STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 8, 2005
v	No. 255241 Oakland Circuit Court
JOHN HENRY JACKSON, Defendant-Appellant.	LC No. 03-193534-FH

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of third-degree fleeing and eluding a police officer, MCL 257.602a(3), felonious assault, MCL 750.82, second-degree retail fraud, MCL 750.356d, and failure to stop after a collision, MCL 257.620. We affirm. This case is being decided without oral argument under MCR 7.214(E).

I. FACTS

Chad Delauter indicated that on November 6, 2003 he was working as the head of the loss prevention department at a Marshall's Department Store. While watching cameras in the surveillance office, Delauter testified that he observed defendant, who was accompanied by a woman, select cologne and take it to the back of the store and then conceal the cologne. Delauter called the Bloomfield Township Police Department and when Delauter approached defendant and identified himself, defendant ran from the store. Delauter testified that he observed defendant attempt to leave the area in his car. As defendant was backing out of the parking spot, he backed into another vehicle. Delauter testified that he then witnessed defendant pull back into the parking spot and back into the vehicle again. Defendant backed into the vehicle four or five times, eventually pushing the car five or six feet and creating an area through which defendant's car was able to leave.

Officer James Moschel of the Bloomfield Township Police Department responded to the retail fraud. Delauter observed Moschel enter the parking lot and pointed out defendant's vehicle, which was attempting to leave the parking lot, to the police officer. Moschel testified that he made eye contact with defendant and defendant's vehicle accelerated. Moschel testified that he turned his car around, activated the car's lights and siren, and attempted to follow defendant's vehicle. Moschel testified that defendant was changing lanes and accelerating rapidly. Moschel testified that defendant ran a red light and was driving around 70 or 80 miles

per hour in the 50 mile per hour zone. Moschel eventually caught up with defendant at an intersection where defendant had struck two other cars. Officers found four bottles of cologne in defendant's car and an additional three bottles in the parking lot area where defendant's car was originally parked.

II. STANDARD OF REVIEW

We review a claim that evidence is insufficient to sustain a conviction by viewing "the evidence in a light most favorable to the prosecution and determin[ing] whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

III. ANALYSIS

Defendant claims that there was insufficient evidence presented to the jury to sustain his convictions for third degree fleeing and felonious assault. We disagree.

A. Fleeing and Eluding

Defendant first argues that the evidence was insufficient to support the conviction of third-degree fleeing and eluding. Defendant contends that since the police officer did not turn on his lights and siren until after defendant had left the parking lot, he did not know that he was being ordered to stop or even that a police officer was behind him and therefore was not refusing to stop.

In *People v Grayer*, 235 Mich App 737, 741; 599 NW2d 527 (1999), this Court held that the six elements of third-degree fleeing and eluding are:

> (1) the law enforcement officer must have been in uniform and performing his lawful duties and his vehicle must have been adequately identified as a law enforcement vehicle, (2) the defendant must have been driving a motor vehicle, (3) the officer, with his hand, voice, siren, or emergency lights must have ordered the defendant to stop, (4) the defendant must have been aware that he had been ordered to stop, (5) the defendant must have refused to obey the order by trying to flee from the officer or avoid being caught, which conduct could be evidenced by speeding up his vehicle or turning off the vehicle's lights among other things, and (6) some portion of the violation must have taken place in an area where the speed limit was thirty-five miles an hour or less, or the defendant's conduct must have resulted in an accident or collision, or the defendant must have been previously convicted of certain prior violations of the law as listed in MCL 750.479a(3)(c).

Moschel testified that after making eye contact with defendant, defendant immediately accelerated away from him. Moschel immediately turned around, activated his lights and siren, and pursued defendant. Thereupon, defendant drove well in excess of the posted speed limit; made rapid lane changes; failed to stop at stop lights; and even entered a left turn only lane at a very high rate of speed in order to proceed through a stop light at the intersection. Moschel had

his lights and siren activated during the entire pursuit of defendant and had probably closed to within 100 to 150 yards of defendant before defendant passed in a left-turn-only lane at an intersection.

The evidence, when viewed in the light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find that the essential elements of third-degree fleeing and eluding were proved beyond a reasonable doubt. A rational trier of fact could have found that Moschel ordered defendant to stop (element three) based upon evidence that Moschel activated his emergency equipment and pursued defendant. A rational trier of fact could also have found that defendant was aware that a police officer had ordered him to stop (element four) based upon defendant's accelerating away from the police officer while still in the parking lot, Moschel's proximity to the vehicle with his lights activated and siren blaring, and the dangerous manner in which defendant drove his vehicle. This was far more than the minimal circumstantial evidence sufficient to show defendant's state of mind in this regard. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999); *Grayer*, *supra* at 744. Finally, a rational trier of fact could have found that defendant refused to obey the order to stop by trying to flee from the officer or avoid being caught (element five) based upon his accelerating away from the officer; traveling well in excess of the posted speed limit; rapid lane changes; failing to stop at stop lights; and passing in a left-turn-only lane at an intersection.

B. Felonious Assault

Defendant's other argument is that the evidence was insufficient to support the conviction of felonious assault. Specifically, defendant contends that there was not an assault, that he did not intend to use his car as a weapon of any kind, and that he did not intend to harm anyone. Rather, defendant contends that his goal was merely to make enough room to enable him to escape. We disagree and hold that the evidence was sufficient to allow a rational trier of fact to find that the essential elements of felonious assault were proved beyond a reasonable doubt.

The crime of felonious assault is codified in MCL 750.82, which provides in relevant part:

> [A] person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

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 Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996), quoting *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993).

The first element, that defendant must have committed an assault, may be shown in either of two ways. An assault can be proven either from "an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978), quoting Perkins on Criminal Law (2d ed), p 117; see also *People v Reeves*, 458 Mich 236, 240; 580 NW2d 433

(1998). Further, if a defendant has committed a battery, the assault element of felonious assault is necessarily satisfied because "it is impossible to commit a battery without first committing an attempted-battery assault." *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004); see also *People v Terry*, 217 Mich App 660, 662-663; 553 NW2d 23 (1996). "A battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *Reeves*, *supra* at 240 n 4. The apprehension-type assault occurs where the circumstances indicate that an assailant, by overt conduct, *causes* the victim to reasonably apprehend an immediate battery. *Id*. at 244.

Pauline Knox, the driver of the vehicle defendant hit, testified that defendant looked in her direction and backed into her car while she was sitting in it. Further, defendant revved his engine before reversing into Knox's vehicle and began colliding with more force. Knox testified that defendant "rammed into my car really hard." Knox testified that defendant's conduct caused her to be "full of fear" and that she began crying out "Please stop." This evidence is sufficient to allow a rational trier of fact to find that the assault element was proved beyond a reasonable doubt through either an attempted-battery assault or an apprehension-type assault. The jury could have concluded that defendant committed an attempted-battery assault based upon a finding of a consummated battery. Moreover, the jury could have concluded that defendant committed an apprehension-type assault based upon defendant's overt conduct of looking back at Knox's car and revving the engine before reversing into her vehicle and causing Knox to be afraid.

The second element of felonious assault requires that defendant must have used a dangerous weapon. An automobile may be a "dangerous weapon" within the meaning of the felonious assault statute when used in furtherance of accomplishing an assault. *People v Goolsby*, 284 Mich 375, 378-379; 279 NW 867 (1938); *People v Sheets*, 138 Mich App 794, 799; 360 NW2d 301 (1984); *People v Buford*, 69 Mich App 27, 30; 244 NW2d 351 (1976); *People v Blacksmith*, 66 Mich App 216, 221-222; 238 NW2d 810 (1975). Although defendant argues that the vehicle was not used as a "weapon" because he was merely trying to create more room in order to escape rather than attempting to harm Knox, the vehicle constitutes a weapon because it was the device used to consummate the aforementioned assault. The argument also misses the point that defendant used the vehicle as a weapon while committing a battery. Defendant deliberately reversed into Knox's vehicle with his own. Therefore, there was sufficient evidence to allow a rational trier of fact to find that the element requiring use of a dangerous weapon was proved beyond a reasonable doubt.

The third element categorizes felonious assault as a specific intent crime, which requires that the defendant either intended to injure the victim or intended to place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 126 Mich App 66, 69; 337 NW2d 315 (1983). Circumstantial evidence is sufficient to establish a defendant's intent, and it is the defendant's outward conduct that is punishable rather than the secret intent. *Reeves*, *supra* at 244.

There was evidence that once Knox's car was positioned in a perpendicular position to defendant's car, with the passenger side of her car facing the rear of defendant's car, Delauter heard defendant scream "move." After colliding with Knox's vehicle a second time, defendant pulled forward and revved his engine before reversing into Knox's vehicle again. Defendant began colliding with Knox's car with more force than he had originally. Defendant pulled

forward and reversed to hit Knox a total of four or five times, moving her car approximately six feet.

The evidence was sufficient to allow a rational trier of fact to find that the element of specific intent to injure or place the victim in reasonable apprehension of an immediate battery was proved beyond a reasonable doubt. The jury could have concluded that defendant either intended to injure Knox based upon his outward conduct of repeatedly reversing into her vehicle or that he intended to cause her apprehension of a battery in order to get her to move her car so that he could escape based upon his screaming "move" and revving his engine.

Affirmed.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello