

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON MICHAEL PITTAO,

Defendant-Appellant.

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UNPUBLISHED

March 3, 2009

No. 283022

Macomb Circuit Court

LC No. 2007-003535-FH

Before: Whitbeck, P.J., and O’Connell and Owens, JJ.

PER CURIAM.

Defendant Brandon Pittao appeals by right his jury convictions of two counts of assault with a dangerous weapon (felonious assault),<sup>1</sup> and carrying a dangerous weapon with unlawful intent.<sup>2</sup> We affirm.

I. Basic Facts And Procedural History

Dawn O’Berry was sitting outside her apartment complex with, among others, 12-year-old Skyler Harms. Pittao and two other men walked past at about 8:30 p.m. O’Berry’s neighbor commented that Pittao was wearing a tether. As Pittao passed O’Berry’s apartment again, he faced O’Berry and the others, gestured rudely, and then walked away.

Pittao returned at approximately 11:00 p.m. O’Berry was sitting next to Harms on the porch. Pittao was carrying a large stick that he struck on the sidewalk as he approached. Pittao shouted at O’Berry for speaking about him and his friends, and threatened to kill her. Pittao continued to approach until he stopped between six and ten feet from O’Berry and Harms. Pittao continued to threaten to kill O’Berry. O’Berry stood as Pittao approached, told Pittao to leave, and stepped off the porch. Pittao began to back away. Around that time, Pittao’s companions returned, each carrying weapons. The three continued to make threats. Harms testified that one man, who held two swords, began grinding the two swords together, approached him closely, and threatened to “slice us up.” O’Berry yelled for her husband, who came out onto the porch

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<sup>1</sup> MCL 750.82.

<sup>2</sup> MCL 750.226.

carrying a baseball bat. Other individuals also came out of the building. Harm's mother shouted that she was calling the police. Pittao left, and his friends followed shortly thereafter.

## II. Sufficiency Of the Evidence

### A. Standard Of Review

Pittao argues that the prosecution presented insufficient evidence to support his conviction for assault with a dangerous weapon as to Harms. We review a defendant's allegations regarding insufficiency of the evidence *de novo*.<sup>3</sup> We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.<sup>4</sup> We do not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses.<sup>5</sup> Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and the reasonable inferences arising therefrom.<sup>6</sup> It is for the trier of fact to determine what inferences fairly can be drawn from the evidence and the weight to be accorded to those inferences.<sup>7</sup>

### B. Elements Of The Offense

"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."<sup>8</sup> Here, Pittao essentially argues that he did not intend to harm Harms and that his assault was entirely focused on O'Berry. However, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to establish the element of intent.<sup>9</sup> The testimony at trial supported a finding that Pittao intended to place Harms in reasonable apprehension of an immediate battery. Harms testified that Pittao's threats were directed at him as well as at O'Berry. Harms was afraid that Pittao planned to come onto the porch and "do something" to the pair. He also testified that Pittao was close enough to him that Pittao could have struck him with the pole and that Pittao's friend approached him close enough to stab him with a sword. O'Berry testified that she was concerned that Pittao and the others were going to injure Harms. O'Berry's husband testified that Harms appeared afraid of Pittao and the other men. The prosecutor was not required to disprove Pittao's assertion on appeal that

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<sup>3</sup> *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

<sup>4</sup> *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

<sup>5</sup> *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992).

<sup>6</sup> *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

<sup>7</sup> *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

<sup>8</sup> *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007), quoting *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

<sup>9</sup> *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

he intended to harm or scare only O’Berry.<sup>10</sup> We conclude that the prosecution presented sufficient evidence to support Pittao’s conviction for felonious assault as to Harms.

### III. Double Jeopardy

#### A. Standard Of Review

Pittao argues that his convictions for both felonious assault and carrying a weapon with unlawful intent violate his double jeopardy protections against multiple punishments for the same offense. Double jeopardy issues present questions of constitutional law that we review de novo.<sup>11</sup>

The double jeopardy provisions of the United States and Michigan Constitutions protect citizens from multiple punishments for the same offense.<sup>12</sup> The validity of multiple punishments is determined by considering “whether each provision requires proof of a fact which the other does not.”<sup>13</sup> If the Legislature clearly intended to impose multiple punishments, the imposition of multiple sentences is permissible regardless whether the offenses have the same elements.<sup>14</sup> But if the Legislature did not clearly express its intent, multiple offenses may be punished if each offense has an element that the other does not.<sup>15</sup>

#### B. Elements Of The Offenses

As stated, felonious assault requires the use of a dangerous weapon and the intent to injure or place the victim in reasonable apprehension of an immediate battery.<sup>16</sup> The elements of carrying a weapon with unlawful intent require that the defendant: (1) “goes armed with” a firearm or dangerous weapon, (2) with the intent to unlawfully use the weapon against another person.<sup>17</sup> The elements of felonious assault require proof of an element not required to establish carrying a dangerous weapon with intent, i.e., the actual use of a dangerous weapon, either to harm or scare the victim. In the case of carrying a weapon with felonious intent, the crime is complete when the individual arms himself with the weapon and intends to use it. He need not ever approach the victim, nor does the victim have to become aware of this intent. Likewise, carrying a weapon with unlawful intent requires proof of an element not required to establish a felonious assault, that is, the specific intent to “go armed” with a weapon with the intent to use it.

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<sup>10</sup> See *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

<sup>11</sup> *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007).

<sup>12</sup> *Id.* at 299.

<sup>13</sup> *Smith, supra* at 305, 315-316 (citation omitted).

<sup>14</sup> *Id.* at 316.

<sup>15</sup> *Id.*

<sup>16</sup> *Chambers, supra* at 8.

<sup>17</sup> MCL 750.226; *People v Harrington*, 194 Mich App 424; 487 NW2d 479 (1992).

A person could commit a felonious assault without this element by, for example, fortuitously picking up a weapon and using it on another, or by striking someone with a car.

Because each offense has an element that the other does not, Pittao's convictions of both carrying a weapon with unlawful intent and felonious assault do not violate the double jeopardy protection against multiple punishments.

Affirmed.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Donald S. Owens