STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE MARCELLIS WARTHEN,

Defendant-Appellant.

UNPUBLISHED
July 30, 1996

No. 178421
LC No. 90-001108

Before: Hood, P.J., and Markman and A. T. Davis,* JJ.

PER CURIAM.

After a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony. MCL 750.227b; MSA 28.424(2). After confronting at gunpoint a Mich Con repairman in his service vehicle and determining his next service call, defendant stole the vehicle and posed as a Mich Con repairman. Shortly thereafter, he shot a Mich Con customer, who had refused to let him in her house. Defendant was sentenced to a two-year prison term for felony firearm, and to a consecutive thirty-two to forty-eight month prison term for felonious assault. He now appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence that defendant had the specific intent required to support a conviction of felonious assault. We disagree.

When determining whether sufficient evidence was presented to sustain a conviction, the evidence should be viewed in the light most favorable to the prosecution. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The test is whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Jaffray, supra* at 296. Questions of credibility and intent should be left to the trier of fact. *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 830 (1987).

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

To convict a defendant of felonious assault, the prosecution must prove that the defendant had the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993). Intent may be proven indirectly by inference from a defendant's conduct or from the surrounding circumstances. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). Because of the difficulty in proving an actor's state of mind, circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). In this case, the intent to injure or place the victim in reasonable apprehension of an immediate battery may be inferred from testimony that defendant pulled a gun from his coat and fired the gun into the victim's house, striking her in the stomach. *Lawton, supra* at 350.

Defendant's second argument is that the trial court erroneously admitted evidence of earlier crimes committed by defendant. However, defendant failed to object to the admission of this evidence at trial. Therefore, this issue was not preserved for appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). Furthermore, although defendant argued in his appellate brief that this evidence was erroneously admitted, his argument did not correspond to his statement of the issue. Generally, an issue that is not raised in defendant's statement of the issues is not properly preserved for appeal. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990).

Defendant's third argument is that the trial court erred by refusing to instruct the jury on imperfect self-defense. We disagree. Imperfect self-defense applies only to mitigate second-degree murder to voluntary manslaughter where the accused was the initial aggressor. *People v Wytcherly*, 172 Mich App 213, 221; 431 NW2d 463 (1988). There is no Michigan authority to support the application of the imperfect self-defense doctrine to an assault situation. Furthermore, the trial court was only required to instruct the jury on imperfect self-defense if there was evidence to support such an instruction. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Defendant testified that his gun fired accidentally when his arm was slammed in the door. There was utterly no evidence presented indicating that defendant fired his gun in self-defense. Therefore, the trial court did not err by refusing to instruct the jury on imperfect self-defense.

Defendant's final argument is that he did not receive proper credit for time served. We disagree. The statute allowing credit for time served, MCL 769.11b; MSA 28.1083(2), is not to be used to defeat the purpose of a consecutive sentence. *People v Cantu*, 117 Mich App 399, 402; 323 NW2d 719 (1982). Therefore, in the case of consecutive sentences, credit should be given on the sentence to be served first. *Cantu, supra*, at 403.

In this case, defendant was entitled to 1620 days credit for time served. The credit was first applied to his two-year sentence for felony firearm, which was to be served prior to his sentence for the underlying felony pursuant to MCL 750.227b(2); MSA 28.424(2). After receiving credit for the full two-year felony firearm sentence, the excess credit, consisting of 890 days, was properly applied to defendant's thirty-two to forty-eight month sentence for felonious assault.

Affirmed.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Alton T. Davis