STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL RAYMOND ELKINS,

Defendant-Appellant.

UNPUBLISHED
July 30, 1996

No. 180442
LC No. 94-001800

Before: Michael J. Kelly, P.J. and Bandstra and S.B. Miller, * JJ.

PER CURIAM.

Defendant was convicted of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and committing a felony while possessing a firearm, MCL 750.227b; MSA 28.424(2), following a bench trial. He was sentenced to concurrent terms of imprisonment of four to ten years for each of the assault convictions and to a consecutive term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

In response to defendant's first argument on appeal, we note that defendant's convictions were clearly limited to two complainants, Pulcifer and Kidd, the trial court having granted defendant's motion for a directed verdict regarding the count alleging an assault on Williams. Accordingly, we review defendant's arguments as they relate to assaults on complainants Pulcifer and Kidd.

Defendant first argues that the trial court erred by denying his motion for a directed verdict. The basis of this motion was defendant's contention that there was insufficient evidence to prove an assault because neither Pulcifer or Kidd was placed in fear or apprehension of being murdered and/or injured. We test the validity of the motion and the trial court's ruling on it using the same standard as the trial court, whether the evidence presented by the prosecutor up to the time the motion was made, considered in the light most favorable to the prosecution, could lead a rational trier of fact to find that Pulcifer or Kidd was placed in fear or apprehension of being

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

murdered and/or injured. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992).

Applying this standard, we conclude that defendant's motion for directed verdict was properly denied. Pulcifer and Kidd did not remain asleep throughout the shooting incident, but testified that, when abruptly awakened by the gunshots, they took steps to avoid being hit. This evidence was sufficient for a rational trier of fact to infer that the fear or apprehension element of assault was proved. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992). Further, defendant's argument overlooks the fact that an assault can be proved with "either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). A rational trier of fact could conclude that, by shooting into the apartment, defendant committed an attempted battery even though he failed to hit anyone. See *People v Smith (On Rehearing)*, 89 Mich App 478, 484; 280 NW2d 862 (1979).

Defendant also argues that a finding that he had the requisite intent to assault complainants Pulcifer and Kidd went against the great weight of the evidence. Specifically, defendant argues that his only intent was to assault Williams and that this intent cannot be transferred to the assaults regarding Pulcifer or Kidd. In *Lawton*, *supra* at 350-351, this Court rejected this same argument in a similar fact situation, reasoning that "[m]erely because [defendant] shot the wrong person makes his crime no less heinous. It is only necessary that the state of mind exist, not that it be directed at a particular person."

We affirm.

/s/ Michael J. Kelly
/s/ Richard A. Bandstra
/s/ Stephen B. Miller