

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD KENNEDY SIMPSON,

Defendant-Appellant.

UNPUBLISHED

September 27, 1996

No. 183436

LC No. 94-4367

Before: Michael J. Kelly, P.J., and O'Connell and K.W. Schmidt,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277, and one count of possession of a firearm during the commission of a felony (felony-firearm). MCL 750.227b; MSA 28.424(2). He was sentenced to three years' probation with respect to each felonious assault conviction, the sentences to be served concurrently with each other but consecutive to the mandatory two-year sentence for the felony-firearm conviction. He now appeals as of right, and we affirm.

Defendant first argues that the evidenced produced at trial was insufficient to support his convictions. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). As relevant to the present appeal, felonious assault requires a showing that the defendant committed an assault with a dangerous weapon, *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993), and felony-firearm requires a showing that the defendant possessed a firearm. *Wayne Co Prosecutor v Recorder's Court Judge*, 406 Mich 374, 397-398; 280 NW2d 793 (1979), overruled in part on other grounds *People v Robideau*, 419 Mich 458; 355 NW2d (1984). Defendant contends that because the prosecution was unable to present the actual firearm that defendant was alleged to possess, the evidence underlying his convictions is insufficient.

Defendant is incorrect. The prosecution's burden in a criminal case is to prove beyond a reasonable doubt the essential elements of the crime. *People v Jolly*, 442 Mich 458, 460; 502 NW2d

177 (1993). The prosecution need not negate every theory consistent with the defendant's innocence, *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991), but must only prove its own theory in the face of whatever contradictory evidence the defendant may provide. *People v Wolford*, 189 Mich App 478, 480; 473 NW2d 767 (1991). Here, witnesses testified that they observed defendant point a firearm at them in a threatening manner. This testimony alone, when viewed in the light most favorable to the prosecution, *Wolfe, supra*, renders the evidence sufficient; the actual firearm need not be produced because other evidence, that is, testimony, was presented on the issue. While defendant has advanced other theories consistent with his innocence, the prosecution had the burden only of supporting its own theory. *Id.* Therefore, the evidence was sufficient to sustain defendant's convictions.

Defendant also asserts that the trial court's articulation of its findings of fact contained a conclusion that was not supported by the evidence. Specifically, defendant claims that the court found that defendant, one of three perpetrators of the crimes of which he was charged, was the only perpetrator without facial hair despite the fact that no officer testified concerning that issue. Because the trial turned on the issue of identification, defendant contends that this factual error warrants reversal.

Findings of the trial court are sufficient if it appears that the court was aware of the issues in the case and correctly applied the law. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995). The sufficiency of the findings must be reviewed in the specific context of the specific legal and factual issues raised by the parties and the evidence. *People v Rushlow*, 179 Mich App 172, 177; 445 NW2d 222 (1988), *aff'd* 437 Mich 149 (1991). A trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous. MCR 2.613(C).

Our review of the record reveals that the trial court's findings were adequate and were not clearly erroneous. The trial court found that the officers' identification of defendant as their assailant was based upon defendant's height, weight, clothing, and build characteristics. The officers directly observed defendant and his physical characteristics, and noted that defendant's clothing, at the time he was arrested, matched the clothing of the perpetrator of the crime. Contrary to defendant's claim, the court did not base its findings on the presence or lack of defendant's facial hair, but on the officers' identification of defendant, which was based on characteristics other than facial hair. We conclude that the trial court's finding that defendant committed the assault was not clearly erroneous based on the evidence presented.

Affirmed.

/s/ Michael J. Kelly

/s/ Peter D. O'Connell

/s/ Kenneth W. Schmidt