STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY M. KIER,

Defendant-Appellant.

UNPUBLISHED
July 30, 1996

No. 177105
LC No. 93-1301128

Before: McDonald, P.J., and White, and P.J. Conlin,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277. He then pleaded guilty to habitual offender, second offense, MCL 769.10; MSA 28.1082. The trial court sentenced him to four to six years' imprisonment as an habitual offender, after vacating the felonious assault sentence of 2 1/2 to 4 years' imprisonment. Defendant now appeals and we affirm.

Defendant first contends that there was insufficient evidence to support his conviction of felonious assault. When determining whether sufficient evidence was presented to support a conviction, we view the evidence in a light most favorable to the prosecution and determine whether a 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). The elements of felonious assault are (1) an assault; (2) with a dangerous weapon; and (3) with intent to injure or place the victim in fear an of an immediate battery. *People v Coddington*, 188 Mich App 584, 594; 470 NW2d 478 (1991). Shoes and boots may properly be considered dangerous weapons within the meaning of the statute. *People v Hale*, 96 Mich App 343, 345; 292 NW2d 204 (1980); *People v Buford*, 69 Mich App 27, 32; 244 NW2d 351 (1976). Furthermore, intent may be inferred from all the facts and circumstances in evidence. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1993).

Viewed in a light most favorable to the prosecution, there was evidence from which a rational trier of fact could have found the existence of each of the elements of felonious assault beyond a reasonable doubt. Witnesses testified that defendant, with no provocation, verbally threatened the victim

* Circuit judge, sitting on the Court of Appeals by assignment.

and then struck him until he fell to the ground. While the victim was lying helpless, defendant hit him several times. Defendant then took a few steps back and, with considerable force, kicked the victim in the face, while wearing a tennis shoe. Various witnesses described the sound made when defendant's shoe made contact with the victim's head. There was testimony that during the assault defendant told the victim that he could, and would, kill him. This evidence is sufficient to support each of the elements of felonious assault. Further, while there is no discussion on the record regarding jury instructions, defense counsel specifically stated that he had no objections to the instructions as given, which included an instruction on the lesser offense of felonious assault. It appears defendant either requested or acquiesced in the giving of the felonious assault instruction to provide the jury with the option of convicting defendant of the four-year felony, rather than the ten-year felony, as well as the option of the lesser charges of aggravated assault and assault and battery. Defendant did not assert that the tennis shoe could not be regarded as a dangerous weapon when used a kicking device. Under the circumstances, reversal is not warranted.

Defendant also argues that his conviction is against the great weight of the evidence. However, since defendant did not move for a new trial on this ground, the issue is not preserved. *People v Bush*, 187 Mich App 316, 329; 466 NW2d 736 (1991). Moreover, given the testimony describing the kick, we conclude that the verdict was not against the great weight of the evidence.

Next, defendant contends that the prosecutor improperly overcharged him with the crime of assault with intent to do great bodily harm less than murder. Again, defendant raises this issue for the first time on appeal. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). Further, the evidence was clearly sufficient to support the charge.

Defendant next argues that the prosecutor made prejudicial remarks in her closing argument. Again, defendant has not properly preserved this issue for our review as he failed to address it below. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Our review of the record convinces us that the comments did not result in a miscarriage of justice.

Finally, defendant contends that his sentence is disproportionate. The key test of proportionality is whether a sentence reflects the seriousness of the offense and offender. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995); *People v Milbourn*, 435 Mich 630, 634, 654; 461 NW2d 1 (1990). The offense involved a vulnerable victim who had already been assaulted by defendant when he kicked him forcefully in the face with a tennis shoe while threatening to kill him. Furthermore, defendant's previous convictions have escalated from a property crime to criminal sexual conduct and now assault. We conclude the sentence imposed reflects the seriousness of this offense and offender, and is not disproportionate.

Affirmed.

/s/ Helene N. White
/s/ Gary R. McDonald
/s/ Patrick J. Conlin