

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS DUANE LIPSEY,

Defendant-Appellant.

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UNPUBLISHED  
February 10, 2009

No. 281324  
Kent Circuit Court  
LC No. 07-004492-FH

Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to commit great bodily harm, MCL 750.84; and felonious assault, MCL 750.82. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of 5 to 20 years' imprisonment for assault with intent to commit great bodily harm, and 2 to 15 years' imprisonment for felonious assault. He appeals by right. We affirm.

The evidence presented at trial established that defendant pushed his way into the residence of Harry Bennett and attacked the victim by picking her up and throwing her into a wall causing head injuries and damaging the wall. Defendant hit the victim in the head with a cordless telephone, ripped a telephone cord from the wall and wrapped it around the victim's neck rendering her unconscious. Defendant repeatedly kicked the victim in the face and stomped on her body. She suffered hematomas, bruises, head contusions and upper back and hand injuries. Defendant had threatened to kill the victim several times before the attack. He denied causing the victim's injuries alleging that both he and the victim were crack cocaine addicts and that the victim accidentally injured herself and wrapped herself in the telephone cord.

Defendant first argues that the evidence produced at trial was insufficient to support his convictions. We review a sufficiency of the evidence claim de novo, and must review "the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This is a highly deferential standard of review; it requires the reviewing court to respect both the trier of fact's determinations regarding proper inferences that may be drawn from the evidence and its determination of the weight to give those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Assault with intent to commit great bodily harm less than murder is a specific intent crime. *People v Eggleston*, 149 Mich App 665, 668; 386 NW2d 637 (1986). The elements of assault with intent to do great bodily harm less than murder include (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. MCL 750.84; *People v Mitchell*, 149 Mich App 36, 38; 385 NW2d 717 (1986). Specifically, with respect to the intent element, the only requirement is that defendant have the intent to do great bodily harm, which may be found in conduct as well as words. *Id.* at 38-39; *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981). Defendant's intent may be inferred from the means used to commit the assault, the extent of the victim's injuries, and the specific acts of defendant; actual physical injury is not an element of the crime. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995); *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). See also CJI2d 17.7(4).

There was sufficient evidence presented at trial to support defendant's conviction for assault with intent to commit great bodily harm. A rational trier of fact could find defendant's intent established by evidence he forced his way into the home, threatened to kill the victim, and intentionally hit her in the head with a cordless telephone. There was also evidence that defendant deliberately lifted the victim from the bed and smashed her head into a wall before he "stomped on," kicked, and beat the victim with a telephone and his feet. Further, the medical examiner testified that the victim suffered injuries warranting a half-cast for her hand, that she had a bloody and bruised face, neck, head contusions and hematomas, and facial, left hand and upper back injuries. She also experienced a loss of consciousness and was beaten so severely that she lost control of her bowels during the attack. When these facts are viewed in a light most favorable to the prosecution, a rational trier of fact could find all elements of assault with intent to commit great bodily harm less than murder were established beyond a reasonable doubt.

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 fear or apprehension of an immediate battery." *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). An assault is "an attempt to commit a battery or an unlawful act that places another person in reasonable apprehension of receiving an immediate battery." *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978). Objects that are not specifically listed in the statute as dangerous may be deemed dangerous within the meaning of the statute if "adapted to [the] accomplishment of the assault and capable of inflicting serious injury." *People v Goolsby*, 284 Mich 375, 378; 279 NW 867 (1938).

There was sufficient evidence to sustain the felonious assault conviction. The victim testified that defendant pulled a telephone cord out of the wall when she attempted to call 911 for help. Defendant wrapped the cord around her neck; the victim testified that when the cord was around her neck, she was unable to breathe. The jury could reasonably infer from evidence that the victim could not breathe and lost consciousness while wrapped with the cord that defendant's deliberate use of the telephone cord placed the victim in fear or reasonable apprehension of a battery and that the telephone cord was an instrument adapted to accomplish the assault and capable of inflicting serious injury. *Goolsby*, *supra* at 378. Further, Bennett's testimony established that the cord was wrapped around the victim and that he feared defendant was going to kill her. The jury determines witnesses' credibility. *Wolfe*, *supra* at 514-515. When this

evidence is viewed in a light most favorable to the prosecution, a rational trier of fact could find all the elements of felonious assault were clearly established beyond a reasonable doubt. *Id.*

Defendant also asserts on appeal that Michigan's sentencing scheme is unconstitutional under the Sixth and Fourteenth Amendments to the United States Constitution, because offense variable (OV) 4, MCL 777.34, was scored based on facts not determined by a jury beyond a reasonable doubt, and these facts were subsequently used to establish defendant's sentence. See, generally, US Const, Am VI; US Const, Am XIV; *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004); *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). In *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), our Supreme Court held that Michigan's sentencing scheme is not affected by the decisions in *Apprendi*, *supra*, and *Blakely*, *supra*. See also *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Defendant's further assertion that our Supreme Court wrongly decided *Drohan* and *Claypool* is not explained, developed or rationalized in his brief on appeal. The issue is abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

We affirm.

/s/ Jane E. Markey  
/s/ William B. Murphy  
/s/ Stephen L. Borrello