S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 4, 1997
v DONALD CHAPPELL, Defendant-Appellant	No. 182153 Recorder's Court LC No. 94-001587

Before: Markman, P.J., and Smolenski and G.S. Buth,* JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of breaking and entering an occupied dwelling with the intent to commit felonious assault, MCL 750.110; MSA 28.305,[1] and sentenced to four to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant was initially charged not only with breaking and entering, but also with possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Following the testimony at trial, the court found as follows:

> The People have established beyond a reasonable doubt that on December 23, 1993, the defendant went to 8901 St. Mary. He kicked in that door. He went in there because he was angry. I don't know what kind of problems they were having. Apparently, he tried to say it had something to do with the fact that he was not allowed – or maybe he was not allowed to see the child. He kicked in that door, and at the time he did it, he intended to at least frighten this woman, to scare here into doing whatever it was that he wanted to do, and at the time he did that. He put his hands on something that, according to Mr. Dyer, appeared to be a gun.
>
> So they have established that he broke and entered the home with the intent to commit a felonious assault, but because the gun was not actually seen by Mr. Dyer, and only part of it was seen, I am not convinced beyond a reasonable doubt that it was an,

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

> in fact, a real gun and, therefore, I will find him not guilt [sic] of possession of firearm in the commission or attempt to commit a felony.

Defendant argues that his conviction for breaking and entering an occupied dwelling with the intent to commit felonious assault must be reversed and a verdict of acquittal entered. Specifically, defendant asserts that in finding him not guilty of felony-firearm, the trial court found as a fact that he was not armed with a firearm. Defendant then asserts that the possession of a firearm is a necessary element of breaking and entering an occupied dwelling with the intent to commit felonious assault. Defendant thus contends that the trial court erroneously rendered inconsistent verdicts. We disagree for the following reasons.

First, possession of a firearm is not a necessary element of breaking and entering an occupied dwelling with the intent to commit a felony, in this case, the felony of felonious assault. Rather, the elements of this offense are (1) a breaking and entering (2) of an occupied dwelling (3) with felonious intent. *People v Brownfield (After Remand)*, 216 Mich App 429, 431; 548 NW2d 248 (1996). In this case, defendant does not dispute these elements. In particular, defendant does not dispute that he had the requisite intent when he broke and entered the victim's dwelling. As explained in *People v Flores*, 92 Mich App 130, 137; 284 NW2d 510 (1979):

> In the case at bar, the defendant was charged with breaking and entering with intent to commit a felony, to wit: criminal sexual conduct in the first degree. The elements of that crime include (1) the breaking and entering of (2) an occupied dwelling with (3) felonious intent. . . . The record clearly reflects, and the defendant does not dispute, that each of these elements was properly established by the prosecution. *As such, the criminal breaking and entering was completed regardless of whether the defendant was guilty of, or even attempted to complete, the felony (e.g. larceny, murder, arson, or criminal sexual conduct) which he allegedly intended to commit by his breaking and entering*. [(citations omitted) (emphasis supplied).]

Moreover, we do not believe that the trial court's findings are erroneously inconsistent. Because of the difference in the language of the felonious assault statute[2] and the felony-firearm statute,[3] we construe the court's finding that defendant "put his hands on something that . . . appeared to be a gun" as a finding that defendant, when confronting the victim in her home, put his hand on a "dangerous weapon" other than a firearm, for instance, a striking weapon. *People v Vaughn*, 409 Mich 463, 467; 295 NW2d 354 (1980); *People v Stevens*, 409 Mich 564, 567, n 2; 297 NW2d 120 (1980).

Affirmed.

/s/ Stephen J. Markman
/s/ Michael R. Smolenski
/s/ George S. Buth

[1] After defendant committed this offense, it was redesignated as the crime of home invasion, MCL 750.110a; MSA 28.305(a), by 1994 PA 270.

[2] At the time defendant committed his offense, the felonious assault statute provided as follows:

> Any person who shall assault another with a gun, revolver, pistol, knife, iron bar, club, brass knuckles or other dangerous weapon, but without intending to commit the crime of murder, and without intending to inflict great bodily harm less than the crime of murder, shall be guilty of a felony. [MCL 750.82; MSA 28.277, amended by 1994 PA 158.]

[3] The felony-firearm statute provides in relevant part as follows:

> A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony, and shall be imprisoned for two years. [MCL 750.227b(1); MSA 28.424(2)(1).]