward him, saying that he, defendant, wanted to split the victim down the middle. The victim also testified that he was scared because of defendant's conduct. Additionally, the victim's wife and son testified that they saw defendant raise the ax and threaten to strike the victim. While defendant stated that he did not raise the ax or threaten to strike the victim, this Court defers to the trial court on questions of credibility. *Daniels, supra* at 378. Viewed in a light most favorable to the prosecution, we conclude there was sufficient evidence to convict defendant of felonious assault beyond a reasonable doubt.

We affirm.

/s/ E. Thomas Fitzgerald  
/s/ Janet T. Neff  
/s/ Jane E. Markey